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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 9:00 a.m.

14
15 Held on: February 13, 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)
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22 JEFF MARX
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23 KIRK MOLINE
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1 APPEARANCES CONTINUED:
2 GAS FREE SENECA
DEBORAH GOLDBERG, ESQ., EARTHJUSTICE
3 MONEEN NASMITH, ESQ., EARTHJUSTICE
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13 KATE SINDING, ESQ.
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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 NEW YORK PROPANE GAS ASSOCIATION AND PROPANE GAS
21 ASSOCIATION OF NEW ENGLAND
MATTHEW GRIESEMER, ESQ. , FREEMAN HOWARD

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1 (CONFIDENTIAL TRANSCRIPT PAGES 200
2 THROUGH 382 ARE CONTAINED IN A SEPARATE
3 VOLUME MARKED CONFIDENTIAL.)

4 ADMINISTRATIVE LAW JUDGE: So we're
5 on the record at 9:00. Good morning. My
6 name is James McClymonds. I'm the chief
7 administrative law judge with the Office of
8 Hearings and Mediation Services, New York
9 Department of Environmental Conservation
10 and the presiding administrative law judge
11 for the adjudicatory hearing being
12 conducted on the application of Finger

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Lakes LPG Storage, LLC, for permits to
14 construct and operate a new underground
15 liquified petroleum gas, or LPG, storage
16 facility proposed to be located in the Town
17 of Reading, Schuyl er County.

18 This morning we're continuing issues
19 conference pursuant to Section 624.4(b) of
20 Title 6 of the Official Compilation of
21 Codes Rules and Regulations of the State of
22 New York or 6 NYCRR. For the record this
23 issues conference is being held on Friday,
24 February 13th, 2015 at the Holiday Inn

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1 Express, 2666 Corning Road, Horseheads,
2 New York. And now I would like to take
3 appearance of counsel starting with
4 Department staff.

5 MS. SCHWARTZ: Your Honor, Lisa
6 Schwartz, regional attorney from Region 8
7 for Department staff and Jenn Maglienti and
8 Larry Weintraub.

9 ADMINISTRATIVE LAW JUDGE: Thank you.
10 And for Finger Lakes LPG Storage, LLC.

11 MR. BERNSTEIN: Kevin Bernstein, Bond
12 Schoeneck & King for the Applicant.

13 MR. ALESSI: Robert Alessi, DLA Piper
14 for Applicant.

15 MR. BACON: Brad Bacon on behalf of
16 the Applicant.

17 ADMINISTRATIVE LAW JUDGE: And for

18 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
Gas Free Seneca.

19 MS. GOLDBERG: Deborah Goldberg and
20 Moneen Nasmith from Earthjustice.

21 ADMINISTRATIVE LAW JUDGE: And for
22 Seneca Lake Pure Waters Association.

23 MS. TREICHLER: Rachel Treichler.

24 ADMINISTRATIVE LAW JUDGE: And for

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1 the Seneca Lake Communities.

2 MS. SINDING: Good morning, Your
3 Honor. Kate Sinding, Dan Rachel and Jon
4 Krois for NRDC.

5 ADMINISTRATIVE LAW JUDGE: And for
6 the Finger Lakes Business, I'm sorry,
7 Finger Lakes Wine Business Coalition.

8 MS. TOOHER: Good morning, Your
9 Honor. Meave Toher and John Barone,
10 Toher & Barone.

11 ADMINISTRATIVE LAW JUDGE: And for
12 Schuyl er County Legislators Harp and
13 Lausel I.

14 MR. LAUSELL: Michael Lausel I and Van
15 Harp.

16 ADMINISTRATIVE LAW JUDGE: For the
17 National Propane Gas Association.

18 MR. PETRASH: Good morning, Your
19 Honor. Jeffry Petrash.

20 ADMINISTRATIVE LAW JUDGE: And for
21 the New York LP Gas Association, Inc., and
22 the Propane Gas Association of New England.

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MR. GRIESEMER: Good morning, Your

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Honor. Matthew Griesemer for Freeman

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Howard.

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ADMINISTRATIVE LAW JUDGE: And for

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United Steel Paper and Forestry, Rubber

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Manufacturing Energy, Allied Industrial and

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Service Workers International Union, AFL

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CIO CLC? All right. So now I received an

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e-mail from a Katherine Shaw ceding her

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time to the Applicant for this afternoon's

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session on public need and benefit.

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Let me get some clarification as to

11

what precisely that means. Will the

12

Applicant be representing the United Steel

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Workers or defending its petition for party

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status?

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MR. ALESSI: No, Your Honor. We will

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not. We will be doing the same things the

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parties did yesterday when time was ceded

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on an issue to another party. We will be

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speaking about the topic just as that

20

occurred yesterday.

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ADMINISTRATIVE LAW JUDGE: Okay.

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Well, the reason I had originally scheduled

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time for Applicant on the issues is because

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I didn't see you that opposed the

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petitions, or the three petitions of the

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2 Gas Associations and the United Steel
3 Workers so. The only party that opposed
4 the petitions was staff who in their letter
5 had indicated they were taking the position
6 that no party raised substantive and
7 significant issues. So would you be
8 representing the petition or you simply
9 want to be heard on the question of need?

10 MR. ALESSI: Both, Your Honor, in
11 terms of two reasons. Again yesterday in
12 terms of what happened, people spoke to the
13 subject matter. So we would be presenting
14 a position in support of the petition and
15 to address some procedural issues to
16 address the overall issue of the
17 regulations and whether you need to have
18 something wrong with a project to be able
19 to come in and be amicus in a proceeding.
20 So that's one we would address. And two,
21 we would address the substance of the
22 particular topic.

23 ADMINISTRATIVE LAW JUDGE: So you
24 will be defending the petition of the

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1 United Steel Workers? That was my main
2 question.

3 MR. ALESSI: Defending the subject
4 matter of the petition, yes.

5 ADMINISTRATIVE LAW JUDGE: All right.
6 Is there any objection to this?

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7 MS. GOLDBERG: I guess not.
8 ADMINISTRATIVE LAW JUDGE: All right.
9 All right. Very good. So are there any
10 other preliminary matters that anybody
11 wants to raise before we get started? No?
12 All right. Then let's begin on the noise
13 issue. And Gas Free Seneca, you're
14 scheduled to begin. Am I wrong about that?
15 I have you down for 15 minutes.
16 MS. GOLDBERG: Yes, and if I could
17 reserve five minutes for rebuttal. Good
18 morning, Your Honor. Gas Free Seneca
19 retained Sandstone Environmental Associates
20 to monitor noise in the project area and to
21 evaluate the noise studies prepared for the
22 Applicant by Hunt Engineers Architects and
23 Land Surveyors. Sandstone presented
24 numerous criticisms of the noise study

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1 which the Applicant attempted to rebut in
2 response to our petition and in memorandum
3 from Hunt. Sandstone's criticisms and the
4 Applicant's defense are too extensive to
5 address in full now so I will focus on two
6 points. First, the failure to delineate
7 the appropriate region of influence and
8 second, the omission of any construction
9 noise analysis. If I have time I will
10 discuss some of the technical deficiencies
11 in Hunt's analysis.

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12 Before explaining why the Applicant's
13 response failed to eliminate the
14 substantive and significant issues raised
15 by Sandstone, I want to note that the
16 deficiencies in the Hunt study also affect
17 the community character analysis. The
18 region of influence for noise helps in the
19 context of Dr. Flad's cultural landscape
20 analysis to explain why the region of
21 influence for community character extends
22 at least through the counties surrounding
23 Seneca Lake. The failure adequately to
24 mitigate noise impacts has an adverse

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1 impact on community character even for
2 those community members who are not within
3 earshot of the noise.

4 The Applicant begins the critique of
5 the noise study prepared by Sandstone with
6 a series of slurs claiming the report
7 ignored reality and made inappropriate
8 leaps of faith about what could be heard
9 across the lake. In fact Sandstone was the
10 only noise analyst that paid attention to
11 reality. Consistent with DEC noise
12 guidance Sandstone assessed noise impacts
13 in context considering the use of land
14 surrounding the facility including
15 recreational uses such as fishing and
16 boating and the character of the lakeside

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17 community whose residents are actively
18 seeking to preserve the peace and quiet
19 that draw tourists to the region.

20 Sandstone also was the only noise
21 analyst that actually measured noise levels
22 on both sides of the lake instead of
23 assuming that nothing could be heard on the
24 eastern side or that they didn't have to

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1 look. Then Sandstone investigated
2 residents' concerns and documented the fact
3 that noise from the west side carries to
4 the other side of the lake at potentially
5 intrusive levels.

6 Turning to the region of influence,
7 Sandstone's on-ground research demonstrated
8 that the Applicants had delineated an
9 inappropriately confined region of
10 influence. It's important to delineate the
11 region of influence correctly because if
12 it's too narrowly defined, potentially
13 significant impact may not be identified.
14 Sandstone demonstrates that the Applicant
15 made two fundamental errors in defining the
16 region of influence. First, only onsite
17 noise sources were analyzed even though the
18 project would cause significant offsite
19 noise especially from rail and truck
20 traffic along the full length of Route 14
21 from Watkins Glen to Geneva. And second,

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22 only receptors on the east, western side of
23 the shore were examined even though
24 homeowners on the eastern shoreline could

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1 hear noise across the lake.

2 With respect to the offsite noise
3 sources, the Applicant says that there is
4 already truck and rail traffic on Route 14
5 so project generated noise would not be,
6 quote, out of character. Impacts are based
7 on relative increases in noise, not on
8 whether similar sources of noise are
9 already part of the noise landscape.

10 Sandstone's field work shows that the
11 existing noise environment on the east side
12 of Seneca Lake is a quiet natural setting
13 with birds, squirrels and rustling leaves
14 providing the predominant background
15 sounds. Although noise from truck and
16 train does intrude, the results of adding
17 more trucks and more train possibly at
18 different times, late at night for example
19 or on a weekend where traffic is generally
20 lighter, must be compared to background
21 conditions. In view of the fact that truck
22 and rail loading facilities will be capable
23 of operating 24/7, 365 days a year and
24 there is no permit condition restricting

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1 either construction or operation from
2 normal business hours, a noise analyst must
3 assume that truck and train noise could be
4 generated by the project at any time over
5 the full length of Route 14 along the lake.
6 Stating that trucks and train already
7 operate in the area is not a valid reason
8 for excluding analysis of the impacts. If
9 that was an acceptable approach, no traffic
10 noise analysis would ever be conducted.

11 With respect to receptors on the east
12 side of the lake, the Applicant asserts
13 that locating receptors anywhere other than
14 on the property line or on adjacent
15 property is contrary to DEC noise policy.
16 DEC noise guidance is designed to help
17 staff implement SEQRA, not to defeat the
18 statute's purpose. Generally looking at
19 the property line or adjacent areas is a
20 conservative approach. But when a loud
21 noise can be heard farther away, it is
22 neither conservative nor consistent with
23 SEQRA to treat a guidance document as a
24 rigid rule and allows the analyst to ignore

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1 the impact.

2 This refusal to consider the facts is
3 a familiar refrain. We point out evidence
4 of problem. They cite guidance or scoping

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5 as a reason to avoid studying and it really
6 makes you wonder whether they are afraid of
7 what they are going to find out. The
8 Applicant mocks the idea that noise should
9 be monitored across the lake. That EISs in
10 New York have examined noise impacts beyond
11 the immediate adjacent properties and some
12 receptors were thousands of feet from the
13 source. Over land in the Belair dEIS, they
14 had a one mile radius from the source for
15 noise receptors. And in Sterling Forest,
16 again over land, where transmittal of sound
17 is attenuated less, more than over water,
18 they had a 4,000 foot radius. The
19 Applicant has failed to deal at all with
20 the fact that noise is attenuated less over
21 water and that alone is a reason for an
22 adjudicatory hearing.

23 Construction noise. The Applicant
24 provides no analysis of noise impacts

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1 during the construction period even though
2 heavy equipment will be used and the number
3 of workers traveling to the site during
4 construction would be five times the number
5 of permanent employees. In response to the
6 critique of the failure even to identify
7 construction schedule or what kind of
8 equipment would be used, Hunt refers us to
9 the Storm Water Pollution Prevention Plan.

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10 The public should not be sent hunting to
11 find basic information that you need for a
12 noise analysis. Moreover, simply because
13 construction noise is temporary does not
14 mean it should not be evaluated. Sustained
15 noise levels that are 70 to 80 dba in sound
16 level or are substantially louder than
17 ambient noise levels may occur throughout
18 to day during construction. They occur
19 over a period of weeks or months. They
20 will be very disruptive to residents and
21 tourists regardless of the fact that they
22 will stop when the facility is complete.
23 DEC's noise policy recognizes that
24 construction noise should be evaluated in

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1 both its first level noise impact
2 evaluation and in its provisions for
3 mitigation.

4 The Applicant also asserts that the
5 construction activities on site are typical
6 of the construction season. This again
7 confuses the idea of the quality of the
8 source and the level of the noise. There
9 is moreover no evidence in the record to
10 support the assumption that heavy
11 industrial development, similar size and
12 duration are typical of this area. Even if
13 the proposed activities could be considered
14 typical however, they still would require

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analysis of the impacts.

16 In sum, the, we have established a
17 substantive and significant issue about
18 noise in this case because there is
19 sufficient doubt about the Applicant's
20 ability to meet statutory or regulatory
21 criteria applicable to the project such
22 that a reasonable person require further
23 inquiry because the project cannot meet the
24 requirements of SEQRA. dSEIS failed to

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1 take a hard look at the potentially
2 significant noise impacts including
3 construction impacts within an appropriate
4 region of influence and the project is not
5 the alternative that avoids or mitigates
6 more than the maximum percent practicable.
7 Therefore DEC will not be able to make all
8 of the findings required. It is also
9 significant because the failure to mitigate
10 the impacts is grounds for denial of the
11 permit particularly in view of the
12 contribution to the adverse impacts on
13 community character. And if the permit is
14 not denied, the noise impact should result
15 in the imposition of significant additional
16 permit conditions. Sandstone has
17 identified 16 different areas of analysis
18 that still require attention. It is
19 impossible even to identify what mitigation

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is necessary at this point until those
21 analyses are complete. Thank you.

22 ADMINISTRATIVE LAW JUDGE: Does your
23 Sandstone report do the analysis it
24 suggested should be done? Did it go to the

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1 east side of the lake and take some
2 measurements from receptors they thought
3 were appropriate?

4 MS. GOLDBERG: Yes, Your Honor.

5 MR. BERNSTEIN: Morning, Your Honor.

6 ADMINISTRATIVE LAW JUDGE: Morning.

7 MR. BERNSTEIN: Gas Free Seneca does
8 not raise a substantive and significant
9 issue regarding noise. Each of the
10 so-called deficiencies identified in their
11 petition are fallacies. The approach that
12 they suggest to conducting a noise analysis
13 is not consistent with any noise analysis
14 reviewed in any administrative decision by
15 the Department in discussing noise. Two
16 recent examples I would give you is Seneca
17 Meadows rulings on March 26, 2012 and then
18 Dalrymple in 2003, decisions of the
19 Commissioner. And I will get to those a
20 little further and there is also an older
21 precedent as well, WA Aggregate decision of
22 the Commissioner.

23 What Gas Free Seneca is attempting to
24 do is in essence rewrite the noise policy.

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1 And the noise policy, the fundamental
2 purpose of the noise policy is to assist
3 the Department in evaluating whether or not
4 the Applicant can comply with certain
5 statutory provisions including SEQRA.
6 There's a whole list of statutory
7 provisions in terms of background contained
8 in the noise policy and it explains the
9 purpose of that. And that's exactly what
10 was done with Hunt Engineers. It's exactly
11 the approach they took. The methodology
12 they employed was proper. It was
13 consistent with the noise guidance. It
14 talks about first order, second order
15 analysis consistent with the noise
16 guidance. Consistent with directions from
17 the Department including ultimately what
18 was included in the final scope. And most
19 importantly to properly evaluate noise
20 impacts and demonstrate that noise impact
21 can be mitigated, minimized to the maximum
22 extent possible.

23 ADMINISTRATIVE LAW JUDGE: But the
24 policy is not a reg?

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1 MR. BERNSTEIN: It's not a reg.

2 ADMINISTRATIVE LAW JUDGE: It's just
3 a document that helps assist in guiding the

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4 Department exercising it's discretion in
5 doing its review, correct?

6 MR. BERNSTEIN: That's correct.

7 ADMINISTRATIVE LAW JUDGE: So isn't
8 it possible that maybe there might be some
9 other things that should be considered that
10 aren't necessarily reflected squarely in
11 the policy? Does the Department have some
12 leeway to examine a few other additional
13 receptors beyond the typical ones that
14 would be done in a, depending on the
15 circumstances of a case?

16 MR. BERNSTEIN: I would suggest that
17 that iterative process did occur at the
18 outset of the application here and in the
19 context of the SEQRA review that was
20 conducted.

21 ADMINISTRATIVE LAW JUDGE: Was some
22 consideration given to the fact that you
23 have a flat lake next to the site that
24 might, as Gas Free Seneca suggested does

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1 not attenuate sound the way sound traveling
2 over open territory might?

3 MR. BERNSTEIN: Consideration was
4 given to the location of the closest
5 receptors, not necessarily the property
6 line and what the noise generating sources
7 would be and where they are located. For
8 example one, the noise-generating sources

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9 is a well pump right on the edge of the
10 lake. And so that was evaluated in terms
11 of what the noise would be from that noise
12 source and as a result of the analysis that
13 Hunt did it was determined that appropriate
14 mitigation. Now Gas Free Seneca said we
15 didn't consider mitigation or incorporate
16 mitigation into the analysis, but you know
17 that's not accurate. There are two noise
18 sources where we actually did incorporate
19 into the design as the second order
20 analysis under the noise guidance
21 mitigation including structures and also
22 berms around some of the pumps.

23 ADMINISTRATIVE LAW JUDGE: Was there
24 a receptor located east of the pump near

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1 the lake?

2 MR. BERNSTEIN: Near the lake. Right
3 on the lake, yes.

4 ADMINISTRATIVE LAW JUDGE: There was
5 a receptor there?

6 MR. BERNSTEIN: Well, the noise
7 source wasn't --

8 ADMINISTRATIVE LAW JUDGE: Was it
9 measured? That's what I'm asking. Was a
10 measurement done at the lake?

11 MR. BERNSTEIN: The noise source
12 itself was measured and then we decided it
13 was appropriate to put the well pump within

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14 a cinderblock enclosure which would reduce
15 it by, reduce that noise source by up to 40
16 decibels. And so because of the noise
17 source itself, even though the well pump is
18 not, is only for emergency purposes and
19 will only be tested twice a year even
20 though there is not a continuous noise, we
21 decided that we would put an enclosure
22 around the well pump and that's the only
23 noise source that is close to the edge of
24 the lake. It's really on the edge of the

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1 lake. All the other noise sources and
2 receptors were evaluated according to the
3 typical way that the guidance suggests and
4 the typical way that administrative
5 decisions evaluate. For example in the
6 Seneca Meadows case, in terms of background
7 noise. Background noise levels were
8 measured in the adjoining community at nine
9 locations along the boundaries of the
10 project site. Modelling was employed to
11 assess the noise environment around the
12 project site over the life of the mine.
13 The Dalrymple decision talks about how the
14 noise impact guidance is very clear in this
15 regard stating that appropriate receptor
16 locations may be either at the property
17 line in which the facility is located or at
18 the location of use or inhabitants of

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19 adjacent property. Which means that either
20 the property line of the proposed project
21 can be used or appropriate for the
22 circumstances receptors can be located on
23 adjacent properties at points remote for
24 the property line if the actual use on the

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1 property, adjacent property is at some
2 distance from the property line. That's
3 exactly what was done here.

4 ADMINISTRATIVE LAW JUDGE: But
5 neither Seneca Meadows nor Dalrymple were
6 sited next to a very large flat lake, were
7 they?

8 MR. BERNSTEIN: They were sited next
9 to residences.

10 ADMINISTRATIVE LAW JUDGE: Right.
11 And you mentioned residences, but the
12 objection I'm hearing from Gas Free Seneca
13 is that there is this lake that needs to be
14 taken into consideration that may act, that
15 doesn't act as an attenuator and that some
16 consideration of that needs to be made in
17 the noise analysis.

18 MR. BERNSTEIN: And what I think Hunt
19 said in his response is even if you reduced
20 the attenuation level because of distance
21 only, not taking into account any other
22 factor, that still there would be a delta
23 between what the ambient is and what the

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24 resulting noise level is by less than six.

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1 In addition there's already an existing
2 noise level in the area. Route 414 for
3 example, which is on the other side of the
4 lake, is a state highway and there are
5 trucks traveling that highway.

6 ADMINISTRATIVE LAW JUDGE: Are there
7 trains over there, too?

8 MR. BERNSTEIN: There's no trains
9 over there, but there are existing trains
10 on the west side of the lake. And that's
11 part of the background noise that exists
12 now and this project will not measurably
13 add to that train traffic.

14 ADMINISTRATIVE LAW JUDGE: But we
15 don't actually know what the sound level is
16 over there because it hasn't been measured.

17 MR. BERNSTEIN: But what we do know
18 is what the source, the level is on our
19 side of the lake and therefore just simply
20 by virtue of distance attenuation what it
21 would be over on the other side.

22 ADMINISTRATIVE LAW JUDGE: And Hunt
23 took into account a flat lake when it made
24 that, drew that conclusion?

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1 MR. BERNSTEIN: They did not evaluate

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2 in their report the lake itself. They just
3 evaluated nearby receptors and that was
4 really appropriate under the guidance and
5 under existing administrative case law.
6 There was no need to evaluate receptors
7 4,000 feet away when in fact receptors only
8 1,000 feet away were less than six, we saw
9 less than a six decibel increase.

10 ADMINISTRATIVE LAW JUDGE: And those
11 were on the west side of the lake, those
12 receptors?

13 MR. BERNSTEIN: Yes.

14 ADMINISTRATIVE LAW JUDGE: But that
15 didn't have an intervening lake in between
16 them and the sound source?

17 MR. BERNSTEIN: Well, that's correct,
18 but those sound receptors were probably
19 four times the distance from the most, the
20 closest receptor that we did model. So
21 Hunt considered and in response to
22 Sandstone they considered that and they
23 said it wasn't necessary to do and it would
24 not have shown any increase in impact

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1 different in character than the kind of
2 impact that you have based on their noise
3 evaluation.

4 ADMINISTRATIVE LAW JUDGE: Well, Gas
5 Free Seneca did their own study. Did Hunt
6 look at what their results showed? My

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7 understanding is, you know, I don't recall

8 completely, but Miss Goldberg indicated
9 they did their own measurements.

10 MR. BERNSTEIN: Well, they did their
11 own measurements during a time of year when
12 it wasn't appropriate to do because the
13 guidance suggests that ambient measurements
14 should be taken actually in the summer
15 months, not in the winter months.

16 ADMINISTRATIVE LAW JUDGE: You took
17 them in the winter months as well.

18 MR. BERNSTEIN: We took them both
19 times, yeah. We took them both times.

20 ADMINISTRATIVE LAW JUDGE: So there's
21 nothing wrong with taking them in the
22 winter months, is there?

23 MR. BERNSTEIN: Well, no. But it's
24 when, it's when the noise, it's not what

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1 the guidance suggests and it's also when
2 noise levels might reduced because of less
3 activity. So we took noise measurements,
4 ambient noise measurement in the summer
5 when the level of activity would most
6 closely reflect what the background noise
7 levels would be as opposed to now when it's
8 winter and all you really here is perhaps
9 snow falling.

10 ADMINISTRATIVE LAW JUDGE: Yeah. But
11 you can compare the two, can't we? You

12 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
took, your study examined winter months and

13 their study examined winter months.

14 MR. BERNSTEIN: And we looked at
15 summer as well.

16 ADMINISTRATIVE LAW JUDGE: So was
17 there something wrong with what their, the
18 way they did their study beyond the time of
19 the year?

20 MR. BERNSTEIN: Oh, yes. I mean, I
21 think that it substantially prejudices the
22 value of the level of ambient noise levels
23 that you're taking by only talking it
24 during one particular period of time when

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1 it does not necessarily reflect reality of
2 exactly what those on the east side of the
3 lake will be experiencing. So that's a
4 serious deficiency with what they did. In
5 addition I think another serious deficiency
6 is ultimately their preliminary view, which
7 I think is inconsistent as I said earlier,
8 as to what is the geographic limit of what
9 you should really be looking at. Those
10 cases that were mentioned were different in
11 kind from this one. This situation went
12 through a back and forth with the
13 Department as to exactly what would be the
14 scope and what would be evaluated and it
15 was determined that what we would look at
16 were the nearby receptors. And there is no

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17 receptors, there is no house in the middle
18 of the lake.

19 ADMINISTRATIVE LAW JUDGE: Well,
20 nobody is contending that that's --

21 MR. BERNSTEIN: Right. And so that,
22 and that's exactly why we looked at the
23 nearest receptors. Took a look at least
24 initially distance evaluation and we

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1 ultimately determined that there is no
2 impact. Where we saw some potential impact
3 with regard to the injection pumps, with
4 regard to the well pump, we actually added
5 buildings around those structures to
6 further mitigate noise. And, and we were
7 conservative in that regard because we
8 actually didn't take the ultimate reduction
9 that we could have. We took maybe an eight
10 decibel reduction for structures around the
11 injection pumps and the well pump. And we
12 could have taken probably up to 30 decibel
13 reduction, but to be conservative that's
14 what we did.

15 ADMINISTRATIVE LAW JUDGE: What about
16 the rail yard?

17 MR. BERNSTEIN: Okay. The rail
18 activity that occurs now will not be much
19 different than the rail that will occur
20 once we're in operation. So we took
21 maximum rail noise measurements in terms of

Finger Lakes.IC Transcript 2-13-15 Sessi on [Doc 00048].txt

22 potential noise sources and compared those
23 to what the ambient level is now. And we
24 tried to differentiate the two just to see

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1 whether or not, what the increase in full
2 train activity would be versus what the
3 ambient is and we found that there was
4 maybe one location where we were at the six
5 decibel increase and that was the location
6 of the, actually the LPG trucking company
7 right next to the surface facilities and it
8 was a supportive project. Jam Trucking.
9 So there was one location where, the noise
10 guidance suggests that based on noise
11 expertise Leo Buronic (phonetic) and a
12 number of other sources, but the noise
13 guidance that certain increases are
14 tolerable and do not rise to the level of
15 creating an adverse impact. And at the
16 minimum if you stay at six or less over the
17 ambient, that is satisfactory to show that
18 you've minimized environmental impacts to
19 satisfy basically the SEQRA standard which
20 really is where this falls under, the SEQRA
21 standard.

22 ADMINISTRATIVE LAW JUDGE: So there
23 is currently, you're currently bringing in
24 trains now and loading them?

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1 MR. BERNSTEIN: No. There is train
2 traffic along the same rail line.

3 ADMINISTRATIVE LAW JUDGE: Right. I
4 understand that. But aren't you going to
5 be bringing in trains --

6 MR. BERNSTEIN: Yes.

7 ADMINISTRATIVE LAW JUDGE: -- to the
8 rail yard where they are going to be loaded
9 with product?

10 MR. BERNSTEIN: Yes.

11 ADMINISTRATIVE LAW JUDGE: And that
12 was analyzed I presume?

13 MR. BERNSTEIN: Yes. What we did is
14 we went actually to a similar facility and
15 we took noise measurements while those rail
16 activities were occurring, loading and
17 unloading. And we compared those to what
18 the ambient was in the area where the
19 facilities were supposed to be located.

20 ADMINISTRATIVE LAW JUDGE: And so I
21 just want to make sure I understand, so no
22 mitigation was required because the
23 additional noise was below or within the
24 tolerable range as defined by the DEC

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1 policy; is that correct?

2 MR. BERNSTEIN: That's correct.

3 ADMINISTRATIVE LAW JUDGE: So you
4 haven't done any mitigation around the rail
5 yard?

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6 MR. BERNSTEIN: No, there was none
7 necessary. And in addition to that, I
8 think that the rail activities, when those
9 activities will be occurring will be of
10 short duration as well.

11 ADMINISTRATIVE LAW JUDGE: But they
12 could be happening at night, right?

13 MR. BERNSTEIN: Perhaps, but it's
14 unlikely. I think it's more likely they
15 would occur during the day. And you know
16 it's true --

17 ADMINISTRATIVE LAW JUDGE: But there
18 is no limitation, if Gas Free Seneca is
19 correct, there is no limitation on your
20 operations in the permit at this point to
21 avoid say noise at night?

22 MR. BERNSTEIN: No, there isn't, but
23 I think that we explained in the
24 application documents when we expect the

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1 facility to be operating. Typically it's
2 from 6 a.m. to 6 p.m. and not all of that
3 time will there be occurring either rail
4 activity. It's typical that it would be
5 basically during the workday that these
6 activities will be occurring. There is no
7 guarantee that it won't at night, but
8 typically now even when the rail line
9 operates, it operates during the work day
10 and that's what we indicated in the

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11 application documents. So that may not be
12 in the noise study, but it's certainly in
13 other documents that we presented including
14 in the DSEIS.

15 So, I mean, we conducted a proper
16 evaluation. We looked at the noise
17 receptors surrounding where the noise
18 generating sources will be. We actually
19 were conservative in terms of proper
20 attenuation. And even at the edge of the
21 lake it was determined that there was no
22 adverse impact as a result of noise.
23 Given, in addition to that, given the noise
24 monitoring that is required as part of the

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1 permit as additional mitigation, and
2 additional mitigation would be required if
3 for some reason the modelling doesn't hold
4 true for some reason, we have to act under
5 the permit. And so that's additional
6 mitigation that I think that the, that Gas
7 Free Seneca has not taken into account
8 again since they said there is no
9 mitigation. So given all that and given
10 the burden of persuasion that the
11 petitioners have and given the established
12 precedent in terms of how we went about
13 things in terms of the evaluation, we don't
14 think that there is a substantive or
15 significant issue.

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16 ADMINISTRATIVE LAW JUDGE: Thank you.
17 Department staff.

18 MS. SCHWARTZ: Your Honor, I do have
19 an entire statement, but I think you were
20 asking a question before and I would like
21 to point something out to you. Gas Free
22 Seneca's sound evaluation and the levels of
23 sound they projected at their receptor A
24 ranged from 33 to 44 dba. All right.

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1 Their receptor A on the other side of the
2 lake, not on the same side as the project
3 was at the east side of the lake ranged
4 from 33 to 44 dba. In our noise policy
5 areas, 35 dba is characterized as a
6 wilderness area type of sound. 45 dba is
7 characterized as a quite, seemingly serene
8 setting such as rural farmland.

9 ADMINISTRATIVE LAW JUDGE: You said
10 45 dba?

11 MS. SCHWARTZ: 45. So the study that
12 Gas Free Seneca shows does not show a
13 significant impact on the other side of the
14 lake. And that isn't to concede that I
15 think that their study is perfectly in line
16 with our policy or perfectly put.

17 All right. Now I'll go back to my
18 real spiel. The Department staff's
19 position is that noise isn't an adjudicable
20 issue because it's not substantive and

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21 significant. Just to make sure you
22 understand where we started out with our
23 process, the noise impacts from the
24 proposal are discussed in Section 4.3 in

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1 Appendix 1 of the dSEIS. The original
2 study of first level noise impact analysis
3 dated January 5th, 2011 was modified May
4 2011 to reflect comments offered by the
5 Department in its April 28th, 2011 letter.
6 The sound study was again updated on
7 January 20th, 2012. A transmittal to the
8 Department to generally reflect the
9 reconfiguration of the site in partial
10 response to comments. The sound study was
11 updated again in July 2013 to clarify and
12 correct data from one of the sound sources,
13 the brine pump. And finally a supplement
14 to the July 2013 study was provided dated
15 March 7th, 2014 to evaluate potential
16 impacts to receptor seven using ambient
17 noise measures taken for the Arlington Gas
18 Storage Company, the gallery two expansion
19 project which was pending before FERC at
20 that time. So the July 2013 sound study
21 and the March 7, 2014 supplement are
22 identified on our document list in Roman
23 Numeral I (b)32.

24 To go back, the Department staff's

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1 position is that the Applicant sound study
2 was conducted in a manner consistent with
3 the DEC program policy DEP 001, DEC noise
4 policy. The position is that nearby
5 receptors were properly identified. Proper
6 representative ambient noise levels were
7 obtained. The project noise sources were
8 properly estimated and expected changes in
9 noise levels were properly estimated.

10 To drill down and hit some
11 highlights. Based on projected noise
12 levels for the Finger Lakes project
13 operations, including proposed mitigation
14 measures, the expected noise level increase
15 at each receptor, each receptor, sorry, is
16 60 dba. So under our policy that would not
17 be a significant impact.

18 At receptor seven, a daytime
19 increase, just so you know Department staff
20 got some information from the Arlington
21 project --

22 ADMINISTRATIVE LAW JUDGE: Where is
23 receptor seven?

24 MS. SCHWARTZ: Where is it?

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1 ADMINISTRATIVE LAW JUDGE: Yeah.

2 MS. SCHWARTZ: The hotel.

3 ADMINISTRATIVE LAW JUDGE: The hotel?

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4 MS. SCHWARTZ: The hotel, in back of
5 hotel. East side of Route 14A.
6 ADMINISTRATIVE LAW JUDGE: All right.
7 MS. SCHWARTZ: Route 14. Sorry. So
8 Department staff in the processing of the
9 application also looked at some information
10 that was available and is available
11 publicly in the FERC proceeding that had to
12 do with Arlington Gas Storage that was
13 pending at the time. A study done by
14 Hoover and Keefe. And in looking at that
15 there was some data that was taken at a
16 receptor that was close to the Finger Lakes
17 receptor. And in looking at that and
18 evaluating staff determined that at
19 receptor seven, a daytime increase of 7.9
20 dba could be projected under a worse case
21 scenario. That is to say worst case being
22 where all Finger Lakes equipment would be
23 operating at the same time as the equipment
24 for the Arlington Storage Company. That

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1 represents the addition of, the 7.9
2 represents the addition of equipment noise
3 from Arlington of 7, excuse me 47.3, dba
4 and equipment at Finger Lakes of 46.6 dba
5 and then you add them in accordance with
6 the adding requirements of the noise policy
7 which is not the same as one plus one is
8 two, but it means you get to 50.3.

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9 So we want to point out though that
10 even for instance the estimated sound level
11 of 50.3 dba is still well below 65 dba
12 which is the maximum recommended sound
13 pressure level in a nonindustrial setting
14 in the DEC noise policy. In addition as
15 noted in the DEC noise policy EPA's
16 protective noise level guidance from the
17 ambient noise level of 55 dba, LVM, were
18 sufficient to protect public health and in
19 most cases did not create annoyance.

20 As a result, the 50.3 dba did not
21 give us enough concern to say that there,
22 that it wasn't in accordance with the noise
23 policy. We would still say that the study
24 and the results are in accordance with the

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1 noise policy, but I will point out also
2 that we have a permit condition that
3 requires confirmatory study and mitigation
4 measures if what was predicted doesn't come
5 true. So that's kind of it in a nutshell
6 from the Department staff perspective.

7 ADMINISTRATIVE LAW JUDGE: The 60
8 standard, that's for a rural setting? Is
9 that what you said?

10 MS. SCHWARTZ: I said --

11 ADMINISTRATIVE LAW JUDGE: You said
12 the 50.3 was as I understand accumulative,
13 that's both, that's both Arlington and

14 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
Finger Lakes working together?

15 MS. SCHWARTZ: Worst case scenario
16 Arlington and Finger Lakes, everything
17 going at the same time.

18 ADMINISTRATIVE LAW JUDGE: And that's
19 below the 60 you said --

20 MS. SCHWARTZ: Below the 65 dba which
21 is the maximum recommended sound pressure
22 level in a nonindustrial setting in the DEC
23 noise policy.

24 ADMINISTRATIVE LAW JUDGE: Non-

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1 industrial. Is that different from a rural
2 setting?

3 MS. SCHWARTZ: It just says
4 nonindustrial.

5 ADMINISTRATIVE LAW JUDGE: There's no
6 rural setting, there's no rural figure in
7 the policy? Well, I can look.

8 MS. SCHWARZ: I don't know off the
9 top of my head, Your Honor. If I just try
10 and glance through it right now, I might
11 give the wrong answer. I can put it in the
12 brief.

13 ADMINISTRATIVE LAW JUDGE: Right.

14 MS. SCHWARTZ: So let me say just a
15 little bit about the Sandstone noise
16 report. Department staff's policy is that
17 contrary to the claims made in the
18 Sandstone report, the evaluation of offsite

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19 truck traffic and train noise is beyond the
20 scope of the action under review and may
21 not be addressed. Rail lines and highways
22 serving the site already exist and already
23 carry train and truck traffic without the
24 project apart from the rail siting and turn

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1 around area and that's important. I mean,
2 obviously we evaluated for the railroad
3 noise that was right on the site and that
4 was important to us. That was a primary
5 consideration. But other than that, no
6 changes to the existing rail or highway
7 facilities that are proposed as part of
8 this project and we don't believe it is
9 appropriate for us to evaluate them. It's
10 also our position that potential receptors
11 were properly identified in the Applicant's
12 work including which meant properties
13 surrounding the proposed facility on the
14 west side of the lake. The project side of
15 the lake.

16 ADMINISTRATIVE LAW JUDGE: Would the
17 Department ever look at, just to, you know,
18 evaluate potential impact if there was a
19 significant increase in truck or rail
20 traffic as a result of a project, would
21 they look at the noise impacts of that?

22 MS. SCHWARTZ: I don't know, Your
23 Honor. I don't think so, but I don't want

24 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
to say what I'm going to do tomorrow on a

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1 different project that that's not the fact
2 here. You know what I'm saying? I mean,
3 right now I know that, that the trains are
4 going to come by anyway. And if I remember
5 correctly that we shouldn't have more than
6 one extra train trip per day?

7 MR. BERNSTEIN: That's right.

8 MS. SCHWARTZ: In other words, there
9 should be extra rail cars on the back of
10 the trains that are already going through
11 and at most one extra train per day.
12 That's what I believe. I don't remember
13 where it is in the record, which is a
14 problem that I have, but, and as far as the
15 truck increase is concerned I told you
16 about the DOT letter yesterday and I told
17 you about Department staff's own, you know,
18 evaluation to check up on DOT. We don't
19 think over 14 more than, it will be more
20 than one point, and 14A it will be more
21 than 1.2 percentage increase.

22 ADMINISTRATIVE LAW JUDGE: 1.2
23 percent increase in truck traffic on.

24 MS. SCHWARTZ: Truck traffic on 14

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1 and 14A. Not more than one point and in
2 some cases, in some place less than that.

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3 So it's, I don't, I don't, I can't speak,
4 speculate to a project in the future where,
5 you know, there's a 99 percent increase in
6 traffic maybe in a different kind of
7 neighborhood. I don't know. But right
8 here and right now on this situation it
9 doesn't seem reasonable to go beyond both
10 our policy, our practice and the situation
11 doesn't call for it.

12 ADMINISTRATIVE LAW JUDGE: Okay.
13 Thank you.

14 MS. SCHWARTZ: All right.

15 ADMINISTRATIVE LAW JUDGE: I think
16 your time is up.

17 MS. SCHWARTZ: Is it?

18 ADMINISTRATIVE LAW JUDGE: Yeah.

19 MS. SCHWARTZ: Okay. We're going to
20 brief this, Your Honor. Is that okay?

21 ADMINISTRATIVE LAW JUDGE: That would
22 be wonderful.

23 MS. GOLDBERG: So let me start by
24 addressing some of the issues raised by

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1 Department. I point out that nobody, not
2 either the Department nor the Applicant
3 addressed the fact that part of the region
4 of influence problem occurs on the west
5 side of the lake. There are traffic
6 impacts that go up and down the highway and
7 the railroad on the west side of the lake.

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8 Those continue to whole distance. They are
9 not just on the project site. And there's
10 nothing in the report right now that
11 addresses that. To suggest that you don't
12 look at traffic impacts, it strikes me as
13 absolutely absurd. If you have a shopping
14 center that's generating a lot of traffic,
15 you're going to ignore all the noise
16 through the neighborhoods because you're
17 not changing the street configuration. I
18 don't believe that this Department would
19 actually allow a developer to create a new
20 traffic and not analyze the noise impact
21 along the routes that are taken.

22 Secondly, the condition in the permit
23 which does require additional monitoring if
24 there is a problem covered only the

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1 existing receptors. So if you start with
2 the wrong receptors or inadequate region of
3 influence, you continue the problem that
4 you started with. The Department says
5 that --

6 ADMINISTRATIVE LAW JUDGE: So if we
7 added the receptor across the lake that you
8 propose, would that satisfy Gas Free
9 Seneca?

10 MS. GOLDBERG: If you make a
11 determination that it is necessary and
12 there is a need for a new noise study and

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13 direct the applicant to do a new noise
14 study and they add the appropriate
15 receptors, that would be wonderful. I
16 think that it is something that the public
17 should be entitled to review and comment on
18 it. It will be brand new information.
19 It's been ignored in the past. But if you
20 would direct them to do an additional noise
21 study and an additional community character
22 analysis, an addition cavern integrity
23 study, you know, all of that is required
24 and there is an additional public process,

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1 I would not have an objection to that. But
2 if what we are going to do is just move to
3 consider or not whether or not there is a
4 factual question here, there is plainly a
5 factual question here and there is a need
6 for an adjudicatory hearing on it.

7 The Department suggests that the
8 noise that we analyzed in the wintertime
9 showed only a 33 to 43 dba sound level. We
10 had no choice but to do this in a brief
11 period time between the announcement of an
12 issues conference and submission of papers
13 so we're in there doing that. And our
14 study was based on a noise measurement of
15 81 dba. But Hunt in its response to us
16 said that the maximum noise level is 88.9
17 and Hunt's conclusion is, and I will read

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18 directly from it so as not to misstate it,
19 neglecting any reductions over the water,
20 the maximum on-site noise level is 88.9
21 dba. Train activity would be perceived on
22 the eastern shore as 51.9. Now the
23 baseline that our expert identified was in
24 the mid 20s or high 20s. Assume 30, you

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1 got a 21, almost a 21 dba increase and
2 that's a significant impact. That's based
3 on their own statement allegedly rebutting
4 our analysis.

5 Again the fact that there's a, there
6 would be only one whole train in addition
7 strikes me as not a reason to avoid
8 analysis. As we indicated that adds to the
9 frequency of the train and we still don't
10 know when those trains are going to be
11 coming through. Likewise with the traffic.
12 It may be a small increase, but the timing
13 makes a big difference. And of course with
14 community character impacts, what those
15 trucks are carrying and what those trains
16 are carrying makes a difference as well.

17 The Applicant says that we
18 understated the baseline because we did it
19 in winter. Well, we obviously had no other
20 choice. But the guidance does not tell the
21 analyst to analyze in summer. What it says
22 is people generally have their windows open

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23 during summer and therefore there is less
24 attenuation by the buildings in which they

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1 are enclosed.

2 ARBITRATOR: We can compare apples to
3 apples, right? Because if we got yours in
4 the winter, we got theirs in the winter, we
5 can compare something in terms of relative.

6 MS. GOLDBERG: Yes. That would be
7 possible. He also misstates what the
8 baseline would be like. The east side and
9 west side are not comparable because the
10 receptors along the shore are buffered by
11 forest that is growing up the side of the
12 hill. Route 415 on the western side is up
13 above these homes that are down below on
14 the eastern shore. So you're not hearing
15 truck traffic from the highway the way you
16 are on the western shore which is right
17 along open field.

18 So we did not say that there was no
19 mitigation. I'm perfectly aware there is
20 some mitigation and that is a monitoring
21 requirement. What we said was it's not
22 nearly adequate to consider the full range
23 of construction noise and I will note that
24 nobody mentioned the construction noise

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1 either. And that's for the receptors on
2 the western shore as much as it is for the
3 receptors on the eastern shore. So there's
4 still whole areas that are not covered at
5 all. Both the receptors and the sources
6 and that presents an adjudicable issue that
7 requires a hearing.

8 ADMINISTRATIVE LAW JUDGE: Thank you
9 very much. All right. So that's noise.
10 Shall we take a brief recess? Would you
11 like a break or should we soldier on to
12 alternatives. Break? No? Let's go ahead?
13 All right. We're going ahead. So the
14 Seneca Lake Pure Waters Association.

15 MS. TREICHLER: Seneca Lake Pure
16 Waters petition for party status, we
17 asserted that the DSEIS fails to identify
18 or analyze a reasonable range of
19 alternatives for the proposed storage
20 project. The Department's regulations
21 required that alternatives to the project
22 must be provided and that the no action
23 alternative must be considered. The only
24 alternatives discussed in the dSEIS are

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1 alternative locations for the brine ponds.
2 There is no consideration of any site, any
3 alternative site for the underground
4 storage facility. Nor is there any
5 consideration of the no action alternative,

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6 not building a facility anywhere. The
7 failure to discuss alternative sites or the
8 no action alternative is a fatal defect in
9 the draft SEIS and can only be cured by
10 issuing a new draft. Alternatives that
11 could have been considered, but were not
12 include building the facility away from
13 Seneca Lake. And near a rail line that
14 does not have the safety issues that are
15 posed by the Watkins Glen line. Another
16 alternative that was not considered was the
17 alternative of building in the caverns in a
18 non salt bed and moving the storage caverns
19 farther away from the fault line,
20 particularly the Jacoby Dellwig fault that
21 it is sited right next to.

22 And in these, in considering
23 alternatives, the applicant has talked
24 about the TEPPCO storage facility and,

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1 which is still in the area, but it's very
2 instructive, the history of that facility
3 is very instructive to a consideration of
4 alternative. From 1964 to 1984 TEPPCO
5 stored LPG in a cavern in the salt bed
6 right next to where the proposed site is,
7 but in 1982, I'll just say that it has
8 already been pointed out yesterday that
9 during that time the salt levels in the
10 lake went up very considerably. In 1982

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11 TEPPCO obtained a DEC permit to dig a new
12 cavern in the Genesee Shale. So for
13 whatever reasons TEPPCO decided to move out
14 off the salt beds and dig a new cavern in
15 the Genesee Shale which is much closer to
16 ground level and far removed from the salt
17 bed and they lined, that new cavern is
18 entirely lined I have heard by steel. I'm
19 not certain exactly what the lining
20 material is. And TEPPCO transferred its
21 LPG storage materials to that new site.

22 According to articles in the press by
23 Peter Mantus, the DEC has denied his FOIL
24 requests for any records which might

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1 explain why TEPPCO spent the money and the
2 time to move his LPG storage facilities out
3 of the salt bed, but surely that is an
4 inquiry that needs to be conducted in
5 connection with this proposal. Why did
6 TEPPCO move? Why did TEPPCO move out of
7 the salt beds? So when we're looking at
8 alternatives, that should be part of the
9 discussion of alternatives along with other
10 discussions.

11 So as I have said, the failure to
12 include any discussion of any of these
13 alternatives cannot be cured by a
14 discussion of alternatives in a final EIS.
15 The DEC must be required to issue a new

16 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
draft EIS that analyzes clearly reasonable
17 alternatives and I would like to reserve
18 the rest of my time for rebuttal. Thank
19 you.

20 ADMINISTRATIVE LAW JUDGE: Okay.
21 Thank you. Gas Free Seneca.

22 MS. NASMITH: Thank you, Your Honor.
23 I would like to reserve two minutes at the
24 end of my time for rebuttal, please. Under

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438

1 Section 624.4 of the DEC's regulations
2 governing issues conference Your Honor is
3 empowered to determine whether legal issues
4 exist the resolution of which is not
5 dependent on the facts that are in
6 substantial dispute. It is our contention
7 that the draft EIS contains two fatal flaws
8 that cannot be corrected in a final SEIS
9 and require by law that DEC complete
10 another draft and resubmit the new draft
11 for public comment and review. The two
12 flaws that we will discuss right now are
13 the failure to include a no action
14 alternative discussion and the failure to
15 discuss sufficient reasonable alternatives
16 to the project.

17 With respect to the no action
18 alternative, there is no doubt and the
19 applicant does not dispute. The SEQRA
20 requires an analysis of the no action

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21 alternative in the EIS. The purpose of
22 this is to create a baseline to which the
23 public and the department can compare the
24 impacts of the proposed project as well as

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439

1 its reasonable alternatives. Under SEQRA
2 in Section 617.9(b)55 the no action
3 alternative discussion, and I'm quoting
4 here, sorry, the no action alternative
5 discussion should evaluate the adverse or
6 beneficial site changes that are likely to
7 occur in the reasonably foreseeable future
8 in the an absence of the proposed action.
9 In other words, the EIS must consider the
10 capability of the site to environmentally
11 improve, recover or allow for restoration
12 and remediation in the absence of the
13 proposed project. These requirements
14 clearly go far beyond what has been
15 included in the current draft which by the
16 Applicant's own admission discusses only
17 the current environmental settings and the
18 financial benefits of pursuing the project.
19 Contrary to the applicant's assertions the
20 petitioners are not elevating form over
21 substance here and looking only for a
22 section in the draft entitled no action
23 alternative. The petitioners are looking
24 for an actual discussion of the beneficial

♀

1 impacts at opting not to proceed with the
2 project.

3 The cases cited to by the Applicant
4 in support of its position of what's in the
5 in draft currently is sufficient actually
6 are, predate revisions to the SEQRA
7 regulations which explicitly include the
8 requirement to examine the feature
9 conditions without the project, a
10 requirement the draft does not fulfill.

11 The Applicant also cites to a
12 reference in the SEQR Handbook which
13 provides that for many, but notably not all
14 private action, the no action alternative
15 may simply be the direct financial effect
16 of not undertaking the action. Given the
17 many issues being raised by the petitioning
18 parties in this case and the lengthy
19 discussions Your Honor oversaw yesterday
20 and today, this clearly is an example of a
21 project where the description of the
22 financial benefits of the project and of
23 the current environmental study is not a
24 sufficient characterization of the no

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1 action baseline that SEQRA requires. This
2 is a fatal flaw under SEQRA and by law
3 requires the reissuance of the draft.

4 The other flaw that we would note is
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5 the absence of reasonable, discussion of
6 reasonable alternatives. SEORA requires an
7 analysis of all feasible and reasonable
8 alternatives to the project and it has
9 already been noticed the only discussion in
10 the draft are three potential brine pond
11 changes. There is nothing that discusses
12 alternative sittings, alternative project
13 sizes, using different caverns, other
14 design changes including how much LPG is
15 brought in the facility via what mode of
16 transportation.

17 The Applicant cannot contend that
18 there are no reasonable alternatives they
19 failed to consider because only two and a
20 half months ago it released a revised
21 transportation product allocation where for
22 the first time they contemplated apparently
23 eliminating the use of trucks and using
24 only rail and pipeline to bring the LPG to

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1 and from the facility. This alternative
2 was never mentioned, let alone analyzed in
3 the draft. We would note also that the
4 applicant would like to take credit for
5 eliminating truck transportation, but and
6 by for example not analyzing the risk that
7 such truck traffic would cause and
8 concluding that the risk is zero in the
9 Quest QRA discussed yesterday. As the

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10 Department noted, and as your questioning
11 elicited, the Applicant still intends to
12 build the truck depot and there are no
13 draft conditions that would restrict the
14 use of trucks. The bottom line is the
15 Applicant seems to want to have it both
16 ways, claiming credit for eliminating
17 impacts when it suits them and then keeping
18 options open without evaluating the full
19 plate of impacts and alternatives.

20 The importance of including
21 reasonable alternatives in the draft for
22 public review and comment is underscored by
23 this example. Eliminating truck traffic,
24 assuming that's what they are doing, has

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443

1 the potential to alter the adverse effects
2 posed by the project. Although there would
3 not be increased truck traffic from
4 operating the facility if the applicant did
5 in fact not use trucks, the Applicant would
6 have to rely on the greater use of the
7 rails and as we discussed yesterday there
8 are risks associated with that.

9 Because this alternative and its
10 associated impact was, were not discussed
11 in the draft neither the public and not
12 even potentially the Department has a good
13 idea of what this change means in terms of
14 adverse impacts of the project. Had this

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15 alternative been included in the draft and
16 the impacts of this alternative discussed
17 and compared to the impact of the project
18 that was proposed in August 2011, we would
19 have understood those implications. Also
20 underscoring the importance of having this
21 impact includes this alternative and other
22 reasonable alternatives like it in the
23 draft is underscored by the fact that by
24 eliminating the truck traffic, they have

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444

1 potentially fundamentally altered the
2 potential benefits of the project which
3 affects the claimed purpose and need of the
4 project. If the LPG no longer is
5 transported via truck, it is much like less
6 likely that this LPG stored at the facility
7 will be going to local customers. If they
8 put it on pipeline and rail, it is more
9 likely to go farther distances and serve
10 farther flung markets. Therefore the local
11 customers are not going to benefit from the
12 apparent price spike decreases that the
13 Applicant claims will result from
14 installing this project. Instead other
15 customers in other parts of New York and
16 New England will benefit. The result is
17 the local communities will be forced to
18 take all of the risk associated with this
19 project and receive almost none of the

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20 benefits. Again this is not discussed in
21 the draft at all.

22 As a result, currently written, the
23 draft is insufficient under SEQRA and it
24 would be insufficient to correct these

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1 errors in a final which would not be
2 subject to public comment and review. As
3 the Court of Appeals held in Webster the
4 purpose of requiring the inclusion of
5 reasonable alternatives to a project, and I
6 think this is equally applicable to the no
7 action alternative, is to aid the public
8 and governmental bodies in assessing the
9 relative costs and benefits of the
10 proposal. Such major defects cannot be
11 cured merely by including the missing
12 information in the final. A new draft must
13 be issued. While the Applicant -- and that
14 new draft must be subject to public comment
15 and review. While the Applicant attempts
16 to style it as a request for a supplemental
17 EIS under 617.9 it is not. The draft is
18 fundamentally invalid and must be redone.
19 This is precisely what the DEC did for the
20 SGEIS on fracking. The original draft was
21 deemed insufficient and it was issued and
22 the Department issued a revision. That is
23 what we would ask Your Honor to do today.

24 ADMINISTRATIVE LAW JUDGE: Thank you.
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1 The Seneca Lakes Communities.
2 MR. KROIS: Your Honor, reserve two
3 minutes for rebuttal. The Applicant's
4 failure to consider a range of reasonable
5 alternatives is a fatal defect in the
6 DSEIS. SEQRA requires that all draft EISs
7 must include a description and evaluation
8 of the range of reasonable alternatives to
9 the action that are feasible considering
10 the objectives and capabilities the project
11 sponsored. The amount of detail that must
12 be in the DSEIS about the alternatives
13 needs to be enough to permit, quote, a
14 comparative assessment of the alternatives
15 discussed. And the purpose of requiring
16 this is to help both the public and
17 governmental bodies to assess the relative
18 costs and benefits of the proposal. So to
19 be meaningful, that assessment must be
20 based on an awareness of all reasonable
21 options other than the proposed action.
22 Reviewing a range of alternatives is
23 crucial to SEQRA's fundamental mandate of
24 weighing the need for this project as

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1 planned versus feasibility of meeting that
2 need in a less intrusive manner. The

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3 alternative analysis has in fact been
4 described as the heart of the SEQRA
5 process.
6 What the Applicant offers here is
7 totally insufficient to meet the
8 requirements and fundamental purposes of
9 SEQRA. The entirety of the dSEIS discussion
10 of alternatives is focused on the brine
11 ponds. There are three sentences on
12 location and all they do is confirm that
13 the Applicant decided not to consider
14 another location. The Applicant attempts
15 to justify this according to the final
16 scope, but Your Honor their reliance on the
17 final scope is misplaced. The final scope
18 does not shield the Applicant, nor for that
19 matter the Department, from being
20 challenged in the permit hearing process
21 for failing to obey SEQRA. They are still
22 required to comply with the law. And
23 failing to do that is to potentially fail
24 the effect in the sDEIS final scope or no

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1 final scope.
2 It's not an argument that seems to
3 have come up very much in case law, but in
4 St. Lawrence Cement Company that case
5 clearly rejects it. There the Applicant
6 objected to Petitioners raising the issues
7 of particulate matter impacts as well as

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8 other impacts like noise because, and I
9 quote, they failed to raise them in the
10 scoping process. The ALJ there held, and I
11 quote again, we disagree with this
12 conclusion based upon a reading of the
13 precedent and a review of the applicable
14 regulations. The Department's intent
15 regarding changes to Section 617.8 was to
16 limit the scoping process by requiring
17 information raised after the preparation of
18 the final written scope that prior to the
19 completion of the dEIS to meet a strict
20 test for inclusion. This period does not
21 include the part 624 issues conference and
22 hearing, end quote. Indeed the ALJ in that
23 case went on to say that, quote, given
24 SEQRA's mandate to consider all potentially

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1 significant environmental impacts to hold
2 otherwise would not comport with statutory
3 requirements. Given this precedent,
4 Applicant's repeated citing to Section
5 617.8(g)(h) is misplaced. Those
6 limitations on raising additional issues
7 plainly do not apply to this issues
8 conference.

9 The Applicant also relies on one line
10 in the SEQR Handbook comparing a final soap
11 to a quote unquote contract between the
12 lead agency and the sponsor. The handbook

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13 does say that there is a presumption toward
14 seeing the final scope that way, but no
15 agreement between DEC and the project
16 sponsor can contract away SEQRA. SEQRA has
17 its origins in New York State law and
18 neither DEC nor the Applicant has the
19 authority to permit the other to submit a
20 legally deficient EIS. In fact immediately
21 after the line, they quote about contracts
22 in the handbook, the handbook goes on to
23 say, and I quote, the lead agency must
24 still in all cases determine whether a

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450

1 draft EIS is adequate before opening public
2 comment on that draft. If a lead agency
3 believes that a late issue is important
4 enough that the draft EIS must address it
5 to be deemed adequate, then the agency
6 should advise the product sponsor of that
7 conclusion.

8 Your Honor, the Applicant is not
9 somehow shielded from the fact their
10 alternatives assessment is totally
11 insufficient and given the project's needs
12 and purposes outlined in the DSEIS combined
13 with a significant number of concerns
14 raised about this site both in public
15 comments over many years and in today's
16 issues conference, failing to discuss any
17 potentially alternative sites is

18 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
unjustifiable.

19 The range of alternatives is supposed
20 to be informed by the objects and
21 capabilities of the project sponsor which
22 in this case encompasses the entire
23 northeast region. The Applicant's entire
24 discussion of the project's needs and

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1 purpose is based not on the Finger Lakes
2 Region or even around New York State, but
3 on the northeast region as a whole. The
4 Applicant begins that discussion by
5 describing the size of the northeast
6 propane market and continues by describing
7 the arteries for supply in that market.
8 They describe the need in terms of the
9 imbalances of supply region wide and they
10 promise that this project makes supply
11 available, quote, with large scale truck,
12 rail and pipeline access.

13 Descriptions and benefits to New York
14 take up less than one page in the dSEIS and
15 are very general. At no point does the
16 Applicant state in discussing the project
17 needs or benefits that the objective of
18 this project is to provide supply primarily
19 either to the Finger Lakes region or to New
20 York State. Their focus is on the
21 northeast market which is a huge area that
22 should have provided a variety of potential

23 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
alternative sites in a variety of different
24 environmental settings. There was no

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1 reason, either in law or in this project's
2 objectives and capabilities, to ignore
3 alternative sites entirely. By doing so
4 the Applicant has denied us the necessary
5 awareness of reasonable options here and
6 they have made it impossible to weigh the
7 need of this project as opposed to the
8 feasibility of meeting that need in a less
9 intrusive manner. For this reason it's a
10 fatal defect in the dSEIS. Thank you.

11 ADMINISTRATIVE LAW JUDGE: So we
12 can't use the hearing process in order to
13 supplement the SEQR record on alternatives
14 if it is determined that it needs to be
15 supplemented?

16 MR. KROIS: We don't think so, Your
17 Honor.

18 ADMINISTRATIVE LAW JUDGE: Why not?
19 Wasn't that what we were doing in St.
20 Lawrence?

21 MR. KROIS: It was, but we would
22 agree with what Gas Free Seneca says that
23 the essence of considering the alternatives
24 is not just the matter of supplementing the

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1 final record, but allowing future comment
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2 of, from both the public and from
3 governmental bodies which requires
4 reopening the SEQRA process and allowing of
5 public comment.

6 ADMINISTRATIVE LAW JUDGE: Well, in
7 the Webster case wasn't the problem solved
8 by the fact there had been discussion and
9 that wasn't a discussion in a context of an
10 adjudicatory hearing. That was a
11 discussion, if I understood the case
12 correctly, in the public generally. So we
13 have an adjudicatory hearing process here
14 that where parties such as yourselves have
15 the opportunity to provide further comment
16 on any alternatives that are being proposed
17 and whatnot, that wouldn't be sufficient,
18 the only recourse the Department has here
19 would be to deny the permit and/or
20 basically, yeah, and require a further
21 draft supplemental EIS; is that correct?

22 MR. KROIS: Yes, Your Honor. Given
23 the situation --

24 ADMINISTRATIVE LAW JUDGE: Do you

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1 have an example of that? Have we actually
2 ever done that?

3 MR. KROIS: I don't have the cite,
4 but we can provide it in post hearing
5 briefing. But given the situation we have
6 here I don't think that we have had the

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7 necessary discussion outside of this
8 process, nor do I think the necessary
9 discussion will occur in this process to
10 allow us to simply supplement the record.
11 In other cases where supplementing has been
12 acceptable, it has been based on
13 discussions of alternative sites and
14 information of alternative sites that's
15 already available. The problem, Your
16 Honor, the reason their dSEIS is
17 insufficient is they have not provided the
18 information that we and the public need to
19 determine what alternative sites are
20 available and to determine whether or not
21 those alternative sites are feasible.

22 ADMINISTRATIVE LAW JUDGE: If we
23 adjudicate it, aren't we doing that? If we
24 adjudicate the issue, then either the

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1 Applicant would defend its current EIS or
2 it would supplement it and parties such as
3 yourself will have the opportunity to
4 provide a record on the alternatives that
5 you believe should be considered. Where we
6 can't, our process is not robust enough to
7 be able to do that in for purposes of
8 SEQRA? SEQRA ordinarily only require
9 public comment. It wouldn't require an
10 adjudicatory hearing.

11 MR. KRUIS: I agree, Your Honor. And
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12 this is an issue that could be submitted to
13 adjudication, but we do believe it is
14 legally deficient and requires reopening
15 the SEQRA process.

16 ADMINISTRATIVE LAW JUDGE: Okay.
17 Thank you.

18 MR. LAUSELL: Your Honor, if I may
19 interrupt. I would ask that we have
20 important information on this topic. We
21 basically have a four page handout from one
22 of our exhibits. If I could just
23 distribute it and have five minutes to
24 explain it? I believe it involves

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456

1 alternatives specifically.

2 ADMINISTRATIVE LAW JUDGE: I don't
3 have any objection to you distributing your
4 handout, but at this point I don't believe
5 this was something that you raised in your
6 petition, so that's why I didn't give you
7 have any time on this.

8 MR. LAUSELL: Well, we did talk about
9 imposing conditions on the permit and
10 particularly as it relates to truck or
11 train traffic. These are the projections
12 that we have done on the county level on
13 those impacts.

14 ADMINISTRATIVE LAW JUDGE: And you
15 presented your position on truck and train
16 traffic I believe during the public safety

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17 portion of this conference.

18 MR. LAUSELL: Yes. In particular
19 though the issue of the truck traffic
20 haven't been taken off of the permit
21 application. I believe it's a direct
22 result of what we have done in our study.

23 ADMINISTRATIVE LAW JUDGE: Right.
24 Well, right now we're talking about the

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1 alternatives analysis under SEQRA, so again
2 I have no objection to you providing your
3 handout to the parties.

4 MR. LAUSELL: It's already part --

5 ADMINISTRATIVE LAW JUDGE: And then
6 there will likely be briefing in this
7 matter, so if you want to raise your
8 concerns in your brief, that will be
9 sufficient I believe.

10 MR. LAUSELL: Okay. Thank you.

11 ADMINISTRATIVE LAW JUDGE: So Finger
12 Lakes LPG.

13 MR. ALESSI: Good morning, Your
14 Honor. We have heard some extraordinarily
15 remarkable unpri ncipled posi ti ons on
16 processes and I would like to highlight
17 them right away. So what we heard, Your
18 Honor, is we have a one way street now that
19 the opponents are proposing for this
20 process that I've never heard of in 28
21 years. They are saying that they can come

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22 in here, add to the record, keep the
23 process open, add to the record to show
24 everything they want about the process, but

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1 nobody else can put anything into the
2 record and nothing else can be looked at
3 after that. In response so the last
4 colloquy you had, I heard the answer that
5 the development of this issues conference
6 record is not enough. That you have to
7 freeze the time, the SEQRA process, you
8 have to freeze it before you start the
9 issues conference and anything that's not
10 in or not to their liking, you got to start
11 the whole process over. But they want to
12 keep going in the same process which is
13 part of the SEQRA process issues conference
14 and keep going through the process. It's
15 incredibly unprincipled. It's
16 unprecedented and as Your Honor alluded to,
17 there is no decision of this Department or
18 the court that would allow such a process.
19 So with regard to the subject matter that
20 came forward, I want to address in terms of
21 the alternatives, the no action alternative
22 argument, the range of alternatives and
23 then I want to speak about scoping.

24 The Gas Free Seneca spoke about the

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1 regulations and once again unfortunately
2 they didn't represent the regulations as to
3 what they are. The regulations are very
4 clear about the alternatives. In one of
5 the things they didn't talk about at all is
6 the case law, the administrative decisions
7 about the difference between a no action
8 alternative between a public action and a
9 private action. And that's what the SEQR
10 Handbook talks about and that's what we put
11 in your briefs and you didn't hear anything
12 about that. The SEQR Handbook says for
13 many private actions no action alternative
14 may be simply and adequately addressed by
15 identifying the financial effects of not
16 undertaking the action. That is what the
17 handbook says. The handbook is still
18 valid. It's not superceded. It is what
19 the Department's policy has been. And you
20 go through the decisions and this is going
21 to be very important for all of the
22 alternatives discussion. With regard to
23 private applicants the standard is well
24 established. So in terms of the no action

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1 alternative, let's turn to how that was met
2 and we put that in our brief. I'm not
3 going to go into detail. We cite section
4 after section.

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5 ADMINISTRATIVE LAW JUDGE: Let me ask
6 you this, what was, do you recall what the
7 no action alternative, how that was
8 analyzed in the St. Lawrence matter?

9 MR. ALESSI: No, I do not, Your
10 Honor. Even though I was --

11 ADMINISTRATIVE LAW JUDGE: Did they
12 simply rely on financial benefit in the
13 St. Lawrence matter?

14 MR. ALESSI: I do not know the answer
15 to that question, Your Honor. And again,
16 as Miss Schwartz says, what one applicant
17 chooses to do in one process is related to
18 the circumstances that are extended there.
19 It does, just because one applicant does
20 more or additional doesn't translate into
21 the argument you're hearing that it's a
22 quote fatal flaw. And so there is no --

23 ADMINISTRATIVE LAW JUDGE: But in
24 terms of what we might require of a private

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1 entity versus a public one, there may be,
2 there is, presumably there may be a range
3 of, I mean, I will have to go back and look
4 at what happened in St. Lawrence myself. I
5 don't recall. But presumably there is a
6 range of what would be expected to be
7 discussed. I mean, if it's a relatively
8 minor project, the financial benefit would
9 be sufficient, but in a more major project

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10 perhaps not. Maybe some more extensive
11 schedule would be required by the
12 Department.

13 MR. ALESSI: Your Honor, that brings
14 me to the next point and I'm going to go
15 right to it. Can somebody please tell me
16 why we have scoping? The scoping
17 regulations, if we're going to talk about
18 scoping, and I had think this is really
19 important as to the policy and the
20 decisions of Your Honor and any
21 administrative law judge and the
22 commissioner. Because basically what you
23 have here is a situation where there was
24 scoping, there was scoping hearings and I

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1 agree. Just because it wasn't raised in
2 scoping isn't ipso facto a preclusion from
3 it becoming an issue in 624, however it is
4 to be entitled to the weight that the
5 regulations give it. And specifically,
6 Your Honor --

7 ADMINISTRATIVE LAW JUDGE: So scoping
8 didn't say, was it actually addressed in
9 scoping that all that Finger Lakes had to
10 consider was the financial benefit, that no
11 further, no action alternative needed to be
12 discussed?

13 MR. ALESSI: It didn't have to
14 because the SEQR Handbook states it very

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clearly. There was no issue raised.
16 Scoping is to determine what issues are to
17 be addressed, how they are to be addressed
18 and which issues are to be eliminated. The
19 scoping process served that function
20 because it didn't say no for this action
21 you have to go beyond, you know, what the
22 handbook says and do more and frankly
23 nobody ever said that it had to, and
24 nothing, and it never even came up in these

♀

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1 parties where it's scoping.
2 So, Your Honor, my question goes to
3 this and it's a rhetorical question because
4 the SEQRA regs talk about scoping. And it
5 says 617.8(g), all relevant issues should
6 be raised before the issuances of the final
7 written scope. Any agency or person
8 raising issues after that time must, must
9 provide for the lead agency and project
10 sponsor a written statement that
11 identifies, it goes through criteria and
12 then there is the important one. The
13 reason why the information was not
14 identified during scoping and why it should
15 be included at this stage of the review.
16 There is no record of that and that should
17 go to the weight.
18 ADMINISTRATIVE LAW JUDGE: Right.
19 But isn't the no action alternative

20 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
required in all cases though, right? Isn't

21 that provision you're reading have to do
22 with other, other project impacts?

23 MR. ALESSI: No, no. This has --

24 ADMINISTRATIVE LAW JUDGE: That would

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1 also apply to the alternatives to be
2 considered as well?

3 MR. ALESSI: Absolutely.

4 ADMINISTRATIVE LAW JUDGE: Including
5 the no action alternative?

6 MR. ALESSI: Absolutely. Scoping
7 applies to every single content of the
8 dEIS, the mandatory ones as well as the
9 voluntary ones. So this clearly applies.
10 And my point is, Judge, just think of
11 yourself as an administrative law judge and
12 somebody --

13 ADMINISTRATIVE LAW JUDGE: I consider
14 myself as that. That's what they pay me
15 for.

16 MR. ALESSI: In this circumstance --
17 I was going to complete my sentence. In
18 this circumstance you had no issue raised
19 before you with regard to a topic and it
20 goes to the appellate division and the
21 appellate division says I think that there
22 was an error. You've never had an
23 opportunity to address it.

24 ADMINISTRATIVE LAW JUDGE: Right.

♀

1 Well, that's exhaustion of necessary
2 remedies, but we are in the middle of an
3 interim process here. We haven't got to
4 file agency determination yet. So this is
5 a, this is a, this is an ebb and flow here,
6 right. There's an attempt made early on in
7 the process to scope the EIS, right. That
8 was done. A draft is provided. Then we
9 have a hearing process which was referred
10 here because staff believed there may be
11 substantive issues that need to be
12 adjudicated and so, and that's used to
13 further supplement the record so.

14 MR. ALESSI: That's not my point.
15 That's not my point. I've heard that
16 discussion from you. My point, Your Honor,
17 is this, my point is how is this reg going
18 to have meaning if they are not required to
19 identify why it was not identified during
20 scoping. That analysis would write the reg
21 out. That analysis writes the reg out that
22 this has no meaning. So nobody has to ever
23 explain why they didn't raise it below. My
24 point is not that they can't.

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1 ADMINISTRATIVE LAW JUDGE: Did they
2 not raise this -- well, of course they
3 wouldn't have known what the no action

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4 alternative looked like at the scoping
5 point of this process because it hadn't
6 been written yet or, right, the dSEIS
7 hadn't been written at that point so how
8 would they do know whether or not it had been
9 adequately addressed in their view?

10 MR. ALESSI: Judge, you just hit it
11 before in your question. You said was
12 there a discussion in scoping about whether
13 or not the no action would just follow the
14 handbook or not. Why would, if someone
15 believes you shouldn't follow the handbook,
16 then somebody should raise that issue in
17 scoping. My point is this, Your Honor,
18 with regard to alternatives. This is
19 particularly appropriate with regard to the
20 range of alternatives. The no action
21 alternative, Judge, this isn't even an
22 issue. I don't know why we're spending so
23 much time on it. It's been addressed.
24 It's been addressed according to the SEQR

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1 Handbook. There should be no further
2 discussion about the no action alternative.
3 It to me is remarkable that we've spent
4 this much time on it because it follows the
5 SEQR Handbook.

6 ADMINISTRATIVE LAW JUDGE: Okay. So
7 then what about the other alternatives
8 thought that are being proposed? Make sure

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9 those are raised during the scoping as
10 things that need to be considered?
11 MR. ALESSI: Absolutely not.
12 Absolutely not. As a matter of fact, Your
13 Honor, I stayed up until 1:30 this morning
14 and read every single comment that was in
15 the scoping document and you want to know
16 something else. Miss Goldberg brought up
17 community character this morning and
18 talked, she talked about it several times.
19 There is not one comment that says
20 community character in the whole scoping
21 document, okay. So the answer is with
22 regard to the range of reasonable
23 alternatives, we want to talk about
24 Webster. Here is what Webster had to say.

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1 Webster says that you have to look at
2 the alternatives, and this is in the SEQR
3 Handbook as well summarizing Webster, must
4 be viable, technical and feasible. The
5 regulations themselves talk about in the
6 very provision that Gas Seneca cited to
7 you, it's remarkable that we cite to the
8 same regulation. And it says a description
9 and evaluation of the range of reasonable
10 alternatives to the action that are
11 feasible considering the objectives and
12 capabilities of the project sponsor.

13 Judge, the range of alternatives is

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14 determined based upon our objectives and
15 capability. Our objective in this action
16 is to store LPG in these caverns. These.
17 Not someplace in Massachusetts for this
18 area for this market. We get to decide
19 that. The law is incredibly clear.

20 ADMINISTRATIVE LAW JUDGE: Does
21 Finger Lakes own other caverns in the area
22 that could be used for this purpose?

23 MR. ALESSI: No. I just checked and
24 got the answer.

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1 ADMINISTRATIVE LAW JUDGE: All right.

2 MR. ALESSI: So for a private party,
3 and that's a very good question, for a
4 private party the law and the handbook are
5 very clear. You don't have to go look
6 beyond your own property or, and I'm going
7 to answer another question. Make sure I
8 get this right. Options?

9 (OFF-THE-RECORD DISCUSSION BETWEEN
10 MR. ALESSI AND MR. BACON.)

11 MR. ALESSI: Do you have any options?

12 MR. BACON: No.

13 MR. ALESSI: See because that's the
14 test. Do you own or do you have options
15 and so we don't. So, Your Honor, this is
16 also very important with regard to the law
17 and you hear all these statements about
18 what the law is. They are misstating what

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19 the law is. When you look at the
20 objectives and capabilities of the project
21 sponsor. Now in terms of the nature of the
22 discussion of alternatives.

23 ADMINISTRATIVE LAW JUDGE: Let me
24 make sure I understand. So you don't own

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1 or have options on facilities that are,
2 that's specifically situated as this with
3 rail connection and presumably pipeline
4 connections. Are there other sites owned
5 by the Applicant that maybe have less
6 advantageous rail and pipeline connections,
7 but nonetheless are near such facilities?

8 MR. BACON: 30 plus miles away.

9 ADMINISTRATIVE LAW JUDGE: 30 plus
10 miles away. So wouldn't that be a
11 potential option alternative to look at?
12 It may be more, you know, the costs and
13 benefits of it.

14 MR. BACON: No, no.

15 MR. ALESSI: Your Honor, you're
16 asking about other projects, so I would
17 like to confer with my client.

18 ADMINISTRATIVE LAW JUDGE: All right.
19 Well, maybe the thing to do would be, and
20 we can do this in briefing.

21 MR. ALESSI: Your Honor, the range of
22 reasonable alternatives, the Department
23 created the range in the scoping document.

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24 The question is this isn't the time to

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1 start asking whether it could be done. The
2 question here is what is reasonable. SEQRA
3 has a rule of reason. No offer of proof
4 has gone in to say for our Savona project
5 that you should have looked in. They
6 didn't mention that as an alternative. So
7 we're talking about matters that they
8 didn't even put in an offer of proof in
9 that we should be using other facilities we
10 own. And, Your Honor, with regard to --

11 ADMINISTRATIVE LAW JUDGE: So if the
12 Commissioner concludes that more
13 alternatives should have been considered,
14 we shouldn't use this process to do that?
15 You would agree with the Petitioners and
16 say we would have to start from scratch? I
17 can't imagine you'd believe that.

18 MR. ALESSI: No, Your Honor, I
19 wouldn't and here is the thing and I've
20 said this several times.

21 ADMINISTRATIVE LAW JUDGE: Can we use
22 the hearing process in order to consider
23 some other alternatives like Savona if
24 that's what?

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1 MR. ALESSI: Your Honor, I'm going to

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2 say what I said yesterday. You have the
3 adjudicatory issues conference in one
4 bucket and you got the ongoing SEQRA
5 process in the other. I am emphatic, and
6 I'm emphatic because the Commissioner's
7 decisions are emphatic. You do not need
8 issues conferences and adjudicatory
9 hearings to solve and satisfy SEQR's and
10 the decisions are legion in that.

11 ADMINISTRATIVE LAW JUDGE: Not
12 necessarily. We don't necessarily have to
13 adjudicate all SEQRA's. We can supplement
14 the SEQRA record through the process.

15 MR. ALESSI: Exactly.

16 ADMINISTRATIVE LAW JUDGE: So could
17 we potentially do that here?

18 MR. ALESSI: Yes.

19 ADMINISTRATIVE LAW JUDGE: If the
20 Commissioner is of the view that some
21 further alternatives need to be considered,
22 could we use the process to do that?

23 MR. ALESSI: Absolutely, Your Honor.
24 And I support that. I said I supported it

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1 yesterday for a number of issues. Listen,
2 we're an existing member of this community.
3 We have been so for the number of years.
4 We are the largest employer in the Town of
5 Reading. The reason why the Town of
6 Reading in their comprehensive plan lists

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7 us as an important part of their community
8 is because of the way we operate, because
9 of our employees who are members of the
10 community. We are not here to shut the
11 public out. We have been responsive and
12 I've made this offer several times and I'll
13 make it again. I don't care if the issue
14 was scoped. I don't care what the issue
15 is, the concern is, as long as it's
16 somewhat reasonable, we will address it in
17 the response to comments. We welcome it.
18 We continue to welcome it through that
19 process. So I would support the
20 Commissioner's --

21 ADMINISTRATIVE LAW JUDGE: Isn't
22 there something more we could do though
23 than just respond to comments. If the
24 Commissioner concludes that further

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1 alternatives should be considered, could a
2 further draft be provided that would go
3 into those alternatives and analyze them
4 and then allow for the process, the issues
5 conference process to go forward and allow
6 the parties to review it and comment on it
7 and etcetera?

8 MR. ALESSI: Judge, in theory. Not
9 for this case, but in theory the judge has
10 that power among many other powers.
11 However, it's not appropriate here and it's

12 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
not appropriate on this record to go cause
13 a dEIS for a project that started in 2008.
14 It's 2015. We had the dEIS complete in
15 2011. It is 2015 that we're even having an
16 issues conference on it. So to me --

17 ADMINISTRATIVE LAW JUDGE: This was
18 only referred to me a few short months ago,
19 so I'm not sure I can take responsibility
20 for what happened before.

21 MR. ALESSI: You can't and we're not
22 saying that you are.

23 ADMINISTRATIVE LAW JUDGE: So why is
24 it -- okay. But so why is it inappropriate

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1 though? We are trying to make sure that we
2 had an adequate, full record for
3 commissioner to consider assuming the
4 commissioner ends up having to make the
5 final decision here, upon which to make
6 that decision. Be able to make findings.

7 MR. ALESSI: Judge, you asked two
8 questions. The first one was could the
9 commissioner have that, does he have the
10 power. The answer I said is theoretically
11 yes. Now I'm going to answer the other
12 question as to why it's inappropriate here.
13 Because the range of reasonable
14 alternatives and it's a rule of reason
15 where the Department staff gets deference
16 because it's their expertise. The reason

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17 why it's not reasonable is because of the
18 objectives and capabilities of the project
19 sponsor. That's why it's not reasonable to
20 reopen the dEIS process. To go through and
21 start this all over again. To have another
22 issues conference possibly based upon a
23 dEIS for alternatives that are not
24 reasonable. That is why I suggest the

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1 other way we can respond to this.
2 ADMINISTRATIVE LAW JUDGE: Well, if
3 the Commissioner can decide it's reasonable
4 to consider this alternative then.
5 MR. ALESSI: If the Commissioner
6 considers it reasonable, he will have to
7 change his decisions with regard to
8 objectives and capabilities of the project
9 sponsor. He will have to change
10 administrative law because the alternatives
11 that have been put in the offer of proof
12 basically get out of New York State. I
13 have never heard a Commissioner say that.
14 ADMINISTRATIVE LAW JUDGE: All right.
15 But what about a local, a local site though
16 that is owned by the Applicant?
17 MR. ALESSI: They have to make an
18 offer of proof for the Commissioner to be
19 able to order that as part of an issues
20 conference and that hasn't occurred.
21 ADMINISTRATIVE LAW JUDGE: Okay.

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22 MR. ALESSI: We have to have some
23 process and respectfully for your process,
24 the Commissioner's process. We just can't

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1 come in in the middle of a discussion on an
2 issues conference and say we would like to
3 have this alternative raised when it's not
4 in the offer of proof. And it is not the
5 way the process, you wouldn't have many
6 applicants who basically will go through a
7 scoping, agree, parties come out, nobody
8 says why it should have been included, the
9 reg is not even followed and under your
10 hypothetical and I treat it as a
11 hypothetical.

12 ADMINISTRATIVE LAW JUDGE: Well, the
13 petitioners may not have been aware of
14 sites, other potential sites owned by the
15 company. The only entity I think would be
16 in a place to require that certainly
17 earlier on in the SEQRA process would be
18 the Department. Was the Department, I can
19 ask this of the Department, were they aware
20 of other potential sites in the area owned
21 by the Applicant?

22 MR. ALESSI: Everybody was aware.
23 They have put it in their comments.

24 ADMINISTRATIVE LAW JUDGE: They

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1 didn't feel that there was any need to, the
2 Department didn't feel there was any need
3 to analyze those as possible alternatives
4 for the weighing of benefits and costs.

5 MR. ALESSI: Not only the Department
6 didn't, but the comments and the offers of
7 proof in here mention other facilities for
8 other context. So I find it devoid from
9 the record that they are unaware. They had
10 the opportunity, Your Honor. You didn't
11 even hear in the presentations today about
12 the other facilities that the Applicant
13 owns. So, you know, I think that that
14 would create a precedent. Judge, you asked
15 several questions. If I could just have a
16 moment just to close up --

17 ADMINISTRATIVE LAW JUDGE: You got a
18 little less than a minute, yeah.

19 MR. ALESSI: Thank you. With regard
20 the alternatives analysis with regard to
21 the range of reasonable alternatives in
22 Section 5.0, I would like to note that you
23 did not hear any comment at all in any
24 submission that it didn't follow what was

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1 set forth in scoping. We followed what was
2 in there. The range of alternatives is
3 based upon our objectives and capabilities.
4 Our objectives and capabilities are to use
5 these caverns.

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6 The other point I wanted to make,
7 Your Honor, is the alternatives and the
8 range and those issues, please remember
9 what I said yesterday which is this is an
10 EIS that builds upon two other EISs, the
11 1988 and the 1992. These very caverns, the
12 very issue of underground storage is
13 addressed in those documents. Cavern
14 integrity, everything is addressed in those
15 documents. So, and we cite to them in our
16 EIS so it's not just EIS. The no action
17 alternative is also in. And it's even got
18 the label, not that you need labels. It's
19 in those documents. So we believe, Your
20 Honor, that that's very important also to
21 the analysis and thank you for the
22 questions and comments.

23 ADMINISTRATIVE LAW JUDGE: Thank you.

24 MR. WEINTRAUB: Lawrence Weintraub

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1 for the Department. Your Honor, I was
2 going to point out as I think you already,
3 I gather you already understand that in the
4 case that established that fatality rule,
5 Webster Associates, the court held, the
6 court of appeals held that the failure to
7 include an alternative in the dEIS was not
8 fatal and, because it was subject to much
9 public discussion.

10 I would point out here that in 2012

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11 the Applicant submitted to the Department
12 staff a document that's in the hearing
13 record and that was provided to Gas Free
14 Seneca, and I'm sure it was FOIed, that
15 sets out the no action alternative. And
16 that is a letter dated February 16th, 2012.
17 I don't have the number of the document.

18 ADMINISTRATIVE LAW JUDGE: February
19 16, 2012.

20 MR. WEINTRAUB: 2012. It begins on
21 page 8 and I think it spills over to page
22 9.

23 ADMINISTRATIVE LAW JUDGE: And that
24 was a letter from?

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1 MR. WEINTRAUB: From the Applicant to
2 Department staff. Just stepping away into
3 higher principles here is that what's the
4 point of this process. The point of the
5 SEQRA process is for the agency to inform
6 itself of the environmental impacts of its
7 decision. The point of the public process
8 is for the public to help inform the agency
9 of the environmental impacts of its
10 decisions. Well, this letter from 2012
11 informed us about the no action alternative
12 which the Department staff no doubt
13 understood from the very beginning of this
14 project, but it informs us and the public
15 has had it and it's been the subject of a

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16 lot of comments. So it would be hard to
17 say that, to actually say that they, that
18 the Applicant should have to prepare a
19 supplement for something they already laid
20 out and that was subject to public comment.
21 And I would say the NRDC attorney was
22 incorrect because that the 624 regulations
23 is a provision that says that the hearing
24 record supplements the EIS. So that's just

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1 plainly wrong what he said.

2 There is also another case that
3 follows Webster Associates that follows the
4 same principle that the failure to include
5 a required item in a dEIS was not always
6 fatal and that's the matter of Caldor
7 (phonetic) Corporation. It's a New York
8 Law Journal case from 1995. It's a little
9 bit hard to get and staff would be happy to
10 distribute it. But it sort of recites the
11 same principle that yes, it is fatal in
12 some cases, but it's not always fatal
13 because there are exceptions to that rule.

14 ADMINISTRATIVE LAW JUDGE: This is
15 the Supreme Court case?

16 MR. WEINTRAUB: This is a Supreme
17 Court case, Justice D. Silverman. And I
18 think both of those court of appeals
19 decision and Caldor sort of follow the
20 Department's sort of view of SEQRA that it

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21 has to be a little bit flexible especially
22 where you have cases like this that just go
23 on for a very long time. And new, you
24 know, new alternatives pop up and there's a

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1 lot of public controversy and the lead
2 agency has to have a little bit of
3 flexibility. So here, yeah. The no action
4 alternative wasn't explicitly discussed in
5 the dEIS, but has since been discussed.

6 ADMINISTRATIVE LAW JUDGE: What about
7 alternative sites? Can you tell me why it
8 is that that wasn't required of this
9 Applicant assuming that they actually own
10 sites in the area.

11 MS. SCHWARTZ: Can I jump in for just
12 a second? Can I just interrupt because I
13 can say something a little bit? I think
14 the Judge is asking about the Savona site
15 and I can say just a little something about
16 it because I've been working for the
17 Department for 25 years and then I will let
18 you talk. I'm sorry. And I am familiar
19 with the Savona site when I was assigned to
20 this project in 2008 or 2009 whenever it
21 was and the same with Peter Briggs. He is
22 familiar with the site. He was assigned
23 from the beginning and other staff working
24 on it. We knew about the site and we knew

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1 about how it worked and what its parameters
 2 were. And it doesn't have a salt plant.
 3 So the brine disposal there is limited.
 4 The caverns that are already there, there
 5 are some caverns that are storing gas and
 6 some caverns that are being expanded in
 7 accordance with the department permit. And
 8 the brine disposal that results from that
 9 is going on under a SPDES permit, but it's
 10 not that fast. And they don't have a salt
 11 plant so we didn't see it as kind of a
 12 reasonable alternative. In fact we saw it
 13 as the salt plant at US Salt was actually
 14 an advantage. The cavern is already being
 15 done at the US Salt site. So you don't
 16 have to solution out the caverns or
 17 anything like that. So you don't have that
 18 kind of brine disposal. But there is a
 19 certain amount of brine disposal that comes
 20 in a place from precipitation on the brine
 21 pond. There's a little bit that's
 22 generated and somebody takes care of all
 23 that.

24 ADMINISTRATIVE LAW JUDGE: The

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1 question here though is, you're saying that
 2 some alternative sites were considered. Is
 3 that documented, if at all?

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4 MS. SCHWARTZ: We didn't think it was
5 reasonable to ask them to look at Bath
6 because we knew from the get go that was
7 not a reasonable alternative.
8 MR. WEINTRAUB: The law is, the law
9 is the Applicant, the agency has to look at
10 reasonable alternative to the site so that
11 is why it was not included. And I just
12 want to add something because, and I've
13 been with the Department since 2007 and the
14 time I've been here and I've worked on a
15 lot of large projects, if not most of them
16 that the Department receive and we're
17 always beating up on applicants to use
18 existing sites and that's for a good reason
19 because, because using existing sites has
20 less environmental impact. So we had a
21 project that came along here and they are
22 using an existing some salt cavern. So
23 that's like an environmental plus rather
24 than going out and creating something new

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1 or different. And that sort of is the
2 policy of not, of not stirring up, you
3 know, green fields and ground that hasn't
4 been. So this is a very reasonable site.
5 And when, and you know there's a lot of
6 boot strapping going on here by Gas Free
7 Seneca. They keep talking about truck. I
8 think my colleague pointed out the truck

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9 traffic from the site is like, would add
10 like one or two percent more to the
11 existing truck traffic on the state
12 highway. I think the discussion about
13 truck traffic, truck traffic and it's
14 impact has gone off the rails, no pun. And
15 so it's not, it wouldn't be significant
16 under any circumstance. I can't think of
17 any project that would add one or two
18 percent to an existing highway where the
19 Department staff wouldn't consider that a
20 significant impact. Yes, the Department
21 staff does look at truck, car and truck
22 traffic of where it might be a significant
23 impact in a rare case where you were
24 establishing, where you were doubling the

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1 size of a state ski facility and adding a
2 resort to an area that didn't have a large
3 scale resort.
4 And Gas Free mentions the Belaire
5 case and the noise study. Well, what they
6 didn't mention was in reciting to that
7 case, which I'm very familiar with, is
8 that, is that that project involved
9 development of a resort in the state forest
10 preserve and the noise was a very big issue
11 because of the presence of the state forest
12 preserve and a construction of a whole new
13 resort on the side of a mountain and of

14 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
course that project has since changed.

15 ADMINISTRATIVE LAW JUDGE: I'm aware
16 of it.

17 MR. WEINTRAUB: And so it's not
18 really a relevant comparison. How much
19 time do I have left?

20 ADMINISTRATIVE LAW JUDGE: Minute, 30
21 seconds.

22 MR. WEINTRAUB: Okay. See if I, just
23 one other thing is that there is a
24 discussion, but it's a programmatic

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1 discussion of a no action alternative in
2 the 1992 GEIS. So you put that together
3 with the letter from the Applicant and the
4 public comment together with that, I think
5 we have a pretty good basis to evaluate the
6 no action alternatives as with other
7 alternatives. Thank you.

8 ADMINISTRATIVE LAW JUDGE: Thank you.
9 So the Seneca Lake Pure Water Association
10 has six minutes remaining.

11 MS. TREICHLER: Well, Mr. Alessi has
12 given us a major reinterpretation of the
13 DEC SEQRA regulations and he hasn't
14 provided any examples of when this has been
15 done. He is saying that the scoping
16 process should require that the public
17 provide alternatives and the consideration
18 of alternatives, but the scoping

19 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
regulations say that the primary goal of
20 scoping is to focus the dEIS on potential
21 adverse impacts. So that's what the
22 scoping process is about is identifying
23 potentially adverse impacts. And the EIS,
24 it's a requirement of the EIS that the EIS

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1 analyze significant adverse impacts and
2 evaluate all reasonable alternatives. The
3 evaluation of reasonable alternatives is
4 not part of the scoping process, but that's
5 understood to part of the EIS process. And
6 he has not given any example of where an
7 applicant has been able to avoid the
8 consideration of alternatives by virtue of
9 the scoping process. I think that Miss
10 Nasmith gave an example of where a draft
11 EIS has been required to be reissued which
12 is the hydrofracking situation.

13 ADMINISTRATIVE LAW JUDGE: Yeah, but
14 the hydrofracking situation didn't go to an
15 adjudicatory hearing.

16 MR. TREICHLER: Well, it didn't and
17 so that is a difference in this proceeding
18 that I think that it would, you know, in
19 this case because of the significance of
20 this issue, it might be the most efficient
21 alternative to redo the EIS before going
22 forward with the adjudicatory hearing so
23 that that should precede a reissuance of

24 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048]. txt
the draft EIS.

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1 ADMINISTRATIVE LAW JUDGE: So we
2 could use our process to do that, right?
3 MS. TREICHLER: Yeah.
4 ADMINISTRATIVE LAW JUDGE: To the
5 extent that I or the Commissioner think
6 that further alternatives should be
7 considered, then we could ask the applicant
8 to provide those alternatives and then we
9 would use the process to review that, get
10 comments and proceed. We could use our
11 process to complete the record, couldn't
12 we, on alternatives?

13 MS. TREICHLER: That, that, I think
14 that's a possibility. I think that it
15 better, a better course of action would be
16 to redo the full draft EIS.

17 ADMINISTRATIVE LAW JUDGE: Why is
18 that?

19 MS. TREICHLER: Well, I think --

20 ADMINISTRATIVE LAW JUDGE: If we're
21 supplementing the EIS here and subjecting
22 it to an adjudicatory process, what would
23 be better about simply doing a new draft
24 EIS and having public comment on it? Why

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1 would that be better?

2 MS. TREICHLER: There are other
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3 issues that have been raised too. That was
4 the only defect --

5 ADMINISTRATIVE LAW JUDGE: Well,
6 right. I'm talking about supplementing the
7 SEQRA record which would include as you're
8 advocating, you know, community character,
9 noise, etcetera. It's include that all
10 those issues need to be supplemented on
11 this record before the Commissioner can
12 make a decision. Why would it be better to
13 only have public comment as opposed to
14 having a hearing process to do the
15 supplementation?

16 MS. TREICHLER: I guess I would hope
17 that it might, it might not be necessary to
18 have the hearing, but I think the hearing,
19 the hearing process is an alternative and,
20 you know, would be a satisfactory
21 alternative.

22 ADMINISTRATIVE LAW JUDGE: All right.

23 MS. TREICHLER: So it is established
24 that the applicant does own other

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1 facilities, other storage facilities in
2 this region. They did not identify those
3 facilities in the draft EIS as other, you
4 know, in consideration of properties that
5 are owned by the applicant. Those were not
6 identified.

7 Mr. Weintraub mentions the no action

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8 alternative was considered in this letter
9 of 2012. I just, I was not familiar with
10 that letter and I just review the documents
11 that are posted on the DEC website for this
12 proceeding. There's a section on positive
13 declarati on and scoping and the letter is
14 not under those documents. There's a
15 section on dSEIS review and hearings and
16 that letter is not under those documents.
17 So I don't think that the public has been
18 given adequate notice of that letter. Ms.
19 Schwartz describes that the DEC did
20 consider the Savona site. I don't
21 understand why that consideration was not
22 part of the EIS in the evaluation of that
23 site. That is a site where brine is
24 currently being disposed of.

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1 One issue regarding the disposal of
2 brine, I don't understand why the TEPPCO
3 facility does not have a brine pond. I'd
4 like, you know, I think it needs to be
5 evaluated. The issue when is a brine pond
6 required. When is it not. Doesn't seem
7 that all LPG facilities do have brine
8 ponds. Mr. Weintraub said it is an
9 environmental plus to reuse existing sites
10 and he points to the US Salt caverns. He
11 did not address again the question as to
12 why TEPPCO moved out of those caverns. And

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13 what was the Department's, you know, when
14 the Department evaluated the caverns for
15 the Applicant, what consideration was given
16 to the circumstances that caused TEPPCO to
17 move. And I think that concludes the
18 conversation. Thank you. And I would like
19 to give my excess rebuttal time to Miss
20 Nasmith if I have any.

21 MS. NASMITH: I'm not sure there was
22 any. Thank you. I appreciate that.

23 ADMINISTRATIVE LAW JUDGE: I'm going
24 to set this for two.

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1 MS. NASMITH: Yes.

2 ADMINISTRATIVE LAW JUDGE: And maybe
3 you can tell me why having a new draft EIS
4 and having public comment is better than
5 considering alternatives through the
6 hearing process?

7 MS. NASMITH: Well, we actually
8 think, Your Honor, both would be an
9 adequate solution. The problem with
10 limiting ourselves here to just the hearing
11 process is that while that is a great venue
12 for developing what alternatives would be
13 reasonable, which has not been done, and
14 discussing those alternatives and
15 elaborating on those alternatives the
16 limitation of an adjudicatory hearing is
17 the fact that the public is not going to

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18 have an opportunity to comment on that.
19 It's limited, the comments that you would
20 receive on those alternatives would be
21 limited to the parties who are granted full
22 and amicus party status.

23 ADMINISTRATIVE LAW JUDGE: We would
24 continue to receive comments. If anybody

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1 wrote in about it, they would go into the
2 SEORA record I believe.

3 MS. NASMITH: Well, as long as the
4 full nature of the alternatives were in
5 fact released to the public and that there
6 was an opportunity for the public to
7 comment and that was made clear to the
8 public because there is often confusion
9 when there is 30 day comment period, not
10 everyone appreciates that they can continue
11 to supplement the record. As long as that
12 was made clear, then that would potentially
13 resolve the issue as long as there was a
14 full discussion in the adjudicatory
15 hearing. We think really both could be
16 done in this situation.

17 I wanted to also just quickly if I
18 may address the February 16th, 2012 letter.
19 First of all that letter is not really all
20 that available to the public. The public,
21 it was accessible to us through a FOIL, but
22 as you well know I'm sure, Your Honor, that

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23 you have to know what you're FOIing and
24 not everyone in the public is conscious of

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1 the fact that there was a letter submitted
2 back in 2012 that they should be aware of.

3 I also want to point out that the no
4 action alternative discussion in that
5 letter is inadequate. There are two
6 sentences that actually go to the no action
7 alternative. The remainder of the
8 discussion is entirely about the purported
9 benefits of the project. If I may,
10 basically all it says is in this case the
11 no action alternative would see the
12 continuation of the activities on the US
13 Salt property, and I'm, continue to list
14 these, at the surface of the facility site
15 owned by Finger Lakes. There would be
16 activity at the site. The surrounding
17 properties would continue to be used for
18 rail transportation, trucking and perhaps
19 solid waste storage. It was two sentences
20 and it was not released to the public in a
21 that SEQRA contemplates.

22 I'd also highlight that under Webster
23 the reason the court there found that the
24 defect wasn't fatal was because it was

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1 clear from the record, and I'm quoting here
2 sorry, that both the general public and the
3 relevant public officials were thoroughly
4 familiar with the alternatives. Although
5 there have been discussions of alternative
6 sitings, nowhere did we discuss or did the
7 Applicant discuss the reasonable
8 alternatives that it raised in December
9 about the alternatives with respect to
10 transportation. We still don't really know
11 what that is going to look like because
12 it's unclear what the applicant intends to
13 do. There is no discussion of the relevant
14 impacts of that.

15 With respect to the Savona site,
16 Ms. Schwartz just provided us with a fairly
17 good explanation of what they considered,
18 but again the fact that Ms. Schwartz can
19 stand here and explain that to us is not
20 the same thing as having that discussed to
21 the public as part of the SEQRA process.
22 And what Ms. Schwartz is essentially
23 engaged in there is an environmental
24 balancing. Not a discussion of what is

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1 feasible and so that should have been part
2 of the record.

3 One final comment, if I may, as well
4 is that Mr. Alessi referred to the fact
5 that there were past dEISs done in this

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6 case. Those were generic dEISs done two
7 decades ago. They are not site specific.
8 They do not obviate the need to have a no
9 action alternative or a reasonable, a
10 discussion of reasonable alternatives to
11 this particular project. And nor does the
12 scoping obviate, or any kind of scoping
13 document obviate the ability or the
14 requirement under the regulations to do a
15 no action alternative and analyze
16 reasonable alternatives to the project.
17 You cannot scope out what is required under
18 SEQRA.

19 ADMINISTRATIVE LAW JUDGE: All right.

20 Thank you.

21 MS. NASMITH: Thank you, Your Honor.

22 ADMINISTRATIVE LAW JUDGE: Seneca
23 Lake Communities.

24 MR. KROIS: Your Honor, nobody is

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1 arguing that we freeze the process
2 indefinitely or even more absurdly that
3 there isn't an adjudicable issue here on
4 alternatives. This is absolutely a
5 substantive and significant issue. Let's
6 talk about Webster for a second. In
7 Webster the defective in the alternative
8 discussion is not cured by an adjudication,
9 which as I looked at again is not what
10 happened there.

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11 ADMINISTRATIVE LAW JUDGE: Right. It
12 was cured by, it was cured by public
13 debate. Isn't adjudication more robust
14 than a public debate among officials. Our
15 process is public. There is opportunity
16 for parties like yourself to participate.
17 The public can offer comments. I mean, is
18 that better than a debate that happened
19 somewhere out in the community in Webster?
20 MR. KROIS: It's different. I think
21 the Webster case shows that. I mean, the
22 primary reason the Webster case is cited
23 for this not being a fatal defect are that
24 these two alternatives both of which had

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1 been identified before the public --
2 ADMINISTRATIVE LAW JUDGE: And so we
3 had to have --
4 MR. KROIS: They were discussed in an
5 election. They were discussed repeatedly
6 in public meetings. What we have here is
7 when the Applicant literally used zero
8 setting of alternatives. In Webster we had
9 two. Both of those alternatives were
10 subject not just in fact finding.
11 ADMINISTRATIVE LAW JUDGE: And so if
12 we use the process to analyze the other
13 potential alternatives, use the hearing
14 process to do that, isn't that a public
15 forum? Won't that be as good as a public

16 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
debate?

17 MR. KRUIS: We don't think so, Your
18 Honor. It's necessary to limit it to the
19 parties that can make it to the
20 adjudicatory hearing based on this issue
21 conference. It doesn't involve the
22 elected. It doesn't involve the general
23 citizenry which is what happened in Webster
24 and it's why it wasn't fatal in Webster and

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1 that's what we think it would add, but this
2 issue is still adjudicable.

3 Now there are two, very quickly, the
4 Applicant is mischaracterizing the projects
5 needs and objectives. Just take a look at
6 their dSEIS. Nowhere in their submissions
7 do they focus on the purpose of the project
8 is Seneca Lake, the Finger Lakes and
9 certainly not these caverns specifically.
10 This is about the northeast region both in
11 the description of the need and the
12 benefits. They are also suggesting that
13 because they have provided no alternative
14 sites, it is the Petitioner's
15 responsibility to show potential
16 alternatives. That's not the way this
17 works. The Petitioners have no or the
18 Petitioners have no reasonable way of
19 determining the alternatives available to
20 the Applicant because many of those

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21 questions not only depend on the sites they
22 own and could option and that the parent
23 company owned and could option, but also in
24 the technical specifications of those

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1 sites. Facts known only really to the
2 Department and to the Applicants. And
3 again, the alternative sites need to be
4 evaluated given the focus in this project
5 which is this region as a whole. Thank
6 you, Your Honor.

7 ADMINISTRATIVE LAW JUDGE: Thank you.
8 All right. So the next issue is cumulative
9 impacts. Do you want to take a break at
10 this point? It's been almost two hours.
11 Would ten minutes be sufficient? All
12 right. We are adjourned for ten minutes.

13 (RECESS TAKEN.)

14 ADMINISTRATIVE LAW JUDGE: And we
15 have an objection from the Seneca Lakes
16 Communities concerning a presentation on
17 public need and benefits by applicant on
18 behalf of the United Steel Workers.

19 MS. SINDING: Yes, Your Honor. Well,
20 first our understanding was that the
21 applicant had suggested that they would be
22 speaking not only to the petition of the
23 United Steel Workers, but also generally to
24 the subject matter of that session which is

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1 the project's public need and benefit. And
 2 we have reconsidered our lack of objection
 3 to them taking that opportunity and indeed
 4 have questions about the propriety of
 5 having a discussion of public need and
 6 benefit at all at the issues conference.
 7 It is our position that consideration of
 8 public need and benefit under SEQRA is
 9 primarily, if not exclusively for the
 10 purpose of determining the appropriate
 11 range of alternatives to the proposed
 12 action.

13 We just had a lengthy and spirited
 14 exchange on the subject of alternatives.
 15 It is clear on the basis of that discussion
 16 that there are at minimum questions of fact
 17 about the adequacy of the range of
 18 alternatives that was suggested and the
 19 extent to which that adequacy or inadequacy
 20 relates to public need and benefit of the
 21 project. And given that we would submit
 22 that it is more appropriate for that issue
 23 to be addressed in briefing in connection
 24 with the alternatives. At a minimum we

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1 believe that it's inappropriate for the
 2 proposed amici and certainly for the
 3 applicant to be able to get up and give
 4 essentially uncontested commentary on public

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5 need and benefits without putting it in the
6 context of the alternatives analysis.
7 ADMINISTRATIVE LAW JUDGE: Well, just
8 procedurally though the presentation, the
9 issues conference was to allow the
10 petitioners to defend their petitions
11 against objectives that they failed to
12 raise substantive and significant issues.
13 All three of these or four of these
14 petitioners, albeit they are seeking amicus
15 status, have submitted petitions to appear
16 as amicus. And staff had objected, had
17 indicated in their letter that they
18 considered that non petitioners had raised
19 substantive issues. So based on that, I
20 scheduled it in so they could defend their
21 petition just like every other petitioner
22 has including some other amicus party
23 petitioners like the Finger Lakes Wine
24 Business Coalition and the two legislators

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1 so.
2 MS. SINDING: I guess I would just --
3 ADMINISTRATIVE LAW JUDGE: And
4 granted, I mean, as you're probably aware
5 from my earlier questioning, one of my
6 questions I have for amicus is if they are
7 proposing to present new information, that
8 that's not something amicus generally does
9 in our hearings. They are only in in order

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10 to make argument on legal issues so that
11 would be part of my reason for wanting to
12 hear from them so they could explain to me
13 what their position is but

14 MS. SINDING: Right. That's fair,
15 Your Honor. That would have been one
16 point. My only other two points, and it is
17 appropriate obviously for the department to
18 have an opportunity to be heard on this
19 question. My only other two points would
20 be that I would, we would renew or we would
21 now object to the petitioner having the
22 opportunity to present in that context.
23 Certainly anything --

24 ADMINISTRATIVE LAW JUDGE: The

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1 petitioner?

2 MS. SINDING: I'm sorry. The
3 Applicant. Certainly anything beyond
4 representing what's in the United Steel
5 Workers petition, although I question the
6 propriety of the Applicant doing that given
7 that they are not, these attorneys do not
8 as far as I know represent that proposed
9 amicus party, and I would, and I would also
10 ask that it be noted that we do believe
11 that this is a conversation that is
12 extricably linked to the alternatives
13 discussion for your consideration.

14 ADMINISTRATIVE LAW JUDGE: Well, but,
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15 but isn't public need and benefit, isn't
16 that, aren't those to be considered in any
17 balancing at the end of the process? If
18 it's concluded there are unmitigated
19 environmental impacts, then SEQRA would
20 require the decision maker to balance those
21 impacts against the socioeconomic benefits
22 of the project and misunderstanding was
23 that that is where public need and benefit
24 went to is that that balancing.

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1 MS. SINDING: With respect, Your
2 Honor, the SEQRA requires the applicant,
3 I'm sorry, the lead agency to select the
4 alternative with the fewest unmitigated
5 significant adverse environmental impacts.

6 ADMINISTRATIVE LAW JUDGE: Right.

7 MS. SINDING: That's where public
8 need and benefit comes in. It comes in in
9 the definition of the range, the
10 appropriate range of alternatives and the
11 selection of the alternatives with the
12 fewest unmitigated significant adverse
13 impacts. It's not a balancing test. SEQRA
14 is very clear in terms of what finding
15 statements it's required to reflect.

16 ADMINISTRATIVE LAW JUDGE: It sounds
17 like we're getting into a debate about
18 should I schedule in some time for you,
19 would that satisfy you? Should I give you

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20 some time to be heard on the issue when we
21 get there?

22 MS. SINDING: No, Your Honor. We
23 would reserve our right to respond in
24 briefing.

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1 ADMINISTRATIVE LAW JUDGE: All right.

2 MR. WEINTRAUB: Your Honor.
3 Department staff. The Department staff
4 isn't challenging the amicus position of
5 the union or the guest's position. We just
6 wanted to make that clear. The Department
7 staff just said they didn't believe it was
8 substantive and significant issues as to
9 need. Miss Sinding is completely wrong in
10 her legal interpretation of SEQRA.

11 ADMINISTRATIVE LAW JUDGE: Let's not
12 go into a discussion about that. So there
13 is no objection to these petitions for
14 party status by potential amici here?

15 MS. SCHWARTZ: That's Department
16 objection?

17 ADMINISTRATIVE LAW JUDGE: Well, the
18 reason I scheduled them for argument was
19 because I understood the Department
20 objected to all petitions. You didn't
21 distinguish in your letter. You simply
22 said no party has raised substantive and
23 significant issues, so I understood that to
24 mean that you were objecting to all the

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1 petitions. So if you have no objection to
2 these petitions for party status, and I
3 heard no other objections to their
4 petitions for amicus status, then we can
5 cancel this portion of the proceeding.

6 MS. SCHWARTZ: We could have maybe
7 been more nuanced, Your Honor.

8 ADMINISTRATIVE LAW JUDGE: Perhaps.

9 MS. SCHWARTZ: So we, we do not
10 object to their standing, but we do say
11 that there are no substantive -- well,
12 yeah.

13 ADMINISTRATIVE LAW JUDGE: Would you
14 like to come up?

15 MS. SCHWARTZ: They haven't raised a
16 substantive issue.

17 MS. MAGLIENTI: Well, if I can try to
18 clarify just for a second. In our practice
19 when the amicus come in they are actually
20 briefing on the legal qualifications that
21 an ALJ decides is adjudicable.

22 ADMINISTRATIVE LAW JUDGE: Right.

23 MS. MAGLIENTI: If you find there are
24 no adjudicable issues, there is no need for

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1 further briefing. So it was in that
2 context that we were saying we don't

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3 actually think there is a need for
4 adjudications on any of the issues raised
5 by the petitioners for full party status
6 and thereby by implication. We didn't
7 necessarily object to the environmental
8 interests or the legal issues that might
9 have been raised by the petitions in and of
10 themselves. But I think, you know, we were
11 prepared to talk about public need and
12 benefit. It is a component of what the
13 Department needs to consider, so that's why
14 we didn't --

15 ADMINISTRATIVE LAW JUDGE: Right.
16 But as an amicus they wouldn't be proposing
17 those issues for adjudication. They would
18 simply be commenting on them through the
19 process.

20 MS. MAGLIENTI: That's correct.

21 ADMINISTRATIVE LAW JUDGE: So is it
22 fair to say then there is really no
23 objection to these petitioners that we need
24 to hear argument about whether or not we

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1 should object to their petitions or not for
2 party status.

3 MS. MAGLIENTI: Right. As for party
4 status, but we weren't prepared to say that
5 the specific legal qualifications that they
6 raised were a problem. Issues that, at
7 least for the appropriate issues, but we

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8 really, we assumed you scheduled this
9 because there is a component of the SJS or
10 the dEIS that actually talks about the
11 project needs.

12 ADMINISTRATIVE LAW JUDGE: Right.
13 But we're, the purpose of this is not
14 something to go through every issue that
15 was covered by the EIS. The purpose of
16 this issues conference is to determine
17 whether or not to grant party status to the
18 petitioners based on whether or not they
19 raised substantive and significant issues
20 so that's why we're here. And if there is
21 no, I don't really want to go into issues
22 that aren't being raised by the parties as
23 basis for their petition. So if there is
24 no objection, I don't see why we should

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1 even need to discuss it at this point. I
2 assume I'm going to hear differently from
3 Mr. Alessi.

4 MR. ALESSI: Yes, Your Honor. I
5 would like to start with the uniform
6 procedures and why they exist. They exist
7 to protect the Applicant. The Applicant
8 has rights.

9 ADMINISTRATIVE LAW JUDGE: Do you
10 object to these parties be parties to the
11 proceeding?

12 MR. ALESSI: I do not. I object to

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13 the fact that they had traveled one person
14 across the country, another here based upon
15 a notice, based upon a schedule that came
16 out that came here to speak about the
17 public need and benefit. The regulations,
18 they came here to advocate why they are
19 supporting the issues and the position of
20 the applicant in this hearing. And one of
21 the issues, and this is why it's getting
22 more and more remarkable, that one of the
23 issues they talk about, the union, the one
24 we were going to speak on behalf of, talks

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1 about the public benefit to this applicant.
2 The public benefits of this applicant and
3 they want to be part of the record. This
4 is no different than any other amici that
5 came in here.

6 ADMINISTRATIVE LAW JUDGE: Right.

7 MR. ALESSI: Right. So why should
8 they not have their opportunity to advocate
9 their amicus petition different than
10 anybody else one and two, they are speaking
11 to issues that are germane. We just heard
12 discussion of the no action alternative.
13 And this is the main point.

14 The no action alternative that Gas
15 Free Seneca quotes, they say the no action
16 alternative discussion should evaluate the
17 adverse or beneficial site changes that are

18 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
likely to occur in the reasonable
19 foreseeable future. I quoted the SEQR
20 Handbook for the source that talks about
21 satisfying the no action alternative can be
22 simply and adequately addressed by
23 identifying the direct financial defects of
24 not undertaking the action. That's what

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1 the union petition amicus does. It says if
2 you don't go forward with these actions,
3 these are the effects that happen. So it
4 is directly relevant to the issues that
5 we're discussing. An amicus should be able
6 to come in and discuss public need and
7 benefit because it relates to others just
8 as we've going for two days. Amicus coming
9 in and talking about other issues that
10 relate to their interests.

11 I would solve this issue that was
12 raised very easily and agree not to address
13 any issue that is not in the petition of
14 the union. That would take care of that
15 issue. I think that the amici have all
16 spoken to matters. We have not objected to
17 Miss Treichler several times coming up and
18 speaking about issues that are not in her
19 petition. And we didn't object, but now
20 we've got to be constrained and the union's
21 got to be constrained about what they can
22 speak to. So we are trying to be

23 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
reasonable.

24 ADMINISTRATIVE LAW JUDGE: Well, I

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1 don't think we're talking about
2 constraining them. I mean, they certainly
3 would be able to, to be heard in the
4 briefing which an amicus would be entitled
5 to do and there's apparently no objection
6 to this, but hold on. Let me ask. Do you
7 wish to be heard here today or will be
8 being heard in briefing be sufficient for
9 you?

10 MR. GRIESEMER: Judge, we would like
11 a brief opportunity to be heard. We have
12 traveled here. There are some issues
13 raised earlier. Whether you're putting it
14 in the bucket of alternatives or whether
15 you're putting it in the bucket of public
16 needs, I think that there are some issues
17 that we need to address especially if we're
18 not petition status.

19 MR. PETRASH: Your Honor, we would
20 like to be heard here and in briefing.

21 ADMINISTRATIVE LAW JUDGE: All right.
22 And, Mr. Alessi, you would limit your
23 comments to, can you represent the United
24 Steel Workers or have they authorized you

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1 to represent them?

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2 MR. ALESSI: Your Honor, the answer
3 is no. They transferred their time just
4 like everybody else when somebody else came
5 up to speak to an issue.

6 ADMINISTRATIVE LAW JUDGE: But I
7 didn't schedule any time for you because I
8 wasn't aware you had any objection to these
9 petitions.

10 MR. ALESSI: Judge, I raised this
11 issue yesterday and I tried to get it
12 addressed yesterday.

13 ADMINISTRATIVE LAW JUDGE: Right.

14 MR. ALESSI: And Your Honor said
15 let's take care of it tomorrow. I tried to
16 address it yesterday because I thought it
17 was the right thing to do for scheduling
18 purposes once we knew about it. As soon as
19 Mr. Bacon told me that the, Miss Straw was
20 not going to be able to make it, I raised
21 it. You said tomorrow. Okay.

22 ADMINISTRATIVE LAW JUDGE: Okay.
23 Well, now it's tomorrow so.

24 MR. ALESSI: Now it's tomorrow so I

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1 don't understand --

2 ADMINISTRATIVE LAW JUDGE: All right.
3 Let me, you know, I don't want to make a
4 mountain out of a mole hill possibly here.
5 Can I give you, can I give the other
6 Petitioners time to respond?

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7 MS. GOLDBERG: Your Honor, we were
8 given no notice whatsoever that we would be
9 required to respond on this issue. And Mr.
10 Alessi just got up and made a passionate
11 argument about how there is no issue in
12 play on alternatives. You can't have it
13 both ways. But there is no issue involved
14 in alternatives. Absolutely nobody has,
15 and we have not raised a public need as a
16 separate issue. It's very different from
17 the situation of the wine business owners
18 and the Wine Business Coalition and the
19 Legislators. They are asking to do amicus
20 briefs on issues that the Petitioners have
21 raised. Now there is no Petitioner who has
22 raised that issue. And there is now no
23 objection. They are trying to come in on
24 issues that are not in play. So I think,

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1 I'm sorry that they came all this way for
2 no good reason. My expert is sitting here
3 for a full day for no good reason, also,
4 because we didn't get the schedule in time.
5 That's the way things happen. But under
6 your own rules and under your own
7 understanding of what amicus does, there is
8 nothing in play here on which they can
9 present an argument.

10 ADMINISTRATIVE LAW JUDGE: Well, it's
11 their own petition. I've allowed the

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12 amicus to be heard on their own petitions.

13 MS. GOLDBERG: But there is nobody
14 objecting to their petition so why is there
15 argument.

16 MS. SINDING: The petition speaks for
17 themselves, Your Honor. The petitions are
18 part of the record. If they are given the
19 ability to brief, that would be part of the
20 record. I share Miss Goldberg's request
21 that that they traveled a long distance,
22 but frankly the Department was clear about
23 the extent to which it was or was not
24 opposing the petition. And there is no

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1 reason that they should have an opportunity
2 for an uncontested presentation on what is
3 in their materials that Your Honor has and
4 is not being contested. And I just want to
5 reiterate that without authority to
6 represent the United Steel Workers and
7 given that their position is fully
8 presented in their materials, there is no
9 reason for applicant to have time to
10 present on this issue.

11 ADMINISTRATIVE LAW JUDGE: Let me
12 hear from Miss Maglienti. She stood up
13 first.

14 MS. MAGLIENTI: I think we've
15 probably spent more time talking about
16 whether they should speak --

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17 ADMINISTRATIVE LAW JUDGE: I know.
18 MS. MAGLIENTI: -- than it would have
19 actually would have probably taken for them
20 to speak. And I do think we're here,
21 everyone had the opportunity to present
22 their particular side of the issue. I
23 think in the interest of fairness people
24 have been able to speak kind to each other

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1 and nobody objected to that. I think
2 everybody has had an opportunity to be
3 heard. We heard from the legislators who
4 are sitting there also petitioning for
5 amici status. We heard from the Finger
6 Lakes Wine Business Coalition. They had
7 opportunities to raise their arguments
8 about why they are petitioner status. I
9 think in the interest of fairness, the
10 people showed up, submitted a petition
11 should be given the opportunity to be
12 heard. I mean, we're the DEC. We like to
13 be criticized by everybody. So it might be
14 nice actually, you know, to give everybody
15 the opportunity to come in and state why
16 they actually submitted a petition and why
17 they are here and why they should be heard
18 for the record. I think it's a fair thing.

19 ADMINISTRATIVE LAW JUDGE: How about
20 specifically about the United Steel
21 Workers?

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22 MS. MAGLIENTI: Department staff
23 doesn't have any objection to it. As I
24 said, people are able to be kind to each

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1 other whether or not they even raised
2 issues of their own in issues. I mean, to
3 give somebody three minutes of your time
4 and four minutes of your time, nobody
5 objected and, you know, we certainly could
6 have. But certainly when these parties
7 didn't raise issues in that specific area.
8 So I think in interest of fairness, the
9 Department doesn't have objection to having
10 everybody get an opportunity to talk.

11 ADMINISTRATIVE LAW JUDGE: I agree.

12 MR. PETRASH: Your Honor, if I might
13 be addressed for a moment. Just this
14 morning we heard arguments from Gas Free
15 Seneca and I think from Seneca Communities
16 about the need for public process, public
17 input, yet when it comes to our view points
18 they object. I find it a tad inconsistent.

19 ADMINISTRATIVE LAW JUDGE: I think
20 I'm certainly going to allow both of you to
21 appear on behalf of your petitions. I
22 guess the one remaining question is about
23 the United Steel Workers so. And would you
24 limit your, did I understand you were going

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1 to limit your presentation to defending
2 United Steel Workers' petition?
3 MR. ALESSI: Your Honor, in order to
4 resolve this issue, yes. I think it's
5 unfortunate that someone who comes in to
6 support a petition that gets snowed in and
7 can't make it in Buffalo that the union,
8 the people who have jobs at issue here
9 basically got to fight for, after we've
10 given the courtesy to everybody as Ms.
11 Maglienti, I think it is quite unfortunate
12 we got to come in here and fight to do
13 that, but if that's what it takes in order
14 for them to have a voice and follow the
15 regs that say an amicus can come in and
16 support. That's what the regs say. Come
17 in and support. They don't have to raise a
18 substantive and significant issue. They
19 can come in and support. So when Ms.
20 Goldberg says there is nothing in place,
21 she is completely wrong on the law. Amicus
22 can come in and support the Applicant and
23 that's why I was referring to the regs
24 about protecting the Applicant. That reg

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1 is in there for support for a reason so
2 that the applicant, so there is some
3 measure to these processes because
4 otherwise you would just have an issues

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5 conference for opposition, substantive and
6 significant. You have that in the reg for
7 support so there is a voice that can come
8 in. Why would there be no voice for people
9 in support in the same voice open to
10 public, to the media, etcetera, so their
11 voice can be completely heard. So if
12 that's what it takes, Your Honor, to give
13 the union workers a voice, a mere voice in
14 this two days, I would do that. I prefer
15 not to, but if that is what I need to do, I
16 will do so.

17 ADMINISTRATIVE LAW JUDGE: Well, that
18 was the purpose of putting them on so they
19 can defend their petition, so if you limit
20 presentation to defending their petition
21 then I think that would be appropriate.
22 Now again I will offer to the other
23 Petitioners time to rebut if you wish to
24 take it.

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1 MS. SINDING: Your Honor, we're not
2 prepared to rebut it and as I said we would
3 reserve the right to do so through
4 briefing. I don't want to belabor this any
5 further. I want to be very clear it is not
6 our position or the position of our clients
7 that anybody should be silenced here. It's
8 our position that when there are
9 uncontested petitions there are here

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hearing on them is not an appropriate use
11 of judicial resources during an issues
12 conference. We're not trying to silence
13 anybody here.

14 ADMINISTRATIVE LAW JUDGE: Ms.
15 Goldberg, did you have anything further on
16 this?

17 MS. GOLDBERG: We join in with what
18 Miss Sinding just said. Nobody here is
19 trying to silence the public. We are
20 trying to adhere to the rules. And there
21 are no objection to this petition. We are
22 just giving that an additional opportunity
23 to speak that other folks would not have
24 time.

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1 ADMINISTRATIVE LAW JUDGE: And you
2 would decline at this point to offer any
3 rebuttal? It will be done in petitioning
4 or briefing?

5 MS. GOLDBERG: Yes, Your Honor. I
6 think it would be more appropriately
7 confined to briefing.

8 MR. LAUSELL: Your Honor, if I may.
9 Since we're discussing party status, we
10 believe it's become clear from the
11 proceedings here that we are in a unique
12 position to provide new information. When
13 we filed our amicus brief there was no
14 draft comprehension emergency plan for the

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16 county. And now the 2008 plan, which is
17 outdated, has been distributed as part of
18 the record. And we would ask for
19 permission to modify our petition for party
20 status to apply for full party status
21 because we believe we have important
22 information to bring to any adjudicatory
23 hearing.

24 ADMINISTRATIVE LAW JUDGE: I think
we'll have to leave this for after the

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1 issues conference. If you're going to be
2 making a petition for full party status,
3 then you will have to meet some standards
4 under our regulations. I think we can
5 handle that in an orderly fashion post
6 issues conference.

7 MR. LAUSELL: But we would be able to
8 submit.

9 ADMINISTRATIVE LAW JUDGE: You can
10 make an application for full party status.
11 It would be a late filed petition for full
12 party status and there are standards in our
13 regulations that govern that.

14 MR. LAUSELL: Thank you.

15 ADMINISTRATIVE LAW JUDGE: You're
16 welcome.

17 MS. TOOHER: Your Honor, if I could
18 just be heard very briefly?

19 ADMINISTRATIVE LAW JUDGE: Sure.

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20 MS. TOOHER: Mr. Alessi took the
21 position that an amicus does not need to
22 have an issue, but rather than can speak in
23 support or opposition. Certainly if that's
24 the standard to be applied, we had welcomed

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1 it. But it's our understanding in our
2 petition for amicus status and I believe in
3 the questioning from Your Honor that we
4 have been bound as an amicus to be tied to
5 particular issues that you determine are
6 adjudicable issues. If in fact the
7 standard is whether or not we support or
8 oppose the application, we would certainly
9 like our petition to be considered in that
10 light and be given the opportunity to speak
11 solely on the basis of opposition to the
12 application.

13 ADMINISTRATIVE LAW JUDGE: I'm sorry,
14 I'm not quite sure I understood what you
15 were getting at.

16 MS. TOOHER: During his presentation,
17 Mr. Alessi in support of allowing the
18 amicus to speak today indicated that it is
19 appropriate for an amicus to speak solely
20 in support. I wasn't clear what he was
21 speaking to since Miss Goldberg has raised
22 the issue.

23 ADMINISTRATIVE LAW JUDGE: No no. I
24 think what he was saying is that a party in

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1 come both in opposition and support of a
2 project. Our regs do require that even an
3 amicus has to speak to a substantive and
4 significant issue.

5 MS. TOOHER: And I believe that that
6 was the point that Miss Goldberg was making
7 is that we have not identified a separate
8 issue for this amicus and I'm not going to
9 speak to whether or not this amicus should
10 be permitted or not. We would just like to
11 be held to the same standards of an amicus
12 in terms of our position on the various
13 issues that we have raised.

14 ADMINISTRATIVE LAW JUDGE: Okay.
15 Yes, certainly.

16 MR. ALESSI: Your Honor, if I could
17 speak to that. The regs are not entirely
18 clear, but this has been discussed
19 endlessly. If you read the regs, a certain
20 section of it literally for amicus, it
21 would mean that a person, because there is
22 a part of the reg that says for an amicus
23 you have to raise, address sub, have an
24 environmental interest and you have to

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1 address a substantive and significant
2 issue. So the question come up years ago
3 well, what if someone comes in to support a

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4 project. And when Your Honor is looking to
5 look for the section that addresses
6 municipalities for example and there are
7 some others, what if someone wants to come
8 in and support a project in an issues
9 conference? Wouldn't it be crazy for
10 someone to be able to come in as an amicus
11 in an issues conference had to --

12 ADMINISTRATIVE LAW JUDGE: Can I cut
13 to the chase real quick here. 6 NYCRR
14 624.5(b)1(v), one of the required contents
15 of a petition for party status is to
16 identify precise grounds for opposition or
17 support. So I think our regs do make it
18 clear that parties can seek party status in
19 our proceedings both in opposition to a
20 project and in support of a project. So if
21 that answers the question.

22 MR. ALESSI: It actually, it supports
23 what I was saying. I don't think it
24 addresses Ms. Toohers point which is she

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1 wants the same standard which she basically
2 said we don't want to have to show a
3 substantive and significant issue if the
4 petitioner in support doesn't have to. And
5 my point is an amicus in support of a
6 project is not going to come in and say
7 that the project is defective, that it
8 doesn't meet a standard. That's just not

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9 what happens. So the provision you just
10 read has always been interpreted to say if
11 you're going to come in opposition as
12 amicus, you have to address a substantive
13 and significant. If you're going to come
14 in and support you don't because you're
15 supporting the project. You're not going
16 to come in. So that's what I was
17 addressing with Ms. Toher's point. She
18 was saying Mr. Alessi created a standard.
19 I want to live by that standard. All I got
20 to do is come in and oppose or support and
21 I don't want to be held to a substantive
22 and significant --

23 ADMINISTRATIVE LAW JUDGE: Perhaps
24 this was my mistake. I, again I made the

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1 schedule. This is pure administrative. I
2 wasn't trying to make determinations on the
3 merit of anybody's petitions. I simply put
4 out the schedule based on my understanding
5 of who I thought, who I believe were being
6 opposed by somebody in the proceeding here.
7 Clearly with respect to the party status
8 Petitioners other than the Gas Associations
9 and the United Steel Workers, the Applicant
10 and staff were clear that they opposed
11 their petition. So I scheduled argument by
12 the Petitioners and response by staff and
13 the Applicant. I understood that there was

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14 an objection to the gas amicus as to
15 whether or not they raised a substantive
16 and significant issue. I understood that
17 to be the case from staff. So perhaps I
18 should have scheduled in time for everyone
19 else. That's my mistake. I'm offering to
20 allow that, but what I'm hearing is that
21 the party status petitioners who would
22 oppose these believe because they are not
23 prepared, because of my mistake in terms of
24 the scheduling are not prepared to speak to

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1 their petitions and it would be better to
2 do it through briefing.
3 MS. GOLDBERG: Your Honor, I don't
4 believe it's your mistake. Honestly. We
5 had a very clear statement that they could
6 not object. They are saying now they do
7 not object. The rules say they have to,
8 there has to be in play a substantive and
9 significant impact. And there's a
10 perfectly good explanation of the rule that
11 you pointed out and that is sometimes there
12 are issues conferences when the Department
13 denies a permit. If the Department denies
14 a permit and the applicant asks for an
15 issues conference and gets one, then
16 someone will come in in support. And they
17 have to identify a significant and
18 substantive issue. And there may be nobody

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19 on the other side except the Department.
20 That is one situation.

21 In this particular situation, the
22 Department has put out a draft permit. And
23 you have just the mirror image of that.
24 There is no reason in the world why an

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1 amicus should be permitted in here where
2 there is no underlying substantive impact.

3 ADMINISTRATIVE LAW JUDGE: So is it
4 your position they don't have a substantial
5 issue?

6 MS. GOLDBERG: Nobody has put one in
7 play. We have not raised purpose of need
8 as a substantive and significant issue. We
9 have adopted --

10 ADMINISTRATIVE LAW JUDGE: But they
11 are proposing it so is it your position
12 that they don't have a substantive issue
13 that they should be heard on.

14 MS. GOLDBERG: No, Your Honor, they
15 have to, they have to identify as amici.

16 ADMINISTRATIVE LAW JUDGE: Right.

17 MS. GOLDBERG: There has to be a part
18 of the petitioner who raised the subject of
19 a significant issue and they will speak
20 to --

21 ADMINISTRATIVE LAW JUDGE: And I
22 believe that's what they have done. They
23 filed a petition saying that in essence

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24 that the analysis of public need and

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1 benefit isn't sufficient and they want to
2 supplement it as amici. Now whether or not
3 they actually do it as amici is the
4 question and that's what I was going to
5 question them about, but they have proposed
6 an issue for adjudication and they've
7 indicated, you know, what their interest is
8 and they want to be heard on it.

9 MS. GOLDBERG: And what they said
10 that they are going to do, and perhaps you
11 will just question them on that and we will
12 be done with it, but talk about effects
13 which is not a legal issue.

14 ADMINISTRATIVE LAW JUDGE: Okay. But
15 that would get into the substance of their
16 petition. So it sounds to me like there is
17 an objection to these petitioners in which
18 case I think they should be allowed to be
19 heard.

20 MR. ALESSI: Your Honor, that's
21 exactly right and, again, I will just state
22 we would like to have the union have a
23 voice at this issues conference like
24 everyone else had on its petition.

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1 ADMINISTRATIVE LAW JUDGE: All right.

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2 Thank you. I'll allow the petitioners to
3 be heard on the petition. I understand
4 that the responses to those representation
5 will be done in briefing. Again I
6 apologize for the schedule the way it is.
7 It was my error. And I understand the
8 obligations of Gas Free Seneca. All right.
9 Thank you. So don't cancel your plane
10 tickets.

11 All right. So we're on to the issue
12 of cumulative impacts and starting with Gas
13 Free Seneca.

14 MS. NASMITH: Thank you, Your Honor.
15 If I may I would like to reserve whatever
16 time I don't use for rebuttal.

17 ADMINISTRATIVE LAW JUDGE: All right.

18 MS. NASMITH: Thank you. Under SEQRA
19 the draft EIS should analyze cumulative
20 impacts where applicable and where the
21 impact has potential to be significant.
22 Here in the draft there is no such analysis
23 of any kind of cumulative impacts
24 whatsoever despite the fact that the

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1 Arlington Gas Storage facility is on the
2 same property as the LPG, the proposed LPG
3 Storage facility, is owned by the same
4 parent company and involves the same type
5 of activity which is the storage of
6 hydrocarbons in salt caverns. The

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7 Arlington facility is, there is a portion
8 that is existing and then there is a
9 portion of it that is planned and has been
10 approved by FERC. These two facilities
11 will have an important and fairly obvious
12 potential cumulative impact that has not
13 been addressed in the supplemental
14 environmental impact statement or
15 elsewhere.

16 The SEQR Handbook instructs that a
17 cumulative impact analysis should be done
18 when the impact, and I quote, the impacts
19 of related or unrelated actions may be
20 incrementally significant and the impacts
21 themselves are related, end quote, or when
22 the two actions are in close enough
23 proximity to effect the same resources.
24 And that's at page 84.

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1 Clearly this is what we have here.
2 Two next door facilities controlled by the
3 same entity engaged in the very same
4 industrial endeavors or very similar
5 industrial endeavors that will impact the
6 same community and the same resources.

7 The Applicant, however, attempts to
8 justify the omission of the cumulative
9 impact analysis by again claiming it was
10 not required by the scoping analysis. This
11 as we have discussed at length today is not

12 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
13 a sufficient explanation for, that will
14 render a document acceptable under SEQRA.
15 You cannot simply say it wasn't required in
16 the scoping outline and therefore this
17 analysis is adequate under SEQRA.
18 I should point out also that as part
19 of the comments that were raised on the
20 scoping analysis that the cumulative
21 impacts were raised by at least one
22 commentator. Again to the extent that Mr.
23 Alessi wishes to go and look through the
24 comments as he apparently likes to do I
would cautious searching for specific buzz

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1 words that lawyers use when assuming that
2 the public hasn't raised a particular issue
3 especially when we're talking about
4 cumulative impacts.

5 As Your Honor also recognized
6 yesterday when discussing community
7 character, the fact that an issue was not
8 raised in the scoping process does not mean
9 that the issue isn't worthy of further
10 inquiry at a later date such as at an
11 issues conference and an adjudicatory
12 hearing. In addition as Mr. Krois
13 discussed earlier today there is very
14 obvious precedent in St. Lawrence Cement
15 that expressly holds the failure to include
16 an item in the scoping outline does not

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preclude consideration of that issue as
18 part of the 624 issues conference.

19 The Applicant also attempts to say
20 that the cumulative impacts analysis is not
21 required under SEQRA. However, in Save the
22 Pine Bush the court of appeals held that
23 there are certain circumstances in which
24 cumulative impacts must be analyzed.

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1 Specifically the court found that when you
2 have related projects, their, a cumulative
3 impacts assessment is required. Chinese
4 Staff also stands for the same proposition.

5 As I mentioned, the Arlington and
6 Finger Lakes LPG Storage Facility certainly
7 are related. The facilities, as I said
8 before are on the same property. US Salt
9 are owned by the same parent company and
10 are part of the same overall plan by
11 Crestwood to create a natural gas storage
12 hub in the northeast. And a natural gas
13 liquid storage hub including both natural
14 gas and LPG.

15 Moreover it's fairly obvious that the
16 combined impacts of these two facilities
17 could be significant. The caverns that
18 both facilities intend to use are in very
19 close proximity to one another. Given the
20 hazardous nature of the product to be
21 stored therein and the associated risk,

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22 these two projects pose a potential
23 combined safety risk to the community that
24 has not been assessed. The creeping

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1 industrialization represented by both
2 facilities also pose as a risk to the
3 quality of the community character which
4 was discussed at length yesterday. Also
5 giving the timing of the project is the
6 fact that the Arlington project, though
7 approved by FERC, but had not yet
8 constructed the expansion rather, there is
9 a potential for the construction of both
10 facilities to occur simultaneously. This
11 has not been ruled out and so as a result
12 there is the potential for combined
13 construction impact that would potentially
14 result in additional noise, traffic and
15 other potential impacts.

16 I would like to note in considering
17 the Arlington storage facility FERC did
18 under NEPA analyze cumulative impact under
19 document number CP13-83, but that analysis
20 was limited to groundwater, surface water
21 and air quality impacts. Nowhere did FERC
22 analyze safety or community character.
23 Also FERC assumes there would not be a
24 common construction schedule and their

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1 finding in their final order that the
2 cumulative impacts of both projects
3 together would be insignificant was
4 predicated on the assumption that there
5 would be adequate mitigation measures
6 imposed by the New York DEC on the LPG
7 Storage facility and as we had extensive
8 discussion yesterday, that issue is in very
9 significant dispute.

10 The failure to consider cumulative
11 impacts therefore renders the dEIS
12 insufficient and it requires, warrants
13 either as we've discussed in the case of
14 alternatives extensive discussion as part
15 of an adjudicatory hearing at which point
16 the public is made very aware of the fact
17 that members of the public are able to
18 submit additional comments on whatever
19 analysis is released or that it warrants
20 the publication of another draft of the
21 SEIS and we would ask Your Honor to order
22 one or the other or both. And I would like
23 to reserve the remainder of my time. Thank
24 you.

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1 ADMINISTRATIVE LAW JUDGE: All right.
2 Finger Lakes LPG.

3 MR. ALESSI: Thank you, Your Honor.
4 I am glad that Miss Nasmi th corrected an
5 oral argument. There is significant

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6 misstatement in the brief which is, in the
7 brief she said cumulative impacts must be
8 analyzed and today she appropriately noted
9 that the regs say that they could be
10 analyzed only where applicable and
11 appropriate. That is the correct standard
12 as we've pointed out to them in our brief.

13 Here's my question with regard to
14 cumulative impacts, Your Honor. Where is
15 the offer of proof? There is no offer of
16 proof. They put in their brief their legal
17 argument that there should be a cumulative
18 impact analysis. Where is there any offer
19 of proof as to what impacts they consider
20 significant. What impacts if not
21 significant when combined together would be
22 a cumulative impact. That's what the
23 issues conference is for. They can't come
24 in in a brief and just say you should

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1 analyze cumulative impacts. The reason why
2 this is important and you'll hear more
3 about this later is there were cumulative
4 impacts analyzed.

5 ADMINISTRATIVE LAW JUDGE: Was the
6 Arlington facility analyzed in context with
7 cumulative impacts?

8 MR. ALESSI: Your Honor --

9 ADMINISTRATIVE LAW JUDGE: Isn't that
10 the offer of proof? They said next door is

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11 the Arlington facility which is a similar
12 facility with similar impact on the
13 community and on the resource. Was it
14 analyzed? Was the Arlington facility
15 analyzed in the cumulative impact analysis?

16 MR. ALESSI: The answer is yes, but
17 also, Your Honor, we would like to note we
18 purchased that facility in July of 2011.
19 So things are kind of hard that when we
20 start the moving here at the issues
21 conference like many of the other issues
22 that, you know, I think we have to
23 understand a little bit about where we are
24 in the process and take a look at what the

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1 real on-the-ground situation was way back
2 in 2009.

3 ADMINISTRATIVE LAW JUDGE: Yeah, but
4 doesn't SEQRA require that we consider
5 reasonably foreseeable cumulative impacts,
6 right?

7 MR. ALESSI: Not required. Not
8 required. Only where applicable and where
9 the impacts are significant. So that is my
10 question on the offer of proof. You can't
11 just simply say you have another facility
12 and you have this facility, you should look
13 at cumulative impacts. It's, you only look
14 at cumulative impacts where you've got two
15 significant impacts they combine. Or you

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16 have, you have cumulative impact or you
17 have impact, pick your impact area.
18 Neither one are significant in and of
19 themselves, but when you combine them they
20 become significant. There is no offer of
21 proof about that analysis at all in their
22 petition. Where is it? What are they
23 taking about? Traffic, community
24 character. What is the issue that

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1 accumulates? What is the impact that
2 accumulates to make it significant between
3 these two projects? That's the failure of
4 their offer of proof. It can't be a mere
5 legal argument.

6 And in every case that they cited,
7 the record in Save the Pine Bush and the
8 record in others the parties there put in
9 and identified and made offers of proof.
10 And it was actually not offers of proof in
11 Save the Pine Bush, it might have been an
12 offer of proof, but they put in what the
13 impact was.

14 So again, Your Honor, we have to be
15 on notice as to what we are shooting at
16 here and not at this particular time. So
17 to me, Your Honor, that is a fatal flaw in
18 the whole cumulative impact analysis. And
19 I think another barometer of that is no
20 other party has brought up cumulative

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21 impacts. And they can speak to why not,
22 but it may be because there are none and it
23 may be because the offer of proof would
24 have to address it. But this is the only

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1 entity that has raised it and they failed
2 in their offer of proof.

3 With regard to the mention of FERC,
4 that is not under SEQRA. That is under
5 NEPA. The requirements for cumulative
6 impacts are completely different. Miss
7 Goldberg and I had a very robust discussion
8 about that in the second circuit two years
9 ago about cumulative impacts and NEPA
10 requirements. They are different so to
11 cite to NEPA as, for anything is inapposite
12 with regard to this matter.

13 So also you heard talking about
14 another facility. I just want to remind
15 for the record that we've got gas and we've
16 got liquid, so we have different situations
17 with regard to certain --

18 ADMINISTRATIVE LAW JUDGE: Let me ask
19 you quickly about NEPA. So is the federal
20 standards more protective than the state?

21 MR. ALESSI: Your Honor, it's not
22 that they are necessarily more protective.
23 The NEPA, with regard to cumulative
24 impacts, it's pretty similar to what New

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1 York State has, but the case law does have
2 some, some differences with regard to
3 cumulative impacts. It's not the matter of
4 is it more protective, it's just that the
5 requirements are different. And NEPA, the
6 SEQRA, the SEQR Handbook is very clear and
7 it interprets and reviews case law is when
8 you have a common resource. That is the
9 whole point of cumulative impacts. And
10 again the offer of proof, had it been done
11 properly, would have said these are the
12 impacts and these are the common, this is
13 the common resource. Even in their
14 petition that doesn't have an offer of
15 proof, they don't even identify the common
16 resource even in their legal argument. So
17 that's another failure of the cumulative
18 impact analysis.

19 ADMINISTRATIVE LAW JUDGE: So the
20 state standard has you look at a common
21 resource?

22 MR. ALESSI: Yes.

23 ADMINISTRATIVE LAW JUDGE: What does
24 NEPA have you look at? What is the

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1 difference, what is significant about the
2 federal standard that's different here?

3 MR. ALESSI: Your Honor, I'm not

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4 prepared to speak to the precise
5 differences of NEPA. I didn't come here
6 prepared to speak to that other than to say
7 it's a different statute and the case law
8 has been interpreted differently, but I
9 would have to go back and look. I want to
10 give you an accurate answer.

11 ADMINISTRATIVE LAW JUDGE: All right.

12 MR. ALESSI: Your Honor, the point on
13 cumulative impacts is that there is, there
14 has been no offer of proof whatsoever to
15 identify even what these impacts are. What
16 is the area? There is no identification,
17 no offer of proof and no statement about a
18 common resource. No statement even in
19 their document. And therefore this claim
20 that cumulative impacts is a shortcoming is
21 complete incorrect. It is an abject
22 failure in terms of law and in terms of
23 offer of proof.

24 And with regard to the matter, I'm

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1 going to let the Department speak to if
2 they choose to because there are aspects
3 where we did for example noise, go back and
4 look at things along the way so the record
5 will be developed a little further. We are
6 not taking the position with regard to the
7 record. We will submit further items for
8 that in briefing. I just wanted to hit the

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9 issues conference issues in terms of their
10 failures of their offer of proof in regard
11 to this issue. And I would add, Your
12 Honor, that, and Miss Nasmi th mentioned
13 something about what my arguments are, I
14 would like to have what I said just now be
15 my arguments, not what somebody else is
16 thinking I'm going to argue or
17 characterize. Thank you very much.

18 MS. MAGLI ENTI: Well, Department
19 staff agrees that there hasn't been a
20 substantive and significant issue raised by
21 cumulative impacts. And as Mr. Alessi
22 indicated, this was raised in Gas Free
23 Seneca's petition. They just sort of said
24 summarily there is no cumulative impact

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1 analysis so it must be deficient. It is
2 difficult because they didn't actually
3 state what specific environmental medium
4 they were concerned about it, so it was a
5 little hard to understand how to rebut that
6 assertion but to say that their offer of
7 proof isn't sufficient on its face.

8 But what they did say in their
9 petition was that DEC should have known
10 about the Arlington facility as early as
11 April of 2011 because there was some
12 activity that they had talked to FERC about
13 actually acquiring the facility. As a

14 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
14 legal matter I don't think it actually
15 makes it deficient because we actually were
16 concerned about it before that at the
17 time --

18 ADMINISTRATIVE LAW JUDGE: Well, it
19 doesn't matter, right? The cumulative
20 impact analysis, doesn't matter who owns
21 the facility. If there's another facility
22 nearby that's reasonably, should be taken
23 into account the combination of these
24 facilities on the environment or community

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1 character or --

2 MS. MAGLIENTI: Right. The SEQR
3 Handbook says either the project has to be
4 related or the impacts have to be related.

5 ADMINISTRATIVE LAW JUDGE: Right.

6 MS. MAGLIENTI: One or the other.
7 Unfortunately we cite the handbook and
8 that's why Gas Free Seneca cites the
9 handbook because of that definition.

10 ADMINISTRATIVE LAW JUDGE: So aren't
11 they suggesting the impacts would be
12 similar. You got liquid fuel being stored.

13 MS. MAGLIENTI: Yes.

14 ADMINISTRATIVE LAW JUDGE: You've got
15 trucks, you've got trains.

16 MS. MAGLIENTI: Well, they actually
17 didn't say that. You're saying that, but
18 they actually didn't say that in the

19 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
petition. But that what they did say was
20 that yeah, there are some similarities.
21 ADMINISTRATIVE LAW JUDGE: Well, it
22 seemed like it was kind of a necessary
23 implication that there is a similar
24 facility nearby --

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1 MS. MAGLIENTI: Oh, absolutely.
2 ADMINISTRATIVE LAW JUDGE: -- and
3 that should be taken into account.
4 MS. MAGLIENTI: Absolutely. And the
5 Department met that obligation. We
6 certainly looked at cumulative impacts.
7 And as they pointed out in the petition we
8 actually asked the Applicant before Inergy,
9 who was the predecessor to Crestwood,
10 before their merger, before they actually
11 acquired the property we asked them because
12 the Finger Lakes project at that point was
13 actually further along in the review
14 process. We actually had a complete
15 application for the project. But when we
16 heard, and we heard some initial
17 conversations with NYSEG at the time, we
18 actually told them, and Miss Goldberg
19 actually said we should have known about it
20 in April. We actually said in March we
21 wanted them to go back and say well, thank
22 you for your resource stability report and
23 our finite element analysis. Would you

24 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
please let us know if there is anything

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1 that changes because now we understand that
2 there might be in the future a proposal to
3 actually adjust, to use caverns at the
4 Arlington facility for natural gas storage.
5 So we did actually consider that and it's
6 documented in the notice of complete
7 application.

8 ADMINISTRATIVE LAW JUDGE: Notice of
9 complete application?

10 MS. MAGLIENTI: That's correct.
11 Right. What Siding (phonetic) actually
12 said in his position is actually the
13 response to our notice of incomplete
14 application.

15 ADMINISTRATIVE LAW JUDGE: Do you
16 recall when that was?

17 MS. MAGLIENTI: It's March --

18 ADMINISTRATIVE LAW JUDGE: So it's
19 March --

20 MS. MAGLIENTI: Yeah, it's actually
21 document number 11, 1(a)11 and it's March
22 20, 2011. So we did. We wanted to make
23 sure because at that point when we looked
24 at the project --

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1 ADMINISTRATIVE LAW JUDGE: Was there
2 a response from --

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3 MS. MAGLIENTI: Yes, there was.
4 April 28th, 2011. And that's what's cited
5 in the petition.
6 ADMINISTRATIVE LAW JUDGE: So 2000?
7 MS. MAGLIENTI: 2011.
8 ADMINISTRATIVE LAW JUDGE: 2011. And
9 do you happen to have that document number?
10 MS. MAGLIENTI: 1(a)12.
11 ADMINISTRATIVE LAW JUDGE: 1(a)12,
12 okay.
13 MS. MAGLIENTI: Yeah, 1(a)12. So in
14 there what they did was they confirmed.
15 They went back and looked at the finite
16 element analysis because there the physical
17 concern wasn't that we actually made a
18 finding that there were any surface impacts
19 that were going to be of concern. We were
20 looking at cavern integrity. Is there a
21 concern because there that was the impact
22 that we were most concerned about. Is the
23 pillar thickness, is the distance from
24 those caverns sufficient so that we can

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1 make decisions about integrity at the
2 Finger Lakes project. So as you said, just
3 because they didn't own the facility
4 doesn't mean that we can't look at the
5 impact, but as a general rule our policy is
6 we weren't having conversations back and
7 forth with Inergy at the time or NYSEG

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8 because there was a process of transition
9 and as a general matter we just don't like
10 to throw a lot of issues at the parties
11 that don't actually own the facility. We
12 like to have direct conversations with the
13 actual applicant.

14 ADMINISTRATIVE LAW JUDGE: But the
15 focus was cavern integrity?

16 MS. MAGLIENTI: The focus was
17 certainly on cavern integrity, but now you
18 have to understand these two projects were
19 moving forward simultaneously. So we had a
20 NEPA review being done by FERC. DEC was a
21 cooperating agency in the FERC process.
22 And when we received submissions in the
23 Arlington project, we actually looked at
24 that analysis and had conversations with

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1 FERC. And actually Scott Sheeley who is
2 here today. And I spent a lot of time
3 talking about the cumulative noise impacts
4 and talking about how we actually recognize
5 a noise study we received from the
6 Arlington facility with the noise
7 information that we received in the Finger
8 Lakes facility. And Ms. Toher actually
9 talked about it today, I don't know if
10 anybody picked up on it, but we actually
11 looked at those two projects. How are they
12 actually going to behave together and

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13 that's when she made a reference on the
14 record that there is a combined decibel
15 levels of 50.3 dba at the hotel which is
16 on, north of the facility and on the same
17 side of the lake.

18 ADMINISTRATIVE LAW JUDGE: I do
19 recall that.

20 MS. MAGLIENTI: So we did actually,
21 we did respond as information came in.

22 ADMINISTRATIVE LAW JUDGE: So you
23 looked at cavern integrity. You looked at
24 noise.

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1 MS. MAGLIENTI: We looked at noise.

2 ADMINISTRATIVE LAW JUDGE: How about
3 some of these other impacts like truck
4 traffic, construction?

5 MS. MAGLIENTI: There wasn't. And
6 construction, there wasn't going to be a
7 combined impact, right. Because
8 construction, the amount of construction
9 that had to be done at Arlington was
10 actually very minimal. When you look at
11 the FERC record and it lists exactly what
12 type of construction they had to do there,
13 we actually knew at that time that there
14 was certain information, there was certain
15 testing being at Arlington that had already
16 been completed. We knew for instance that
17 one of the things that they needed to do

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18 there was plug two wells. Well, that's a
19 concern for us. We consider plugging wells
20 as type two action under SEQRA. We didn't
21 have to consider that in the purpose of
22 making decisions about whether or not
23 construction impacts there. The only other
24 remaining work they had to do at Arlington

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1 was actually install the compressor unit
2 and make some pipeline connections. It was
3 actually a very minimal amount of work.

4 We heard today, actually Gas Free
5 Seneca said well, we never really had an
6 opportunity. That FERC review of
7 cumulative impacts was really only limited
8 to water quality impacts. Well, if you
9 actually look at the order, it's actually
10 paragraph 52 of the order, it states Gas
11 Free Seneca also comments that the EA, the
12 environmental assessment, ignores
13 cumulative impacts and aesthetic noise and
14 community character focusing solely on
15 groundwater, surface water and air quality.
16 So they did have an opportunity to comment
17 on a combined impact because at that point
18 the FERC process had sort of eclipsed us in
19 the Finger Lakes proceeding. We went on
20 for five years. They were able to actually
21 file their official application with FERC
22 in 2013 and this was the EA that Gas Free

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23 Seneca commented on.

24 ADMINISTRATIVE LAW JUDGE: Okay. So

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1 what you just cited to me now was the FERC
2 decision or was that --

3 MS. MAGLIENTI: That was the FERC
4 decision, correct. So they put their EA --

5 ADMINISTRATIVE LAW JUDGE: So the
6 FERC decision considered the cumulative
7 impacts on water quality of both the
8 Arlington and Finger Lakes project?

9 MS. MAGLIENTI: That's correct. And
10 they actually said in paragraph 51 of that
11 order as well that they actually mentioned
12 us and they indicated that the only
13 possible impacts, due to limited scope and
14 impacts for the gallery two project,
15 groundwater, surface water and cumulative
16 air impacts were the only resources
17 identified in the EA that could potentially
18 be cumulatively affected. And then they go
19 on to conclude how there will be actually
20 negligible cumulative impacts on
21 groundwater and surface water. They did
22 actually go through a deliberate process
23 and Gas Free Seneca had an opportunity to
24 comment and raise the exact same issues

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Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
1 about how Arlington and Finger Lakes were
2 going to behave together. And in fact the
3 cumulative impact reviewed by FERC was
4 actually more robust because they said in
5 that petition, Gas Free Seneca said we want
6 you to look at AmeriGas. We want you to
7 look at other proposed projects in the
8 area. And in the Arlington proceeding they
9 actually did a review and looked at all the
10 other pending projects that might be filed
11 in the Town of Reading. So they did a very
12 robust cumulative analysis. And for the
13 purposes of the difference between the two,
14 there is actually not a whole lot of
15 difference between the cumulative impact
16 under NEPA and the cumulative impact under
17 SEQRA. The distinction is that that this
18 is instructive for us, but we nevertheless
19 still had our own obligation under SEQRA to
20 go look at these impacts and we did that.
21 We looked at the noise. There was nothing
22 else in the record that suggests that any
23 other surface impacts were going to be
24 impacted and we concurred in this

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1 determinati on.
2 So in a nutshell there was an
3 opportunity to look in the FERC process at
4 cumulative impacts of both projects as they
5 are going to operate together and not

Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt

6 withstanding the review by FERC which we
7 concluded with and participated in
8 discussions with FERC on how the noise
9 impact analysis should be done. And
10 actually that discussion with FERC, we
11 actually went back in the Finger Lakes
12 proceeding and had the applicant supplement
13 their information because we said, you
14 know, we need to reconcile ambient values
15 here. Let's, you know, can you go back to
16 your engineers or your consultants and give
17 us more detailed information about how
18 receptor seven is actually going to be
19 affected. And it was based on that
20 decision in part while we imposed
21 mitigation measures and why we wanted to
22 make sure that receptor seven, the motel
23 north of the facility, is going to be
24 impacted.

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1 So as a legal matter, I don't think
2 we have to really distinguish here when
3 this project became reasonably foreseeable
4 because we considered it. We not only
5 considered it, FERC considered. We
6 participated in the project. And we had
7 two projects moving along simultaneously.
8 And luckily for FERC they got a lot further
9 along in the process, but nevertheless the
10 documentation in the record suggests and

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11 concludes that we did address cumulative
12 impacts. And of course when we publish a
13 final SDEIS we have a robust opportunity
14 there to respond to public comments in
15 full.

16 And just to note on scoping, there
17 wasn't a reference in scoping. The comment
18 received in January of 2011 on cumulative
19 impact in scoping, the actual commenter was
20 Miss Lawrence and she said I want you to
21 look at cumulative impact of building a
22 rail yard, the brine facility and the truck
23 unloading area. Her comment was not look
24 at the impacts of a facility that hadn't

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1 been proposed. It was can you look at the
2 impacts of all the different components of
3 the Finger Lakes project from a visual
4 perspective. There wasn't an
5 interpretation that she was suggesting that
6 we should look at facilities that hadn't
7 been posed yet.

8 So, you know, then again we responded
9 to information as it rolls along and we did
10 do that and we looked the cavern integrity
11 and didn't find that any other
12 environmental medium would be affected on a
13 cumulative basis.

14 ADMINISTRATIVE LAW JUDGE: Okay.
15 Thank you. So Gas Free Seneca, you have

16 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
16 nine minutes rebuttal.

17 MS. NASMITH: I don't think I'll be
18 taking that amount of time, Your Honor. I
19 wanted to however address a number of
20 points if I may. First of all, Mr. Alessi
21 was talking about the appropriate quotation
22 of what is required under SEQRA and he said
23 that the appropriate quotation was that the
24 Applicant or Department could look at

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1 cumulative impacts. It's actually should
2 just to be careful about --

3 ADMINISTRATIVE LAW JUDGE: Well,
4 apparently the Department did so.

5 MS. NASMITH: So and that's my second
6 part, Your Honor, is the Department did.
7 It's not in the draft. It's not in
8 materials that the public has had ready
9 access to. I would need to go back and
10 check the amount of materials that have
11 been made available pursuant to this
12 proceeding. There is an awful lot of
13 consideration --

14 ADMINISTRATIVE LAW JUDGE: But the
15 FERC process in which apparently the
16 cumulative impact, you know, analysis had
17 been done, that was a public process,
18 right? In fact didn't you participate in
19 it?

20 MS. NASMITH: We did indeed, Your

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21 Honor. And I would say there are a couple
22 of problems with focusing too heavily on
23 the FERC process. First of all, FERC
24 didn't have a lot of materials in front of

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1 it that the DEC has. And specific
2 materials, I won't refer to them in too
3 much detail, but there is a lot of
4 confidential material with respect to
5 underground cavern integrity information
6 specifically about LPG Storage Facility
7 that FERC never received. We were given
8 access to the confidential materials in
9 that proceeding and that there is a
10 significant difference between the
11 materials that we received in this
12 proceeding versus the FERC proceeding
13 including things like the appendices to
14 reservoir suitability report. So to say
15 that FERC was able to do the job that DEC
16 is required to do under SEQRA is not
17 accurate given the materials that were
18 before FERC.

19 I would also say that we contest the
20 fact that FERC ignored our request to do a
21 cumulative impact analysis with respect to
22 community character. We disagree with that
23 decision quite vehemently and attempted to
24 convince FERC otherwise. And as Your Honor

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1 heard significant argument yesterday about
2 why community character is such an
3 important piece of this particular project.

4 ADMINISTRATIVE LAW JUDGE: So FERC
5 didn't have before it a characterization of
6 the community as being for example a wine,
7 the agricultural wine country setting, but
8 otherwise the impacts on the community like
9 visual, noise, traffic, those would have
10 been before FERC, right?

11 MS. NASMITH: Yes. And just to
12 correct, Your Honor, we did put in some
13 comments that started to talk about the
14 community character. We were not in a
15 position at the time to provide as robust a
16 set of testimony with respondent, with
17 respect to the analysis of for example Dr.
18 Flad and Dr. Christopherson had done. That
19 was not before FERC either. We did put in
20 comments that would highlight the
21 viticulture and the character of the
22 community. It was not the same record
23 however that is now before DEC.

24 ADMINISTRATIVE LAW JUDGE: How would

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1 it have been, the analysis have been
2 different if the community character was
3 characterized differently by FERC with
4 respect to the cumulative impact analysis?

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5 MS. NASMITH: Well, they would have
6 actually conducted a cumulative impact
7 analysis. We would have argued that they
8 should have conducted a cumulative impacts
9 analysis given the creeping
10 industrialization that is resulting from
11 not just the Arlington facility -- and I
12 want to clarify one point as well that
13 although the Arlington facility was before
14 FERC, there was an existing facility there
15 as well. So in terms of the cumulative
16 impact analysis that could have been done
17 back in 2011 prior to the expansion
18 application going into FERC, some of that
19 still could have been done even though it
20 wasn't maybe perhaps entirely clear how
21 foreseeable the expansion project. There
22 was an existing facility there already on
23 the same property, engaged in the same
24 activity and with respect especially to the

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1 community character piece and cavern
2 integrity piece isn't simply a function of
3 oh, it's an existing risk and so we can
4 ignore it. It is a function that if you
5 have a baseline, to what extent even an
6 incremental addition can tip you over the
7 significant threshold. That's something
8 that's well established in cumulative
9 impact analysis.

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10 ADMINISTRATIVE LAW JUDGE: Right.
11 But my understanding was that they did look
12 at, you know, the cumulative impact of the
13 cavern integrity, these other, other
14 impacts. So I guess my question remains,
15 what, what would have been different about
16 the analysis if the community had been
17 characterized differently from what FERC
18 had before it?

19 MS. NASMITH: And with respect to the
20 cavern integrity piece of it, that wouldn't
21 have necessarily had much to do with
22 community character, but as I mentioned in
23 terms of the documents that FERC had before
24 it, they did not have the full scope of

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1 materials. Moving on to your question
2 about what would have been different in
3 community, the difference again would have
4 been a more robust record in this situation
5 and we feel that honestly FERC dismissed,
6 improperly dismissed the question of
7 community character and should have
8 evaluated it and didn't. They didn't
9 really provide a whole lot of explanation
10 other than to simply say we don't think
11 it's significant, but we would strongly
12 disagree with that characterization.

13 ADMINISTRATIVE LAW JUDGE: I can find
14 that characterization in their decision,

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15 right?

16 MS. NASMITH: Yes. They basically
17 just say that this is what we are
18 evaluating and they move on. They don't
19 really provide a whole lot of discussion.
20 They say they don't think it's significant
21 and again with all the material we
22 presented yesterday we strongly dispute
23 that assumption.

24 I also just wanted to quickly discuss

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1 the question of the offer of proof. As
2 Your Honor has indicated, we think that the
3 offer of proof here first of all we're
4 raising a legal issue here in terms of the
5 deficiencies in the draft Supplemental
6 Environmental Impact Statement given the
7 standards out there where you have very
8 clear indication that related projects must
9 be considered to have cumulative impact
10 considerations. Under Safe the Pine Bush,
11 I reread the decision very quickly and
12 there is no discussion of what proof of
13 significance was offered in that case. It
14 was much more of a legal decision. There
15 may have been more to the record and I'm
16 happy to look into that at a later date.

17 ADMINISTRATIVE LAW JUDGE: So if your
18 theory is that basically you're just simply
19 making a legal argument. You're not

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20 proposing to develop the record on
21 cumulative impacts. You're simply making a
22 legal argument that cumulative impacts was
23 not analyzed, so therefore there is a
24 deficiency in the EIS.

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1 MS. NASMITH: Yes, sir.

2 ADMINISTRATIVE LAW JUDGE: And, but
3 we heard from the staff that they did
4 consider cumulative impacts. So does that
5 mean --

6 MS. NASMITH: Well, I mean I would
7 argue that they may have considered
8 cumulative impacts behind the scenes, but
9 the actual record on that is not
10 particularly apparent. And that that is
11 the type of, whatever it is they produced
12 as a result of considering those cumulative
13 impacts needs to be added into the record
14 and again made open to the public and made
15 clear to the public that the public can
16 comment on that exact issue and perhaps at
17 the end of that, we will have a sufficient,
18 sufficiently robust cumulative impacts
19 analysis to satisfy the requirements under
20 SEQRA, but right now none of that material
21 was included in the Draft Supplemental EIS.
22 All the things that Ms. Maglienti mentioned
23 are not --

24 ADMINISTRATIVE LAW JUDGE: So if we
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1 were to supplement the record with the FERC
2 decision, you know, other materials that
3 support the Department's review of these
4 cumulative impacts and subjected some
5 further process here, would that take care
6 of it?

7 MS. NASMITH: It might, Your Honor.
8 I'd have to, I reserve, you know, depending
9 on what that would actually look like, but
10 it's possible yes, that that might actually
11 be a robust enough cumulative impact. At
12 this point I don't know and it would depend
13 on how that would all play out.

14 ADMINISTRATIVE LAW JUDGE: Well,
15 since you're not offering factual issues
16 with respect to it and it would only simply
17 be a legal question as to whether or not
18 any subsequent supplementation of the EIS
19 was sufficient to address --

20 MS. NASMITH: That would be correct,
21 Your Honor.

22 ADMINISTRATIVE LAW JUDGE: Okay. And
23 then we would either agree with you or not
24 as to its sufficiency.

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1 MS. NASMITH: Yes. And unless you
2 have further questions, I think I will --

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3 ADMINISTRATIVE LAW JUDGE: No, I
4 don't.
5 MS. NASMITH: A few more minutes.
6 ADMINISTRATIVE LAW JUDGE: You have
7 well actually --
8 MS. NASMITH: Four seconds?
9 ADMINISTRATIVE LAW JUDGE: One
10 minute.
11 MS. NASMITH: Thank you, sir.
12 ADMINISTRATIVE LAW JUDGE: Thank you.
13 That concludes cumulative impacts. Do you
14 want to take a brief recess or should we
15 continue on to the indemnification clause?
16 (RECESS TAKEN.)
17 ADMINISTRATIVE LAW JUDGE: So we're
18 back on the record and we're going to move
19 along to the topic of the indemnification
20 clause. We'll start with the Seneca Lake
21 Communities.
22 MS. SINDING: Thank you, Your Honor.
23 The Seneca Lake Communities have raised a
24 substantive and significant issue regarding

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1 the adequacy of the indemnification
2 provision contained in the draft permit
3 conditions to effectively mitigate
4 significant adverse environmental impacts
5 from the proposed project. The issue is
6 substantive, because as I will address,
7 there is sufficient doubt about the

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8 Applicant's ability to meet statutory and
9 regulatory criteria applicable to the
10 project such that a reasonable person would
11 require further inquiry. And it's
12 significant because, again, as I will
13 address, it has the potential to result in
14 the denial of a permit, a major
15 modification proposed project or the
16 imposition of significant permit conditions
17 in addition to those proposed in the draft
18 permit.

19 The indemnification provision
20 contained in the draft permit condition,
21 which is condition number nine, is either
22 unreasonably ambiguous and/or inadequate to
23 mitigate potential significant adverse
24 impacts from the project. Condition nine

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1 requires the Applicant to, quote, accept
2 the full legal responsibility for all
3 damages, direct or indirect, of whatever
4 nature and by whomever suffers arising out
5 of the storage facilities construction and
6 operation to the extent that such liability
7 is attributable to the actions of
8 permittee, its employees, agents,
9 contractors or subcontractors and to the
10 extent that the permittee is liable under
11 the law for such actions. The permittee
12 must indemnify and save harmless the state

13 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048]. txt
13 from suits, actions, damages and costs of
14 every nature and description arising from
15 such actions. And, Your Honor, I would
16 pause. I forgot to carve out time for
17 rebuttal and request four minutes, please.

18 ADMINISTRATIVE LAW JUDGE: Four
19 minutes, sure.

20 MS. SINDING: Thank you. These
21 provisions --

22 ADMINISTRATIVE LAW JUDGE: Just a
23 minute. I have to be my own bailiff here
24 so. All right.

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1 MS. SINDING: So this provision is
2 ambiguous in that it appears to be limited
3 to that liability which is already
4 established pursuant to applicable law.
5 Again the final clause of the first
6 sentence of the provision uses the
7 conjunctive "and" and says and to the
8 extent the permittee is liable under the
9 law for such actions.

10 ADMINISTRATIVE LAW JUDGE: Can I ask
11 you a quick question?

12 MS. SINDING: Sure.

13 ADMINISTRATIVE LAW JUDGE: Can you
14 identify which regulatory provision under
15 the ECL is at play in this? Which
16 regulatory standard is not being met by
17 this indemnification clause?

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18 MS. SINDING: Well, we would argue
19 that generally speaking the gas storage law
20 requires that there, I don't have it in
21 front of me, but requires permit conditions
22 sufficient to protect against adverse
23 impacts.

24 ADMINISTRATIVE LAW JUDGE: Right.

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1 And that would include then the
2 indemnification clause by the permit holder
3 vis-a-vis the public.

4 MS. SINDING: To the extent that --
5 well, I'll get to that, but to the extent
6 that an indemnification provision is being
7 proposed as mitigation, potential
8 mitigation for significant adverse impacts
9 and this is also an issue under SEQRA and
10 that would be the other provision that we
11 would cite, then yes. That needs to extend
12 to the public. And any entity that --

13 ADMINISTRATIVE LAW JUDGE: Are places
14 in the Environmental Conservation Law where
15 there is expressed authority for the
16 Department to impose payment of a bond or
17 something like that. Are you aware of any
18 provisions like that under Article 23 of
19 the ECL?

20 MS. SINDING: I'm not aware of any
21 provisions like that under Article 23 of
22 the ECL. I haven't looked to see if there

23 Finger Lakes.IC Transcript 2-13-15 Session [Doc 00048].txt
are any provisions like that under Article
24 23, but I'm inferring from your tone that

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1 there are not any, I'm happy to take a
2 look.

3 ADMINISTRATIVE LAW JUDGE: Well, I'm
4 not aware of and maybe others will --

5 MS. SINDING: And I'm happy to take a
6 look, but I don't think the absence of such
7 a provision means that in the sense of the
8 need to satisfy the requirements not to
9 harm the environment whether under SEQRA or
10 Article 23 of the ECL that the imposition
11 of an appropriate financial surety
12 requirement of some kind of another is
13 required.

14 ADMINISTRATIVE LAW JUDGE: All right.
15 So if the Department is, has the authority
16 to impose such a surety requirement absent
17 express statutory authority, is that, would
18 that be your view assuming there is no such
19 statutory authority?

20 MS. SINDING: That would be our view,
21 yes. Shall I continue?

22 ADMINISTRATIVE LAW JUDGE: Please.

23 MS. SINDING: So again we argue that
24 the provision is ambiguous even to the

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1 extent that it extends only to coverage of
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2 the state in that it is limited by the
3 clause and to the extent the permittee is
4 liable under the law for such actions. In
5 that sense it's merely a truism and repeats
6 that which the law would otherwise hold.
7 In addition the provision appears to
8 be limited in that the second sentence
9 suggests that it's applicability is limited
10 to the state presumably on the basis that
11 the State would have permitted the facility
12 for the potential for an accident or other
13 event that could impose actual or
14 substantive cost for which the State does
15 not wish to be exposed to liability. To
16 the extent the second sentence in fact so
17 limits the first, it renders the
18 condition -- oh, boy. Inadequate to
19 protect potentially impacted entities
20 including the Seneca Lake Communities in
21 the event of a severe incident. I don't
22 want to cut into my time for rebuttal, but
23 I would have gone on to point to the
24 testimony and offer of proof that is

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1 contained in the affidavits of Mr.
2 Cooperwitz, Mr. Horn and Mr. Bromka on
3 behalf, the latter two on behalf of the
4 City of Geneva and Village of Waterloo,
5 both of which operate water treatment
6 facilities that serve collectively

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7 thousands of citizens around Seneca Lake.
8 ADMINISTRATIVE LAW JUDGE: Right. I
9 saw it in your briefing. You have four
10 minutes in reservation so.
11 MS. SINDING: Thank you, Your Honor.
12 ADMINISTRATIVE LAW JUDGE: The Finger
13 Lakes Wine Business Coalition.
14 MS. TOOHER: Thank you, Your Honor.
15 I would like to reserve additional four
16 minutes in rebuttal. Your Honor, the
17 Finger Lakes Wine Business Coalition would
18 also like to petition for amicus status on
19 this particular issue. We feel that we
20 have a unique perspective on both the law
21 and the policy concerning the
22 indemnification provision that would be of
23 value to the court in examining this issue.
24 You asked a moment ago as to the

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1 regulatory authority for even examining the
2 indemnification provision and what I would
3 say to Your Honor is that as determined by
4 Bath Petroleum Storage, Inc., in 309(f),
5 357, 375, which was the northern district
6 of New York. That decision is cited in our
7 brief. ECL 23-0301 is clear that the
8 regulation of LPG's underground storage is
9 to protect landowners rights and the
10 general public. And they cite ECL 23-0301
11 for that provision. We would submit that

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12 that same provision brings into play here
13 the indemnification that has been put in
14 the draft permit.

15 ADMINISTRATIVE LAW JUDGE: Well, the
16 indemnification appears to me to be -- I
17 mean, you know, some people analogize a
18 permit to being essentially like a contract
19 between the State and an Applicant or a
20 permittee and that that's sort of a typical
21 indemnification clause as between the state
22 and the applicant about whether or not
23 holding the State harmless for the actions
24 of the applicable under, pursuant to the

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1 permit.

2 But insofar as imposing upon the
3 applicant a requirement to have a bond or
4 some sort of surety for harms that might be
5 caused, vis-a-vis the general public, there
6 is no specific, do you have any other
7 specific provision of the ECL that would
8 apply or are you generally relying on the
9 general proposition that the Department is
10 supposed to protect human health and the
11 environment in reviewing a permit under
12 Article 23.

13 MS. TOOHER: I would agree that there
14 is not a specific provision in Article 23
15 that speaks to that, but I do think that
16 the Department and in fact the State has

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17 the authority to protect the public health.
18 ADMINISTRATIVE LAW JUDGE: Okay.
19 Right. But would that also extend, again
20 there are provisions of the ECL that
21 actually give the Department the express
22 authority to impose bonding, sureties and
23 whatnot. Doesn't that suggest then the
24 absence of that under Article 23 suggests

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1 that the legislature did not intend for the
2 Department to have that power?

3 MS. TOOHER: And we're not
4 necessarily proposing that there be a bond
5 in this instance, Your Honor. What we are
6 proposing and that we think it should be
7 examined in the context of an adjudicatory
8 hearing is that the Applicant's ability to
9 cover the kind of catastrophic loss that
10 could occur here should be examined before
11 issuance of the permit. But if in fact we
12 were to say that the corporate entity is
13 incapable of dealing with the support
14 services that would be necessary, the kind
15 of damages that could occur specifically
16 for my client, it could have a devastating
17 impact on the businesses in the region,
18 that this entity needs to be examined
19 carefully to determine whether or not they
20 have the financial resources to address any
21 of those concerns. And although I

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22 understand there is no bonding and we're
23 not asking for a bonding element to be
24 imposed because we submit that that is not

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1 set forth in the statute, we do think that
2 it's appropriate in determining whether or
3 not to issue this draft permit to determine
4 that the Applicant can in fact address
5 those very serious concerns. Concern that
6 are somewhat unique given the catastrophic
7 injury that could result. In the
8 Cooperwitz's affidavit he submits that
9 there could be millions, if not billions,
10 of dollars of damages in the event of a
11 catastrophic incident. And he relies upon
12 his experience in the history and the type
13 of accidents that have occurred
14 historically to support the concept that
15 this is an important issue to resolve prior
16 to the issuance of the permit.

17 ADMINISTRATIVE LAW JUDGE: Can you
18 cite to me the authority under SEQRA or the
19 ECL where it indicates that among the
20 things we should consider is the fitness, I
21 guess, of a business entity to be able to
22 live up to its financial liabilities in the
23 event there is some sort of catastrophe?

24 MS. TOOHER: I think the entire

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1 premise of SEQRA in terms of looking at the
2 mitigation of environmental impacts in
3 establishing that in fact those impacts can
4 be mitigated or can be addressed throughout
5 the SEQRA process. I don't think they
6 preclude consideration of those issues.

7 ADMINISTRATIVE LAW JUDGE: I'm just
8 asking if whether or not you're aware if
9 there was any, if we've ever done that.

10 MS. TOOHER: I've not, Your Honor.
11 I'd certainly be willing to look at that
12 issue and would like an opportunity to
13 address it in a post issues brief.

14 ADMINISTRATIVE LAW JUDGE:
15 Absolutely.

16 MS. TOOHER: Because I do think that
17 it is a very important and unique issue. I
18 think historically this type of a situation
19 hasn't been examined in that context. I
20 don't think that it precludes us from
21 examining it in this context here. And I
22 think that my clients as an amicus would
23 like an opportunity to bring to the court
24 the very policy issues that are presented

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1 by this type of determination. The fact
2 that it has not been done historically and
3 as this industry develops does not mean it
4 should not be done in this instance. It

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5 does give us an opportunity to go forward
6 looking at what has happened around the
7 country and with these types of facilities,
8 the types of damages that have been
9 incurred and the opportunity to resolve
10 those situations. Here we could do it in
11 advance. In effect mitigate the potential
12 economic catastrophe that could result in
13 the consequence of these types of actions.

14 ADMINISTRATIVE LAW JUDGE: Okay.
15 Thank you. We have four minutes reserved.
16 Mr. Alessi.

17 MR. ALESSI: Thank you again, Your
18 Honor. In my presentation I'm going to
19 address two components of the arguments
20 that you've heard today. I'm going to
21 address the SEQRA aspect of the arguments
22 and then I'm going to address the
23 ECL/statutory regulatory components. I'll
24 first address the SEQRA component.

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1 Miss Toher said something that was
2 notable in regard to the scope of SEQRA.
3 She said and ended we are suggesting this
4 issue to mitigate the economic impacts.
5 That's what she said. And we put in our
6 brief and the precedent is resoundingly
7 clear that economic issues are not within
8 the scope of SEQRA. The law has been clear
9 on that since SEQRA was created in 1978 and

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10 I'm aware of no decision that even
11 undercuts that in the least. With regard
12 to the issue that the communities raised in
13 their argument to, they said it would
14 mitigate significant impacts. That's why
15 they said it was a substantive and
16 significant issue. Then they went on to
17 speak about other matters, but they never
18 said what the impact was that they were
19 seeking to mitigate. And I, there is no
20 environmental mitigation when you're
21 talking about putting up financial
22 assurance unless you make a real attenuated
23 argument and then you could take any
24 economic argument and attenuate it all the

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1 way until you eventually touch the
2 environment. So I note that there was no
3 statement about that, nor can there be
4 because this is not a SEQRA issue, Your
5 Honor.

6 And let me be very, very clear on
7 behalf of the Applicant. We take safety
8 extraordinarily seriously. We have a
9 record in this community. We are a member
10 of this community. We have extraordinary
11 safety procedures and we are proud of our
12 record. In addition there is a lengthy
13 history in this State of this very type of
14 operation. We reference the 1988 GEIS. We

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reference the 1992 GEIS. The program for
16 this that specifically mentioned the
17 storage of liquid propane gas in salt
18 caverns.

19 And so with regard to the sort of
20 context in which this is being discussed I
21 think it's important to understand that
22 even though what these arguments are
23 addressing are legally inaccurate and
24 insufficient, we as the Applicant take the

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1 underlying matter of safety very, very
2 seriously and we work with the Department
3 and the Department regulates this very,
4 very carefully. So I don't want any of my
5 arguments to be misconstrued as me saying
6 that this is not a matter that doesn't
7 deserve attention, but it has already been
8 given attention in the public safety and
9 other issues.

10 What we are talking about with regard
11 to this issue is solely as framed by each
12 of the individuals you just heard, an
13 economic issue. They have made it very
14 clear it's an economic issue. They are
15 concerned about the Applicant not having
16 sufficient funds to deal with the issue.
17 That is classically outside of the scope of
18 SEQRA and therefore cannot even be
19 considered in SEQRA, let alone adjudicated.

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ADMINISTRATIVE LAW JUDGE: Well,

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there is some consideration of economics.

22

I mean, again it's a balancing at the end

23

of the day. The, you know, assuming there

24

are unmitigated impacts, then the

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1

Commissioner would have to balance those

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against the social and economic benefits of

3

the project. So there is some

4

consideration of economics. And

5

presumably, I mean, the company has got

6

some insurance to cover its liabilities in

7

the event something does go wrong and there

8

is lawsuits. I guess the question is is

9

the, the petitioners are asking us to look

10

into that and how far can we look into that

11

so see are you adequately capitalized in

12

the event that something goes wrong and,

13

you know, all the other safety precautions

14

unfortunately fail and somebody gets

15

injured.

16

MR. ALESSI: Your Honor, if I could

17

please address your point about the

18

balancing. If the balancing that the

19

Commissioner has to do, which you correctly

20

note is social, economic and environmental.

21

If that economic word in there carried

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forward, there would be no case law that

23

economics are not proper for SEQRA.

24

ADMINISTRATIVE LAW JUDGE: Well, no

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1 no. I think, doesn't our case law, our
2 authority says that we don't adjudicate
3 economic issues because those are beyond
4 SEQRA, but they are proposing it's a legal
5 issue. In other words, I don't think they
6 are seeking to offer any proof on this or
7 have a hearing on it. They are simply
8 raising the question of do we, does, should
9 the Department look at whether or not
10 you're adequately capitalized in the event
11 of a catastrophe and is there some
12 authority for us to look into that or maybe
13 require some indemnification or something
14 along those lines.

15 MR. ALESSI: I understand, Your
16 Honor, but --

17 ADMINISTRATIVE LAW JUDGE: So we're
18 not talking about adjudicating a fact issue
19 which I think our authorities say we don't
20 do generally under SEQRA, but simply the
21 legal question of what do we look at when
22 we are looking at any economic balances.

23 MR. ALESSI: Judge, I can only go by
24 what they are saying in their petition.

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1 They're saying our dEIS is insufficient.
2 What does that mean? I mean, that means
3 they want to adjudicate it. They call it a

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4 legal issue, but then they are saying the
5 dEIS is insufficient. And my point is
6 simply you can't point to an economic issue
7 to say that a dEIS is insufficient. I want
8 to now get to the balancing. Certainly the
9 Commi ssi oner balances economi c
10 considerations and there is no doubt about
11 that. And we've got to --

12 ADMINISTRATIVE LAW JUDGE: And that's
13 why the EIS has some reference to it. I
14 mean, now whether we would adjudicate
15 economic issues, again, I mean, that's a
16 separate question. But to the extent that
17 the EIS provides some information on the
18 soci oeconomi c, you know, background so that
19 if we end up having to do the balancing,
20 we've got some information to base it on.
21 And argument that it's insufficient as a
22 matter of law can be addressed is it a
23 matter law or not, right, and my initial
24 question is do we have the authority to

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1 even look at this.

2 MR. ALESSI: You don't. The
3 Department does not --

4 ADMINISTRATIVE LAW JUDGE: I figured
5 you would say that.

6 MR. ALESSI: -- and I will get to
7 that next. And I'm going to give you
8 reasons why, but, Your Honor, we have to, I

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9 would like to refocus on why we are here.
10 We are talking about an issues conference.
11 They want to have this relate to an issues
12 conference.

13 ADMINISTRATIVE LAW JUDGE: Right.

14 MR. ALESSI: It's inappropriate for
15 an issues conference. As I've said, for
16 the past two days there are other buckets,
17 response to comments where we can take this
18 issue. We can respond to comments.

19 ADMINISTRATIVE LAW JUDGE: Well, an
20 issues conference in addition to determine
21 whether or not there are triable issues of
22 fact is to also resolve legal issues.

23 MR. ALESSI: Yes.

24 ADMINISTRATIVE LAW JUDGE: And

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1 they're presenting, their argument is that
2 it's a legal issue.

3 MR. ALESSI: That's correct, but they
4 are saying it's a legal issue that should
5 relate to the issues conference. I'm okay
6 with this going into the SEQRA record. So
7 I think want to now, I think it's a good
8 segway into the second part of the
9 argument, Your Honor, with regard to the
10 regulatory and does the Department even
11 have authority to do this regardless of
12 whether it's balancing, regardless of where
13 we are in the process.

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14 The Communities said when you asked
15 what's the regulatory standard, they didn't
16 provide one. And I'm going to get to what
17 amici said about that. They didn't have
18 any to offer, okay. And the record will
19 speak for itself as to whether they spoke
20 about a substantive and significant issue,
21 but you asked is there a regulatory
22 standard. They did not provide one.

23 In terms of financial surety and
24 those requirements, Your Honor through his

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1 questioning and I will only say that Your
2 Honor's questions I will just translate
3 them into answers, that there is no
4 authority for this. You are absolutely
5 correct that this, there is no provision
6 even in the ECL for the clause that is in
7 there. The reason it's in there is
8 precisely the reason Your Honor put in his
9 questions which is when you get a, when you
10 have a permit and the Department is issuing
11 it there is this sort of contract, not that
12 the Applicant has a lot of leverage in
13 this, but they put the condition in there
14 because if the Department --

15 ADMINISTRATIVE LAW JUDGE: You're not
16 suggesting it's an adhesion contract, are
17 you?

18 MR. ALESSI: I would never suggest

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19 that of my good friends at the Department
20 of Environmental Conservation. But it's
21 there because in case there is a lawsuit
22 over something, the Department wants
23 protection because it issued the permit.
24 So they are sort of participated in the

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1 process and while I may have my own views
2 whether they have the legal authority to
3 even force that, it's a nonissue because we
4 agree to it. We agree to it. We are not
5 here to contest that provision. We agree
6 to it and we stand by our agreement and we
7 will honor that agreement. That is much
8 different from someone coming into
9 something we didn't have to do, but we
10 committed to doing. That there is no
11 legislative authority to have happen. And
12 then to say in addition you think you're
13 legally insufficient because you should do
14 more and you should protect us. As Your
15 Honor well knows even in areas where the
16 Department has some pretty clear authority,
17 give you pesticides, you can only assert,
18 assess fees against an applicant where
19 there is specific legislative authority to
20 assess the fee. The Department has tried
21 at other times to assess fees, etcetera,
22 and has been struck down by the courts when
23 there is no legislative authority.

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24 So I appreciate the fact that amici

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1 want to take some time to look for it.
2 They have that right to do so as part of
3 the briefing. We don't see it. We don't
4 understand it to be there. And that really
5 is the key point of the second part.

6 ADMINISTRATIVE LAW JUDGE: Doesn't
7 the Department look at the fitness of the
8 Applicant though and at least in part their
9 financial fitness?

10 MR. ALESSI: Your Honor, the answer
11 to your question is fitness is an issue.
12 There is actually a ROC on that.

13 ADMINISTRATIVE LAW JUDGE: Right.

14 MR. ALESSI: And, however in order to
15 have an applicant be subject to --

16 ADMINISTRATIVE LAW JUDGE: A ROC is
17 an R-0-C.

18 MR. ALESSI: Record of compliance,
19 yeah. I'm sorry. Those do exist, but
20 there are certain criteria that have to be
21 met before the Department can even require
22 an applicant to go through that process.
23 Those are not met here. And those are
24 really sort of fitness in terms of their

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1 track record, in terms of violations,

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2 etcetera. That is what that points to. So

3 the answer to that question is, Your Honor,
4 yes, but it wouldn't be relevant here.

5 With regard to, the statement was
6 made that we are somehow unique and that
7 therefore we should, that's another reason
8 to create a law I guess is what is being
9 said here. We are not unique. There are a
10 number of facilities throughout this state.
11 Power plants, I could go on and on and
12 on, that are members of the community that
13 if you were to create a scenario, I'm not
14 going to get into the risk assessment that
15 we had before, but if you create scenarios
16 that we don't think are realistic, but even
17 assuming they were, it's not unique. There
18 are many other facilities. And the key
19 point is it's for the legislature to decide
20 which situation requires the extraordinary
21 measure of saying to an applicant in New
22 York State or from anywhere that you have
23 to agree before you get the permit that you
24 have to agree to indemnify everybody all

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1 around you. I've never heard of it and it
2 would, in my experience it would be
3 incredibly unprecedented in this state.
4 But the point, the underscored point here,
5 Your Honor, is that there is no authority
6 for it.

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7 And so, you know, I don't know why
8 we're going to brief something for which
9 there is no authority. I do understand
10 there is an opportunity given to see if
11 people can find authority and the applicant
12 understands that part of the process.

13 So, Your Honor, I also want to note
14 just for completeness that the wells are
15 bonded. So in terms of my fellow members
16 of the community of New York State I want
17 them to know that there are protections
18 that are there. The wells are bonded so
19 there is that measure. There are the
20 safety measures we take at the facility.
21 There is the Department's oversight,
22 etcetera. There are permit conditions.

23 ADMINISTRATIVE LAW JUDGE: And they
24 are bonded for what? They are bonded for

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1 what, closure? What is the bond for?

2 MR. BERNSTEIN: Plugging and
3 abandonment.

4 ADMINISTRATIVE LAW JUDGE: Plugging
5 and abandonment. That would come into play
6 if something happened and you had to shut
7 down the facility. There's money there to
8 make sure it gets done. Is that what we're
9 talking about?

10 MR. ALESSI: Yeah. And that relates
11 to safety and some of the same issues which

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12 is when you have that bond, you have that
13 requirement. That motivates the permit
14 holder to do things right and if they
15 don't, there's a protection there and the
16 community does benefit from that as well.
17 It's slightly, it's not the issue we're
18 talking about here today, but I just wanted
19 to put that on the record that this isn't
20 a, something that is not thought out. It's
21 something that is thought of.

22 So, Your Honor, in conclusion I
23 started with and ended with the two prongs.
24 I talked about SEQRA and that in terms of

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1 it's not within the zone of interest of
2 SEQRA to talk about an insufficient EIS,
3 what should be in an EIS, what should be
4 discussed in an EIS and we've got the Sunco
5 case in it. We've got the St. Lawrence
6 2001 decision talking about economics
7 beyond the scope of SEQRA. You and I
8 certainly discussed the balancing of the
9 Commissioner. I won't get into that more.
10 And on the regulatory side, it is very,
11 very clear that there is no authority for
12 what is being requested here, sureties, the
13 like. And if that authority is to come, it
14 would have to come, it couldn't come from
15 the Commissioner. Respectfully I don't
16 think it could come from the administrative

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17 law judge or even from the court. I think
18 it has to come from the legislature if that
19 requirement is going to be imposed. So
20 again thank you for the opportunity to
21 present on this issue.

22 ADMINISTRATIVE LAW JUDGE: Thank you.

23 MS. SCHWARTZ: So briefly I want to
24 confirm the Department staff's position

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1 that there is no regulation or statute that
2 would allow us to require permittees for an
3 underground gas storage facility to provide
4 insurance or indemnity to even close
5 municipalities, let alone those that are 20
6 or 30 miles away. None whatsoever that we
7 are aware of. No cases we're aware of at
8 all.

9 ADMINISTRATIVE LAW JUDGE: Can we
10 look at the financial ability of the
11 Applicant? Not only did you look at what
12 they are required to do under the permit,
13 but potentially --

14 MS. SCHWARTZ: We don't examine it
15 per se, although as Mr. Alessi said we do,
16 they do provide bonds under statute
17 regarding the wells and those are bonds for
18 us, not for the municipalities, if we would
19 have to plug and abandon the wells. And I
20 will also set out that that's under statute
21 and the statute even regulates exactly how

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22 much those bonds can be for. So the
23 legislature is kind of carved out, you
24 know, they are controlling the purse

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1 strings here.
2 ADMINISTRATIVE LAW JUDGE: Part of
3 permit review though the Department doesn't
4 look at whether or not the Applicant is
5 sufficiently capitalized or whatever to
6 fulfill its obligations under the permit?
7 MS. SCHWARTZ: No. No. I'd also
8 like to clarify because I don't want
9 anybody to be confused regarding the draft
10 permit conditions, attachment one, permit
11 condition nine. It was not the
12 Department's intention drafting it to
13 indemnify or to seek indemnification from
14 the applicant for any party, but the
15 Department? The State. I should correct.
16 The State. It was not to the intention to
17 seek indemnification for municipalities.
18 Thank you.

19 ADMINISTRATIVE LAW JUDGE: Thank you.
20 So Seneca Lake Communities, you have four
21 minutes in rebuttal.

22 MS. SINDING: Thank you, Your Honor.
23 I will just try to make three quick points
24 in rebuttal. The first is we've done as

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1 quick a review as we can over here at the
2 table and, and would cite merely to the
3 fact that the Department does under Article
4 23 require bonding of wells as was --

5 ADMINISTRATIVE LAW JUDGE: As
6 expressed as statutory for that though is
7 my understanding.

8 MS. SINDING: In this case.

9 ADMINISTRATIVE LAW JUDGE: Right.

10 MS. SINDING: My understanding is
11 that that is by, done by regulation. And
12 it's NYCRR 552.2, but I may be incorrect
13 about that. In any event I think the main
14 point that I would like to make on this is
15 if in fact the Department does not have the
16 authority to impose a bond or to otherwise
17 require indemnification for parties beyond
18 the State, then what you have here is a
19 significant, is an unmitigated significant
20 adverse environmental impact under SEQRA
21 that itself may mandate denial of the
22 permit if it can't be mitigated through
23 some kind of financial surety.

24 ADMINISTRATIVE LAW JUDGE: Has this

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1 ever been recognized in any case law or?

2 MS. SINDING: Not that I'm, not that
3 I'm currently familiar with. Although
4 we're, I don't know that it needs to be
5 recognized in case law. I think that if

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6 you've got this situation, and this takes
7 me to my second point, this is not about
8 economics. This is not an economic
9 argument. It's not an attenuated
10 environmental impact that we're talking
11 about. It's a direct environmental impact.
12 And if as testified to by Mr. Cooperwitz
13 and the representatives of the Seneca Lake
14 Communities there is an inability to
15 address the immediate or long-term
16 environmental impact of a catastrophic
17 failure or a slow, long-term leaching of
18 salt into the lake. That's an
19 environmental impact and it relates to
20 water quality and drinking water quality
21 and public safety and those are
22 environmental impacts that are within the
23 purview of SEQRA. And if those can't be
24 mitigated because the Applicant does not

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1 have the financial wherewithal to
2 adequately address those short and
3 long-term impacts, it's an unmitigated
4 impact.
5 ADMINISTRATIVE LAW JUDGE: But isn't
6 that really, doesn't tort law take care of
7 it? I mean, if there is something here
8 happens and the Applicant ends up being
9 responsible and the municipality is
10 incurring costs as a result, wouldn't they

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11 just know they have to sue them in court to
12 get recompass (phonetic), right? And isn't
13 it up to the Applicant to have adequate
14 insurance essentially to cover that if that
15 happens? How is that an environmental
16 impact? Is that really an economic issue?

17 MS. SINDING: No, Your Honor, it's
18 not because our position is that, there
19 would be at least a year and set forth in
20 the affidavits that we submitted from the
21 city manager and the manager of the
22 Waterloo treatment facility there would be
23 at least a year in order to design and
24 implement water treatment facilities that

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1 would be able to adequately treat this
2 water during which time Matt Horn, City
3 manager for the City of Geneva, they are
4 not aware of what, of any avenues to
5 provide drinking water to their residents.
6 That's an environmental impact.

7 ADMINISTRATIVE LAW JUDGE: Right.
8 But what you're seeking indemnification for
9 would be the economic impacts if something
10 like that occurs.

11 MS. SINDING: To implement the
12 remediation of what is an environmental
13 impact, that's correct.

14 ADMINISTRATIVE LAW JUDGE: Right.
15 Okay.

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16 MS. SINDING: So it's fundamentally
17 at its core what we're talking about is are
18 you going to have unmitigated significant
19 adverse environmental impacts within your
20 sense of SEQRA. If you're permitting an
21 activity for which there is no ability to
22 provide adequate financial assurances.

23 ADMINISTRATIVE LAW JUDGE: Okay.
24 Thank you.

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1 MS. TOOHER: Thank you, Your Honor.
2 I am not certain what I said earlier, but
3 if I misspoke or that was interpreted as a
4 pure economic impact, certainly that's not
5 what our intent, that's not what the
6 petition says. And even though there may
7 be monetary issues here, that doesn't make
8 it an economic impact. What we said in the
9 petition is that this issue goes to human
10 health and safety and impacts upon the
11 agricultural uses including the health and
12 safety of crops and animals which may be
13 subject to explosion from fire, explosion
14 or the slow escape of stored gas.

15 I would also like to make a minor
16 point and that is we segregated this issue
17 out for purposes of this conference, but in
18 our petition we tied together risk
19 assessment and indemnification. We don't
20 think that they are particularly

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21 segregatable in terms of looking at this
22 issue. And because of that I think it
23 highlights that this is in fact an
24 environmental impact. That this is

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1 socioeconomics. And that it's not
2 necessarily something that we look at just
3 in terms of the indemnification.

4 In terms of the uniqueness, again I
5 would have to defer to the court reporter,
6 but it's the uniqueness of the impact of
7 this project upon particularly from our
8 perspective the Finger Lakes wine region
9 than in the event of a catastrophic event
10 it's not going to be just a question of
11 money, but certainly the environmental
12 impacts would be vast and far reaching.

13 ADMINISTRATIVE LAW JUDGE: Right.
14 But in that we talked about, we talked
15 about the environmental impacts and
16 potential impacts on public safety, but the
17 specific challenge of the indemnification
18 clause can be that you were seeking
19 indemnification not only, you know, the
20 Department, but for other parties that
21 might be injured. So that's why I tried to
22 focus it down on our authorities to do
23 that.

24 MS. TOOHER: I certainly understand

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1 that focus, but I think even in the
2 Department, I mean, what the Department is
3 looking for is, quote, anything that the
4 State might be responsible for as a
5 consequence of the Applicant's actions. I
6 would also submit that the State, the
7 Department speaks to we, the People of the
8 State, and the injury that is incurred here.
9 We are not asking for an indemnification
10 insurance policy for the Finger Lakes Wine
11 Region Business Council, although certainly
12 if the Applicant would like to provide
13 that, we will take it. But we are looking
14 that if the Applicant is in a position
15 where there are injuries to the People of
16 the State, that they are in fact
17 financially capable of doing so. And we
18 would submit that although this might be a
19 somewhat novel concept in the context of
20 this hearing, I don't see anything in the
21 regulations or the statutes that prohibit
22 an inquiry of this nature. And that's why
23 we do believe that it is an appropriate
24 legal issue and a policy issue for us to

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1 attempt to address with you in this context
2 and in the adjudicatory hearing that there
3 should had be a requirement. The fact that

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4 there is a requirement for bonding on the
5 well, the fact that, that there is an
6 opportunity and circumstances to look at
7 the financial wherewithal, we think that
8 this circumstance also justifies that type
9 of review. Thank you.

10 ADMINISTRATIVE LAW JUDGE: Thank you.
11 All right. So that concludes the
12 indemnification clause issue. That moves
13 us along to public need and benefit. Does
14 anybody wish to take a brief recess or
15 should we just continue? Sorry you had to
16 be last, but somebody had to be last. Are
17 you reserving any rebuttal time or.

18 MR. PETRASH: Would you leave, I
19 would reserve for rebuttal anything that I
20 don't use in my direct.

21 ADMINISTRATIVE LAW JUDGE: All right.

22 MR. PETRASH: Thank you, Your Honor,
23 for the opportunity to address you here
24 today in this which is to us an extremely

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1 important proceeding. My client the
2 National Propane Gas Association is a
3 national advocacy group for the propane
4 industry. We represent and our members
5 include producers of propane, transporters
6 of propane, manufacturers of propane
7 equipment and most importantly propane
8 retailers of which there are about 2,500

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9 members who deliver propane to consumers,
10 principally residential, agricultural and
11 commercial customers. We have those
12 members in every state and we frankly
13 believe at least in the lower 48 every
14 county with perhaps the exception of
15 Manhattan our members exist.

16 We deliver, our members deliver
17 propane to six million households in the
18 United States, a quarter of a million of
19 which are here in New York. The propane in
20 the residential sector is principally for
21 space heating, for water heating, for
22 cooking and to lesser extents pool heating,
23 fireplaces, etcetera.

24 There has been a lot of discussion

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1 here in the last two days about
2 agriculture. Propane is exceedingly
3 important in agriculture. It runs
4 irrigation pumps. It runs crop drying
5 operations. And as we found out last year
6 is exceedingly important in poultry and
7 livestock facilities. I don't know for a
8 fact, but I would expect that the members
9 of the Seneca Lakes, Finger Lakes Wine
10 Business Coalition are large users of
11 propane in their operations.

12 Most people don't realize it, propane
13 is also used in vehicles, fire vehicles,

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14 principally in school buses. A third of
15 the school buses made in the US this year
16 will run on propane. In fact there are
17 more propane vehicles on the road in both
18 the United States and the world than either
19 electric or natural gas.

20 I want to shift a perspective a
21 little bit here today from what we've been
22 talking about the last two days. Some of
23 you may have noticed that it's a little
24 chilly outside. The business that we are

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1 in is warmth. And this project and the
2 people, our members who will put propane
3 into this storage facility if its built are
4 delivering warmth to their consumers, an
5 essential human need. And we would urge
6 you to consider this project in that
7 context. Should this project not go
8 forward, and we view it as an essential
9 part of the national infrastructure and
10 I'll discuss that in a minute. The
11 alternatives are pretty clear. People can
12 heat their homes with electricity. First
13 electric resistance which is hideously
14 inefficient or heat pumps. But even so 50
15 percent of electricity in the United States
16 is generated by coal. And so propane is a
17 much more environmentally benign way to
18 heat a home than electricity.

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19 Natural gas also is very similar to
20 propane. We call propane portable natural
21 gas, but people who use propane to heat
22 their homes in all likelihood do not have
23 natural gas infrastructure near them which
24 is why they use propane. In this area and

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1 to the northeast of here, fuel oil is very
2 important, but fuel oil is largely imported
3 at this point or significantly imported and
4 very bad for the environment in terms of
5 emissions. Also terrible for homeowners
6 having to clean burners and that sort of
7 thing.

8 ADMINISTRATIVE LAW JUDGE: Can I ask
9 you a question real quick?

10 MR. PETRASH: Sure.

11 ADMINISTRATIVE LAW JUDGE: I'm going
12 to ask you the same question I've been
13 asking all the amicus petitioners is that
14 amicus petitioners generally are not in the
15 proceeding to provide information that is
16 not otherwise already in the documents.
17 They are simply to provide legal argument.
18 The parties that want to provide
19 information generally seek full party
20 status.

21 MR. PETRASH: Correct.

22 ADMINISTRATIVE LAW JUDGE: It seems
23 to me from our petition you're proposing to

24 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
provide information about a variety of

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1 different subjects are liability of propane
2 services, reduction of greenhouse gases,
3 need for storage, that sounds to me like
4 you're wanting to put in additional
5 information that's not already in the
6 application materials.

7 MR. PETRASH: I think, Your Honor,
8 that much of this is in the application
9 materials and to the extent that it isn't,
10 it would be a matter of public record of
11 which you could take judicial notice and on
12 which we could make policy arguments.

13 ADMINISTRATIVE LAW JUDGE: Take
14 judicial notice on, on, on things such as
15 reliability of propane service. That
16 doesn't sound to me like something I can
17 take judicial notice of. I can take
18 judicial notice of notorious facts. Like
19 what time the sun rises and sets, but facts
20 about --

21 MR. PETRASH: What do you mean about
22 reliability, Your Honor?

23 ADMINISTRATIVE LAW JUDGE: Well, that
24 was your petition. You're proposing to

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1 provide information concerning the
2 reliability of propane services in New York
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3 and the surrounding states and how this
4 project impacts that.

5 MR. PETRASH: I think the application
6 addresses that, Your Honor.

7 ADMINISTRATIVE LAW JUDGE: So your
8 role then would be, if I allow party status
9 for you, that you will be submitting briefs
10 that will basically, based on the
11 information in the application?

12 MR. PETRASH: And in the public
13 record, US DOE information, etcetera.

14 ADMINISTRATIVE LAW JUDGE: All right.
15 So you are not proposing to provide me any
16 new information that is not already in --

17 MR. PETRASH: No, Your Honor. Except
18 should you request that, we would gladly do
19 it. Let me talk briefly about
20 infrastructure, because this is an
21 infrastructure project. Propane production
22 is at record levels in the last several
23 years, but we are in the process of
24 replumbing both propane infrastructure and

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1 natural gas infrastructure and this project
2 is a critical part of that. We have seen
3 one of the two TEPPCO lines that serve this
4 area and are frankly the backbone of the
5 Northeast and Mid-Atlantic and Mid-West
6 propane markets be reversed. And so now
7 the ability to get propane and other fuels

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8 to this area has been constricted so
9 storage is much more important. Storage
10 located here that can support New York,
11 New England and actually even parts of the
12 middle west. Last year in the winter of
13 2013 and '14 we had the worst winter the
14 propane industry has ever seen. The
15 mid-west was very hard hit both in home
16 owners and in farms, agriculture. New
17 England also was very tense and frankly the
18 only thing that prevented New England from
19 having trouble was they imported propane
20 for the first time in six years. For those
21 of us who worked on those issues, we said
22 all along last winter if Finger Lakes were
23 in operation, this would be an entirely
24 different situation.

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1 Last, obviously your job and job of
2 state government and also federal
3 government is to protect consumers from
4 environmental risks. We endorse that. We
5 believe that facilities should be built to
6 the highest standards. The government
7 should oversee and regulate them, but we
8 also believe the role of both federal and
9 state government is to provide for the
10 needs of consumers and energy such as
11 propane and natural gas, etcetera, is an
12 essential human need. Almost without

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13 exception either state or federal
14 government or both are involved in
15 processes for permitting the infrastructure
16 and it's our argue certainly that those
17 essential human needs have to be considered
18 when permitting facilities such as these as
19 well as the environmental impacts. Let me
20 stop there. I'm glad to answer any other
21 questions you might have, Your Honor, and
22 we appreciate the opportunity to be heard.
23 Thank you.

24 ADMINISTRATIVE LAW JUDGE: You have

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1 one minute, 30 seconds remaining.

2 MR. GRIESEMER: Good afternoon, Your
3 Honor.

4 ADMINISTRATIVE LAW JUDGE: Good
5 afternoon.

6 MR. GRIESEMER: I represent -- I'd
7 like to reserve two minutes for rebuttal.

8 ADMINISTRATIVE LAW JUDGE: Okay.

9 MR. GRIESEMER: I represent the New
10 York Propane Gas Association as well as the
11 Propane Gas Association of New England.
12 And I'd like to reiterate what Mr. Petrash
13 said and we fully support the project as
14 well. The New York Propane Gas Association
15 consists of 337 organizations and they are
16 involved in all facets of the propane
17 industry including retail. So the, and the

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18 Propane Gas Association of New England has
19 675 members in various states in New
20 England and as well they are also involved
21 in all aspects of the propane industry.
22 So we do have a unique perspective here
23 along with Mr. Petrash and I think that
24 this is a perspective that Your Honor and

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1 the Commissioner would find particularly
2 helpful in viewing this project as a whole.
3 We are seeking amicus status to not
4 provide new information. We are going to
5 rely on the information that the Petitioner
6 or the Applicant has already supplied.
7 However we also want to focus on the
8 importance of Article 23, Section 301 of
9 the ECL. The stated purpose and position
10 of this State with respect to minimizing
11 waste and encouraging the efficient storage
12 of gas.

13 And there's two key areas that we
14 would like to address with respect to
15 that, it's really the environmental
16 interests of the project and the consumer
17 benefit of the project. Let's talk about
18 the consumer benefit first. We've heard a
19 lot of discussions today, especially from
20 the communities about the fact that there
21 is no local benefit or there is no benefit
22 here to people in the greater Southern Tier

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23 and that's simply not true. Propane a
24 supply market. It is not an export market.

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1 And the fact there that there is more
2 supply means the price is are going to be
3 less, so there is a huge benefit for local
4 people. Especially considering that the
5 majority of users of propane happen to be
6 living in rural communities such as the
7 Town of Reading and other towns locally.

8 So these costs, in past, current
9 storage capacity is insufficient. I think
10 everybody realizes that. And in the past
11 we had to, retailers had to import propane
12 from away places such as other countries
13 and this increases the cost of
14 transportation significantly and guess who
15 pays for those costs. The consumer does.
16 So this project has an immense impact
17 locally and we're going to address that.
18 And whether it's in connection with the
19 alternatives argument or the benefit
20 argument, it's an important part of the
21 project that the Commissioner and Your
22 Honor needs to consider.

23 I also want to discuss the delivery
24 efficiency of the project as a whole. And

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1 traditionally having to transport propane
2 using diesel really defeats the point to
3 some extent of the efficiency of propane as
4 a whole because you're using diesel fuel to
5 transport propane to consumers and
6 ultimately not gaining the best benefit and
7 increasing more waste which is inconsistent
8 with Section 301.

9 ADMINISTRATIVE LAW JUDGE: Trains use
10 diesel, don't they?

11 MR. GRIESEMER: Trains use diesel to
12 some extent, but they also use electricity.

13 ADMINISTRATIVE LAW JUDGE: Do they
14 use electricity up here?

15 MR. GRIESEMER: No. They use diesel
16 up here, but they are much more efficient
17 than putting it on the back of a truck and
18 driving it. That being said, it's a much
19 more cleaner fuel, propane is a much more
20 cleaner fuel source. And I think everybody
21 here agrees with that. But importantly
22 what I would like to just say is it's going
23 to decrease cost volatility to the consumer
24 and that's really a huge benefit here.

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1 And getting back, getting to the
2 environmental consumption, which I will
3 touch on briefly, greater access to
4 propane, which this project will encourage,
5 will actually de-incentivize people to use

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6 alternative methods which is what Mr.

7 Petrash stated and some of those methods
8 are more dangerous. They are certainly
9 less efficient.

10 ADMINISTRATIVE LAW JUDGE: Such as?
11 MR. GRIESEMER: Electricity. If you
12 don't have access to cheap propane, then
13 you're more likely to heat your home using
14 your oven or with an electric space heater
15 or using some sort of a wood burning
16 furnace or even oil. And I'd also like to
17 wrap up with the security of the supply is
18 also a very important consideration here.
19 And having the ability to not have to rely
20 on foreign nations and foreign areas for
21 consumer consumption of propane is a huge
22 benefit to that. Storing it here, having
23 more propane here and having the consumer
24 to have access to the propane actually

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1 encourages New York State being an
2 independent operation for propane in the
3 storage facility.

4 ADMINISTRATIVE LAW JUDGE: Is the
5 propane that's going to be stored here
6 solely going to be generated in New York?

7 MR. GRIESEMER: No. No propane is
8 generated in New York. But the important
9 part is that it's stored here and it's
10 available for use here.

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11 ADMINISTRATIVE LAW JUDGE: Right.
12 But you're saying the benefit of not having
13 to rely on foreign countries, where is the
14 propane coming from?
15 MR. GRIESEMER: Great question. It's
16 coming from Texas, coming from the Midwest.
17 ADMINISTRATIVE LAW JUDGE: It's not
18 coming from Canada?
19 MR. GRIESEMER: It does come from
20 Canada.
21 ADMINISTRATIVE LAW JUDGE: Well,
22 that's a foreign country.
23 MR. GRIESEMER: It is. It is. But
24 the important --

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1 ADMINISTRATIVE LAW JUDGE: It's not
2 having to come to the Middle East; is that
3 it?
4 MR. GRIESEMER: I didn't want to go
5 there.
6 ADMINISTRATIVE LAW JUDGE: Or
7 Venezuela.
8 MR. GRIESEMER: I didn't want to go
9 there, Your Honor. What I mean is last
10 year when there was a fuel shortage we had
11 to actually import fuel from propane from
12 England. They had to bring tankers over.
13 So that's really what I'm referring to.
14 I'm not necessarily referring to Canada as
15 a whole. I'm just referring to the

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16 necessity to go to a foreign nation that we
17 hadn't historically had to go to in the
18 last few years because there's a shortage
19 of propane.

20 ADMINISTRATIVE LAW JUDGE: But having
21 a storage facility here does that -- oh,
22 yes, I got it. Never mind.

23 MR. GRIESEMER: And I'd like to just
24 wrap up by saying I do think we have a

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1 unique voice here and I do think we have a
2 unique perspective and we do support the
3 project and again I'll defer to Mr.
4 Petrash's analysis of the propane industry
5 as a whole. Thank you.

6 ADMINISTRATIVE LAW JUDGE: Thank you.
7 Nine minutes for the United Steel Workers.

8 MR. ALESSI: Nine?

9 ADMINISTRATIVE LAW JUDGE: I'm sorry.
10 Ten.

11 MR. ALESSI: Thank you. Thank you,
12 Your Honor. The USW has put in a petition
13 and as agreed I will stick to their
14 petition with regard to the basis for their
15 amicus status in support of the
16 application. As indicated in page 2 of
17 their petition, they speak to the public
18 benefits of the project, boosting the
19 economy of the region, helps to lower
20 propane costs for consumers and meet the

21 Finger Lakes. IC Transcript 2-13-15 Session [Doc 00048].txt
energy needs of the State of New York.

22 Helps retain jobs.

23 ADMINISTRATIVE LAW JUDGE: Are they
24 proposing to provide information that is,

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1 regular information that is not already in
2 it?

3 MR. ALESSI: Pardon me?

4 ADMINISTRATIVE LAW JUDGE: Are they
5 proposing to provide information for the
6 record that isn't already in the record?

7 MR. ALESSI: Absolutely not, Your
8 Honor. That is what I was going to get to.
9 I was going to give you citation by
10 citation where it is in the record, every
11 single thing I will mention here. The
12 report, fortunately the Amicus starts with
13 their footnotes and I will continue it
14 because, they reference the Applicant here
15 so I will have that document.

16 Your Honor, public need is very, very
17 important in this matter. It is very
18 important because it's part of the basis
19 upon which the Commissioner will do his
20 balancing. And it is not an insignificant
21 matter and it is important because out of
22 all of the issues we've discussed here
23 today, this affects the most people in a
24 positive way. Their energy costs and

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1 reliability of people is about the most
 2 fundamental thing you can have. The power
 3 to put your lights on in your home. To
 4 feel secure in your home, that your alarm
 5 system if you had one. To be able to make
 6 sure when you're sick or infirm you have
 7 appropriate heating. It goes on and on and
 8 on. It's one of the most fundamental
 9 aspects of our lives. Substitute, most of
 10 us perhaps do not use propane in this room,
 11 but there are an extraordinary number of
 12 people in this community who do, in this
 13 area of the state. Just think if you
 14 didn't have electricity. Think if you
 15 didn't have the natural gas in your home to
 16 live. It's an extraordinarily important
 17 aspect of daily lives. And the number of
 18 people it will benefit in this county is
 19 extraordinary because of the number of
 20 people who depend upon propane. And that's
 21 what the USW goes to in talking about in
 22 their petition in terms of the benefits
 23 that this project will have.

24 With regard to their interest, Your

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1 Honor, they speak to the fact that the USW
 2 has an extraordinary track record in
 3 support of clean energy. They consider
 4 propane to be a clean energy source. They

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5 work on projects for clean energy projects
6 daily in their lives. They have an
7 extraordinary interest in making sure that
8 they get to express their own views of what
9 should be the balance of energy and clean
10 energy. So their environmental interest
11 and their interest in general is
12 established.

13 With regard to the needs that they
14 speak about for, they talk about the energy
15 needs of the State of New York and the
16 entire Northeast. That's on page 2. And
17 with regard to that particular issue, you
18 can turn to the DSEIS in this proceeding
19 that the USW will rely upon. I'm going to
20 do it from memory. I think it's pages 12
21 and 13 that talk about these very issues.
22 Talk about the volatility that occurs and
23 has occurred. You've heard from other
24 amici about this volatility. Volatility is

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1 not some academic, ethereal concept. It
2 affects how much people have to pay for a
3 fundamental need. They don't get to use
4 propane as a discretionary spending item in
5 their budget. They must have it. What
6 happened to people, as we put in the dEIS,
7 their costs went up in an extraordinary
8 amount and it was sudden and it was
9 unplanned. Those are not the types of

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10 public situations anybody should want to
11 have.

12 Who are these people who are
13 affected? These are seniors. These are
14 some of the most vulnerable people when it
15 comes to these particular types of issues.
16 So the public need is very, very
17 compelling.

18 With regard to the support for this
19 project, USW is proud to have been
20 participating in the support for this
21 project. Over a thousand signatures of
22 residences, over 300 businesses, some of
23 which are wineries who have supported this
24 particular project. So they work in the

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1 community. They live in the community.
2 They are members. They support the project
3 and they are out there advancing their
4 support.

5 ADMINISTRATIVE LAW JUDGE: Was that
6 in the public comments somewhere, this
7 petition?

8 MR. ALESSI: Oh, yes.

9 ADMINISTRATIVE LAW JUDGE: Okay.

10 MR. ALESSI: Yep. It's in there.

11 ADMINISTRATIVE LAW JUDGE: All right.
12 You saw them last night at 1:00?

13 MR. ALESSI: No, I didn't, no, I
14 didn't go read through them last night at

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15 1:00. In terms of the aspects of, further
16 aspects of the public benefit, Your Honor,
17 what we have focused on the region, and I
18 want to say something about the region. I
19 want to talk about the public support. The
20 Schuyl er County Legislature, and the USW
21 has participated in getting this support,
22 has the support of the Schuyl er County
23 Legislature. And there's a resolution that
24 has been passed in support of it. So while

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1 there are two legislators here today,
2 members of that legislature, I would like
3 to make sure, it's a public record, the
4 support that the Schuyl er County
5 Legislature has and the USW is proud to
6 have participated in the establishment of
7 that support. And I would also, Your
8 Honor, in support of the petition in terms
9 of the, how it benefits the public and
10 where that's reflected in the Schuyl er
11 County 2014 County Comprehensive Plan.

12 ADMINISTRATIVE LAW JUDGE: Does the
13 petition of the United Steel Workers talk
14 about the Schuyl er County Legislature?

15 MR. ALESSI: Your Honor, the petition
16 does not, however, we have heard
17 discussion --

18 ADMINISTRATIVE LAW JUDGE: Yeah, but
19 I think we're limiting his discussion to

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20 what was raised by the United Steel Workers
21 in their petition.

22 MR. ALESSI: Your Honor, we talked,
23 and that's where I was going to go, on page
24 2 of the petition it talks about help, the

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1 Crestwood project will help to boost the
2 economy of the region and that's where I
3 was going with the County Comprehensive
4 Plan. It talks about on page 68 the
5 economic climate of the Town of Reading,
6 the host community.

7 ADMINISTRATIVE LAW JUDGE: Do they
8 cite the county plan?

9 MR. ALESSI: They do not cite the
10 county plan.

11 ADMINISTRATIVE LAW JUDGE: I think
12 for purposes of this discussion that we
13 will allow them to brief what they think is
14 appropriate on that.

15 MR. ALESSI: Okay. Your Honor, with
16 regard to the -- so am I not able then to
17 reference the Environmental Impact
18 Statement that everybody else has
19 referenced if it's not in their petition?

20 ADMINISTRATIVE LAW JUDGE: If they
21 make arguments about matters that appear in
22 the environmental impact statement, that's
23 fine. I don't want to give you the
24 Applicant rebuttal time on issues that

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1 we've discussed already.

2 MR. ALESSI: Well, Your Honor, I'm
3 standing in the shoes of the USW. And I
4 think I'm entitled on their behalf to speak
5 to the issues on page four where they talk
6 about SEQRA in Article 8.

7 ADMINISTRATIVE LAW JUDGE: Okay.

8 MR. ALESSI: And as I said to you, I
9 would provide the citation to each part of
10 this petition so that you could be assured
11 that I'm do that.

12 ADMINISTRATIVE LAW JUDGE: Proceed.

13 MR. ALESSI: Thank you. So with
14 regard to SEQRA, they cite in their
15 petition, the issue here is with regard to
16 the balancing that Your Honor talked about,
17 that these economic considerations are very
18 important and when you had industry, right,
19 this industry and the Town of Reading
20 speaks about that it is going to have a
21 positive impact. We talk about that in the
22 EIS. The EIS has that. And when you see
23 at bottom source Crestwood Midstream,
24 source Crestwood Midstream, they are

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1 referring to the Kamoin (phonetic) report.
2 And in the Kamoin report, and I want to

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3 underscore this, the results of the study
4 indicate that the net economic impact of
5 the project is expected to be positive.
6 Overall the project will have a one time
7 economic impact to Schuyler County of 58
8 jobs, jobs of USW people including 2.3
9 million dollars in earnings and 5.6 million
10 in economic output. Additionally it will
11 generate an annual economic impact of 17
12 jobs, \$684,000 in earnings and \$507,000 in
13 indirect economic output in the county.
14 The net fiscal impact of the project, i.e.
15 municipal revenues less expenditures
16 related to the project, will be \$613,000
17 annually. Those are all extraordinarily
18 significant numbers in a positive way.

19 So when we've been talking about the
20 balancing that the Commissioner needs to
21 do, he balances both sides of the economic
22 coin. And we want to on behalf of USW make
23 sure that the record is very robust about
24 the virtually uncontroverted, positive

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1 economic impacts both individual and net
2 benefits because what happens is the report
3 that is referenced here in their petition,
4 the Kamoin report, Kamoin was
5 intellectually honest. They said, you
6 know, there are some costs that are going
7 to go the community from response and other

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8 issues, but there is benefits and the net
9 benefit is still going to be \$613,000
10 annually.

11 So in sum, Your Honor, USW is a very
12 deep member of the community. They have
13 participated before the legislators. They
14 participate in clean energy jobs. And
15 their interest is to show the economic
16 benefits, but also the clean energy because
17 of the low carbon content of the propane
18 fuel. Thank you.

19 ADMINISTRATIVE LAW JUDGE: Thank you.

20 MR. WEINTRAUB: Your Honor, I have
21 just some short, short comments. One has
22 to do with the place of discussion of
23 public aid. And contrary to NRDC's
24 statement, it is as you've sort of

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1 indicated there to balance adverse
2 environmental impact findings. And I know
3 you're familiar with Judge Burmaster
4 (phonetic).

5 ADMINISTRATIVE LAW JUDGE: I know him
6 pretty well.

7 MR. WEINTRAUB: And he has an
8 excellent discussion of it on page 35 of
9 the Seneca Meadows decision 2012, so I
10 won't say anything more about that.

11 ADMINISTRATIVE LAW JUDGE: I'm sorry.
12 Page 5?

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13 MR. WEINTRAUB: Page 35 of the Seneca
14 Meadows decision of 2012.
15 ADMINISTRATIVE LAW JUDGE: You're
16 talking about his hearing report?
17 MR. WEINTRAUB: Yeah.
18 ADMINISTRATIVE LAW JUDGE: I don't
19 think the Commissioner's decision was 35
20 pages long, was it? Judge Burmaster tends
21 to write quite a bit.
22 MR. WEINTRAUB: This is a very
23 cogent, this is very cogent.
24 ADMINISTRATIVE LAW JUDGE: Oh, good.

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1 MR. WEINTRAUB: Additionally, and not
2 to overload your reading, but there is an
3 interesting historic discussion on
4 underground storage and the bill jacket to
5 the underground storage law. And just to
6 save everybody's eyes we will append a copy
7 of the relevant bill jacket rather than
8 having people go find it.
9 ADMINISTRATIVE LAW JUDGE: What is
10 that?
11 MR. WEINTRAUB: The bill jacket to
12 the underground storage law of 1962.
13 ADMINISTRATIVE LAW JUDGE: The entire
14 bill jacket?
15 MR. WEINTRAUB: We're not, you don't
16 need to read the entire bill jacket. There
17 is just discussion of the underground

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storage law and the need to create
19 underground storage in New York because of
20 shortages of propane. And I'm doing that I
21 have to say from memory because I
22 researched in connection with something
23 else, but I remember there was a discussion
24 in the bill jacket on that. So my memory

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1 may be wrong, but I think it's right.
2 And finally, the other thing I wanted
3 to mention is that there is a decision,
4 that there's a finding statement that the
5 Department issued in the Town of
6 Houndsfield.
7 ADMINISTRATIVE LAW JUDGE: I'm sorry.
8 The town of?
9 MR. WEINTRAUB: Houndsfield.
10 ADMINISTRATIVE LAW JUDGE: Hounds-
11 field?
12 MR. WEINTRAUB: Yeah. It's a wind
13 project on Lake Ontario. And there is a
14 good analysis of cumulative and public
15 needs and how that is handled in a finding
16 statement and that case was actually
17 litigated, Town of Henderson versus DEC,
18 and the Department was upheld through the
19 appellate division.
20 ADMINISTRATIVE LAW JUDGE: Am I going
21 to be able to find that public statement?
22 MR. WEINTRAUB: It's on, it's on the

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DEC's website, but you will append it to
24 our brief so you don't have to, we'll just

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1 append the relevant sections from it so you
2 don't have to read the whole thing. That's
3 all I have to say. Thank you.

4 ADMINISTRATIVE LAW JUDGE: Thank you.
5 So there is rebuttal time if you wish to
6 use it. You've got one minute, 30 seconds.

7 MR. PETRASH: Your Honor, with your
8 leave, I don't intend to rebut, but I would
9 like to respond to a question you asked my
10 colleague about Canadian imports and the
11 like. Yes, it is the case that the United
12 States imports propane from Canada at the
13 moment. Those this year will be less than
14 last year as a result of the reversal of
15 the Cogent pipeline in the midwest, but
16 nevertheless because of the increase in
17 shale gas production most of that is wet
18 gas that produces propane. Propane
19 supplies have been increasing dramatically
20 and you can see this all on the US DOE DIA
21 website. The result is US production of
22 propane is more than sufficient to meet US
23 propane consumption needs for both
24 residential, petrochemical, agricultural,

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1 etcetera. So that is a real benefit of
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2 shale production. Thank you.

3 MR. GRIESEMER: Judge, I have no
4 rebuttal.

5 ADMINISTRATIVE LAW JUDGE: Thank you.
6 So that concludes the oral argument portion
7 of the issues conference. So let me go off
8 the record.

9 (RECESS TAKEN.)

10 ADMINISTRATIVE LAW JUDGE: We just
11 had a brief discussion about the briefing
12 schedule for this matter. And it's
13 basically been agreed that once the
14 transcript is available, which will be in
15 generally about two weeks or so, that we
16 will have the additional briefing will
17 occur 30 days thereafter and then
18 responsive briefing will be 30 days after
19 the opening briefing is filed. Requests
20 for replies will be by leave of the
21 administrative law judge as is provided for
22 under regulations. Once the transcript is
23 available, I will issue an e-mail to the
24 parties establishing the specific dates of

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1 when the various submissions are going to
2 be due. And all the previous filing rules
3 that we've been following in this
4 proceeding will apply to the briefs. So
5 e-mail service will be fine provided there
6 is a hardcopy followed by mail. Is there
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7 anything else at this point from anyone?
8 So hearing none, we stand adjourned at
9 1:52.

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

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

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22 DELORES HAUBER

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