

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

In the Matter of  
the Application for a Mined Land Reclamation Permit Pursuant to  
Article 23 of the Environmental Conservation Law of the State of  
New York to Develop and Operate the Meadow View Mine in the Town  
of Waterloo, Seneca County, New York,

- by -

**Seneca Meadows, Inc.,**

Applicant.

DEC Application No. 8-4538-00094-00001

INTERIM DECISION OF THE COMMISSIONER

October 26, 2012

INTERIM DECISION OF THE COMMISSIONER

Seneca Meadows, Inc. (Seneca Meadows or applicant) proposes to develop and operate a 120.8-acre clay mine (mine) on the north side of State Route 96 between Burgess and Powderly Roads in the Town of Waterloo, Seneca County. The proposed mine, to be called the Meadow View mine, is located on parcels owned by applicant. Over the course of the proposed mine's estimated 11-year operational life, approximately 3.4 million cubic yards of material would be excavated and used primarily for construction and operation of the adjacent Seneca Meadows landfill that applicant owns.

Pursuant to Environmental Conservation Law (ECL) article 23, title 27, the proposed mine requires a Mined Land Reclamation permit from the New York State Department of Environmental Conservation (DEC or Department). Additionally, a State Pollution Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (GP-0-06-002) is required.

Pursuant to the State Environmental Quality Review Act (SEQRA), Seneca Meadows conducted an environmental review for the proposed mine. The Department, as lead agency, determined that the proposed mine may have a significant adverse environmental impact and issued a positive declaration on July 29, 2009. A public scoping meeting was subsequently held and a final scope issued. A two-volume Draft Environmental Impact Statement (DEIS) was accepted by the Department on September 28, 2011 (see Issues Conference Exhibits 3, 15 and 16), and the application deemed complete in accordance with ECL article 70 and part 621 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR).

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (ALJ) Edward Buhrmaster. A legislative hearing and issues conference were subsequently held. Participating in the issues conference, in addition to Department staff and applicant, were Concerned Citizens of Seneca County (CCSC), Dixie Lemmon, Richard Westfall, and Gary Westfall (hereinafter, petitioners).

In the Rulings of the Administrative Law Judge on Issues and Party Status dated March 26, 2012 (issues ruling), Judge Buhrmaster determined that, with respect to air quality impacts, "an issue exists as to whether a sufficient analysis of fine particulate matter [PM] has been performed, consistent with DEC

policy" (Issues Ruling, at 28). The ALJ determined that no other issues would be subject to adjudication. Additionally, the ALJ ruled that the petitions of CCSC, Dixie Lemmon, and Richard Westfall be granted and consolidated under the name of CCSC for all future proceedings in this matter because Ms. Lemmon and Mr. Westfall, who are members of CCSC, "offer the same input and viewpoint as the group [CCSC] itself" (Issues Ruling, at 83).

CCSC filed an appeal from the issues ruling (appeal). Responses to the appeal were received from Department staff (Department staff response) and Seneca Meadows (Seneca Meadows response), respectively.<sup>1</sup>

For the reasons that follow, the appeal is rejected and the ALJ's issues ruling is affirmed.<sup>2</sup>

#### **APPLICABLE STANDARDS**

My task on this interim appeal is to determine whether the ALJ adhered to the standard for adjudicable issues as set forth in 6 NYCRR 624.4(c). In this proceeding, Department staff expressed no objections to the project (see Hearing Transcript [Tr], at 20; Issues Ruling, at 8). In addition, Seneca Meadows expressed no objection to the draft permit that Department staff prepared (see Tr, at 24; Issues Ruling, at 8; Issues Conference Exh 7 [draft permit]); see also letter dated December 6, 2011 from DEC Assistant Regional Attorney Lisa Schwartz to the ALJ [circulating new language for inclusion in the draft permit] and letter dated December 28, 2011 from Scott M. Turner, Esq., to the ALJ, at 1 [noting applicant's agreement to the proposed additional permit language]).

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<sup>1</sup> Gary Westfall had previously submitted a petition for party status that the Office of Hearings and Mediation Services received on November 14, 2011, one week after the filing deadline of November 7, 2011 (see Issues Conference Exhibit [Exh] 11). The ALJ denied the late-filed petition (see Issues Ruling, at 81-82), and Mr. Gary Westfall did not appeal from the ALJ's ruling with respect to party status.

<sup>2</sup> As discussed in this interim decision, in the event that it is determined that the permit application be granted, staff will be directed to modify the draft permit for the project (see Issues Conference Exhibit [Exh] 7) to add language that would require applicant to notify Department staff within two hours if any test pit excavations or borings detect bedrock within five (5) feet of the final mine floor.

In accordance with the Department's permit hearing regulations (see 6 NYCRR Part 624), where, as here, contested issues are not the result of a dispute between an applicant and Department staff (see 6 NYCRR 624.4[c][1][i] and [ii]), but are proposed by third parties, an issue must be both "substantive" and "significant" to be adjudicable (see 6 NYCRR 624.4[c][1][iii]).

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

An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

In order to participate as a party in a Part 624 proceeding on a permit application, the potential party must file a petition in writing that, among other things, identifies the precise grounds for opposition and support (see 6 NYCRR 624.5[b][1][v]). Pursuant to 6 NYCRR 624.4(c)(4), where Department staff has determined that an applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable requirements of statute and regulation, "the burden of persuasion is on a potential party proposing an issue to demonstrate that it is both substantive and significant."

A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues. The offer of proof must specify "the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" (see 6 NYCRR 624.5[b][2][ii]). Judgments about the strength of the offer of proof must be made, among other things, in the context of the analysis of Department staff (see Matter of NYC Department of Sanitation [Southwest Brooklyn Marine Transfer Station], Decision of the Commissioner, May 21, 2012, at 5); see also Matter of Mirant Bowline, LLC, Interim Decision of the Commissioner, June 20, 2001, at 3).

The submission of a petition for party status is not a pro forma exercise. Conducting an adjudicatory hearing "where 'offers of proof, at best, raise potential uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [quoting Matter of AKZO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]).

In order that the issues conference serve a worthwhile function, it is not meant to merely catalogue areas of dispute, but rather makes qualitative judgments as to the strength of the offers of proof and related arguments. With respect to the offer of proof, any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration at this stage. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions. In areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue (see, e.g., Southwest Brooklyn Marine Transfer Station, at 6; Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, December 29, 2006, at 6; Matter of Mirant Bowline, LLC, Interim Decision of the Commissioner, June 20, 2001, at 3; Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2). Furthermore, absent express authorization by the ALJ or the Commissioner, no offer of proof may be supplemented once the issues conference is completed.

With respect to SEQRA, where, as here, the Department as lead agency has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the Department to make findings required pursuant to SEQRA will be made in accordance with the same standards that apply to the identification of issues generally (see 6 NYCRR 624.4[c][6][i][b]).

Where SEQRA issues are being challenged, I must determine whether Department staff identified the relevant areas of

environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination (see, Matter of Metro Recycling & Crushing, Inc., Decision of the Commissioner, April 21, 2005, at 6 [citing Matter of Chemical Specialties Manufacturers Assoc. v. Jorling, 85 N.Y.2d 382, 396-97 (1995)]). If Department staff's conclusion is "reasonable and supported by the record, it will be upheld" (Matter of Metro Recycling & Crushing, Inc., at 6), and a substantive and significant issue will not be found. Furthermore, SEQRA does not require the Department to use the adjudicatory forum to resolve or otherwise address comments on the DEIS where substantive and significant issues are not raised (see, e.g., Matter of Wilmorite, Inc., Interim Decision of the Commissioner, October 7, 1981, at 3-4).

### DISCUSSION

As noted, the ALJ determined that an issue with respect to air quality impacts, specifically whether a sufficient analysis of fine particulate matter has been performed consistent with DEC policy, was adjudicable. He ruled that the remaining issues did not raise any substantive and significant issues and would not be adjudicated.

CCSC, in its appeal, challenges the ALJ's ruling with respect to the following:

- (1) environmental justice;
- (2) the comments of Ms. Barbara Warren;
- (3) traffic and traffic impacts;
- (4) the reclamation plan; and
- (5) impacts on water supplies.<sup>3</sup>

Based upon my review of the record, and as discussed below, the ALJ's ruling is hereby affirmed.

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<sup>3</sup> Issues relating to visual impacts and wetlands were raised in CCSC's petition for party status but were not pursued at the issues conference (see Tr, at 335-337; Issues Ruling, at 10). On appeal, questions related to wetland mitigation were included in Ms. Warren's comments (see Appeal, at 21). However, as the wetland mitigation issue was withdrawn by petitioners at the issues conference, it cannot be considered upon appeal.

## Environmental Justice

CCSC, for the first time on appeal, contends that no "environmental justice impact [was] prepared according to the [Department's] environmental permit review process" and cites to Commissioner Policy 29, Environmental Justice and Permitting (March 19, 2003) (CP-29) (Appeal, at 8). CCSC states that "[e]ach application must have an environmental justice analysis of impacts" and "DEC must compile all of the environmental justice analyses to determine if, on the whole, development of this mine is placing an undue burden on a community of concern" (id.).

CCSC provides no reason why environmental justice concerns were not raised in its petition or during the issues conference. Furthermore, CCSC did not seek to obtain the ALJ's permission to raise this new issue. Accordingly, this issue was not timely raised. A participant in an issues conference cannot raise new issues after its petition for party status is submitted and the issues conference is held, unless it seeks and is granted permission by the ALJ. Otherwise, as here, the new issue is "untimely and unauthorized" and cannot be heard on appeal (see Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5).

Even if CCSC had timely raised its environmental justice concerns, CCSC has not demonstrated that those concerns constitute a significant and substantive issue. In fact, CCSC's contentions are in error and based on an incorrect interpretation of CP-29. CP-29 does not apply to permit applications under ECL article 23 or to general permit applications which, as noted, are the subject of this proceeding (see CP-29, at 6-7 [listing permit applications subject to environmental justice review which does not include title 27 of article 23 or general permits]).

Further, even if CP-29 were applicable, no potential environmental justice area<sup>4</sup> exists in the Town or Village of Waterloo (see Department staff response, at 2 [referencing use of an integrated geographic information system application]). Department staff noted that no potential environmental justice area is located within six miles of the proposed mine and that

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<sup>4</sup> A "potential environmental justice area" is defined as "a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies" (CP-29, at 4).

no demonstration was made that the proposed mine would have any potential significant adverse impact on a potential environmental justice area (see Department staff response, at 2).

#### Comments of Ms. Barbara Warren

CCSC's appeal includes comments from Ms. Barbara Warren on the ALJ's issues ruling, in which Ms. Warren emphasizes that a key issue is whether "clean water would be drawn into the mined excavation" (Appeal, at 16 [emphasis deleted]). She expresses concerns that contaminated water might be drawn into the mining site (see Appeal, at 16-18). Attached to her remarks is a copy of the comments that she had prepared for CCSC's use at the issues conference (see Issues Conference Exh 8, Exhibit C).

Ms. Warren contends that her comments that were contained in CCSC's petition for party status were not considered by the ALJ, and therefore, "an appeal. . . should be automatically accepted" here (Appeal, at 16).

Based on a review of the record, it is clear that the special conditions in the draft permit, the analysis in the DEIS, and Department staff's evaluation of the application, have addressed the concerns that Ms. Warren raises (see, e.g., DEIS, at 3-2 to 3-6 [alternatives analysis]; DEIS Table 3-1 [alternative sites]; DEIS §§ 2.2.1 & 2.2.2, and DEIS Appendix N [groundwater and surface water analysis]; Draft Permit Special Condition 1 [conformance with plans, including Mined Land Use Reclamation Plan and Stormwater Pollution Prevention Plan dated April 2010, revised June 2011]). Moreover, the ALJ gave due consideration to the concerns set forth in Ms. Warren's comments (see, e.g., Issues Ruling, at 21-22 [contamination concerns], 73-75 [alternatives], 77-78 [project segmentation], 78-79 [reclamation plan]).

There is no support for Ms. Warren's argument that her comments should be identified as issues for adjudication. The comments are general and speculative, raising only potential uncertainties. Notwithstanding the foregoing, her concerns were considered and the record demonstrates that none raised any substantive and significant issues.

#### Traffic and Traffic Impacts

CCSC noted the following reasons for its appeal on traffic issues: (1) Burgess Road was mischaracterized as a secondary

road; (2) the proposed crossing at Burgess Road would result in negative traffic impacts; and (3) highway services are not maintained and changes to the local traffic infrastructure were not evaluated (see Appeal, at 3).

CCSC contends that the proposed mine would "result in significant adverse traffic impacts[,] . . . impose an unmitigated burden from interruption of otherwise normal traffic flows" and would "impose a threat to public safety" (Appeal, at 3). In support of its position, CCSC includes exhibit A, which lists businesses in the area, and exhibit C, which summarizes traffic counts on various roads, including Burgess Road, where the proposed mine would be located. CCSC argues further that traffic generated from the proposed project does not maintain the existing level of highway service on Burgess Road (see Appeal, at 5).

During the issues conference deliberations, CCSC expressed concerns about traffic impacts from trucks traversing the proposed Burgess Road crossing, but did not provide a credible offer of proof to support their contentions. They identified no expert witnesses for this issue and did not specify the nature of evidence that would be presented. On appeal, their contentions regarding traffic (see Appeal, at 3), and of "a constant wait and back-up of traffic for the right-of-way authority to proceed" for the proposed Burgess Road crossing (see Appeal, at 4) are conclusory and speculative. With respect to Burgess Road, the ALJ thoroughly addressed traffic concerns, noting in particular how the proposed mining project would reduce traffic on major roads, leading to reduced levels of air pollution, as well as related traffic impacts (see Issues Ruling, at 49-52). He also noted the failure of petitioners to make an adequate offer of proof on traffic issues (see, e.g., Issues Ruling, at 50 [no expert offer of proof] and 51 [no offer of proof to the contrary]).

The DEIS provided a detailed review of traffic and transportation issues, including an evaluation of potential impacts (including future soil delivery generation and distribution and the Burgess Road crossing) and mitigation measures (see DEIS § 2.4). As part of its review, applicant has fully considered and addressed other traffic-related concerns (see id. [using soil from the proposed mine for the landfill instead of from offsite locations to the west of the site resulting in decreased air emissions, fuel consumption, and traffic on the local and State highways around the site, and mitigating the impact at the proposed Burgess Road crossing with

a four-way stop sign, among other things]; Table 2-6 [traffic counts of intersections in Waterloo]; Figure 2-11 [map of current truck route and truck route for proposed mine]; see also Tr, at 205-206).

Furthermore, the Department, as the lead agency responsible for ensuring compliance with SEQRA, appropriately relies upon the expertise of other agencies to determine the adequacy of SEQRA review when aspects of that review fall within the expertise and jurisdiction of such other agencies. In this matter, the Seneca County Highway Department, which has jurisdiction over traffic matters in the area, indicated that the design of the Burgess Road crossing would be acceptable (see Issues Ruling, at 48; DEIS, at 2-39 to 2-40; and DEIS Appendix G [letter dated February 9, 2009 from Jason T. McCormick and Roy Gates to Seneca Meadows, Inc.]).<sup>5</sup>

No substantive and significant issue has been raised.

#### Reclamation Plan

CCSC states that the ALJ erred by not finding an adjudicable issue regarding the reclamation plan for the proposed mine. Specifically, CCSC contends that: (1) applicant's reclamation plan does not include specific plans for redevelopment of the site and, therefore, does not meet the requirements set forth in 6 NYCRR 422.3; (2) the time for completing the ponds proposed for the site will be greater than the two year allowable timeframe under the regulations; and (3) the proposed ponds will create a nuisance and attractive hazard (see Appeal, at 5-7).

CCSC makes conclusory assertions that Seneca Meadows' reclamation plan is "not a road map to reclamation" (Appeal, at 6). CCSC has not presented any credible offer of proof that the reclamation plan does not meet legal requirements, as set forth in 6 NYCRR 422.3. As detailed in the Mined Land Use Reclamation Plan (Plan)(see Issues Conference Exh 14), the mine site will be reclaimed within the prescribed period (see Plan, at 7-3; see also Department staff response, at 3-4).

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<sup>5</sup> With respect to CCSC's contention that Burgess Road is no longer a secondary road, that fact, even if true, would not change the analysis. Applicant's traffic analysis and traffic counts (see, e.g., DEIS § 2.4 and DEIS Appendix G) demonstrate that traffic considerations were fully evaluated. Furthermore, as Department staff notes, its review of traffic levels, traffic safety, or changes to local infrastructure, would not be affected by the classification of Burgess Road (see Department staff response, at 8).

Contrary to CCSC's claims, Seneca Meadows has addressed the reclamation requirements required by 6 NYCRR 422.3. Its plan discusses the disposition of excavated and stockpiled material, creation of two sediment ponds, sidewall slopes and benches or flat areas to act as safety benches, and revegetation of the graded areas (see Plan, at 7-1 to 7-3). Department staff has determined that the reclamation plan is acceptable and "complies with 6 NYCRR 422.3" (Department staff response, at 3 [noting suitability of final reclamation for future uses]; see also Tr, at 278-280).

The ALJ noted that the proposed mine site will be restored to make it suitable for open space, wildlife habitat, or passive recreational use, which is compatible with existing land uses in the area, and is consistent with the regulatory requirements (see 6 NYCRR 422.3[b]; Issues Ruling, at 79-80; Plan, at 7-1 to 7-3). Additionally, the Plan details that construction of the two ponds will be timely completed after mining ceases (see Plan, at 7-3 [North Pond to be reclaimed approximately eight to twelve months into Phase II of the excavation and South Pond to be reclaimed approximately eight to twelve months after completion of Phase IV]).<sup>6</sup>

CCSC also contends that the six-foot berms, slope, and benches are not adequate protective measures and that the site will be a "nuisance and attractive hazard" to the public (see Appeal, at 7). Again, CCSC speculates as to these potential impacts without any offer of proof for its contentions. Furthermore, as Department staff indicated, the sloping and benches are conditions typically required in mine permit applications, and Seneca Meadow's pond design meets these conditions (see Tr, at 288-289; see also Department staff response, at 4).

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<sup>6</sup> In contending that the "ponds do not appear to have 'continuous movement of water'" (Appeal, at 6), CCSC raises this issue for the first time on appeal. CCSC's raising new arguments on appeal is untimely, and an appeal from an issues ruling is not an appropriate vehicle to attempt to supplement offers of proof or otherwise new information (see Southwest Brooklyn Marine Transfer Station, at 20). Even if the argument were timely, no basis is provided for this contention. Furthermore, as described in the permit application and discussed by Department staff (see Department staff response, at 3), the ponds will be subject to evaporation, percolation, groundwater inflow and precipitation, all of which will enter the ponds naturally (see 6 NYCRR 422.3[d][2][iv][c]), and an aerator will be installed if the presence of stagnant water results in significant odors or algae build-up (see DEIS, at 2-20; Department staff response, at 3).

Department staff determined that applicant's reclamation plan complies with the regulatory requirements in 6 NYCRR 422.3, and I find nothing in the record that would disturb or otherwise call staff's determination into question.

### Water Supply Impacts

CCSC contends that the proposed mine's impacts on water supplies surrounding the site were not fully evaluated. On appeal, CCSC identifies the following contentions and concerns: (1) a Principal Aquifer<sup>7</sup> is located on the mine site (noting issues relating to aquifer mapping, existence of high yielding deposits and boundary situations); and (2) insufficiency of hydrogeologic data in the DEIS (see Appeal at 10-15).

### Contamination of "Principal" Aquifer

CCSC maintains that the proposed mining operations will expose a Principal Aquifer located at the proposed mine site to contamination (see Appeal, at 10). It contends that applicant relied on "outdated and incomplete" aquifer mapping to determine whether a Principal Aquifer is on-site, referencing applicant's use of the New York State Department of Health "GIS clearing house web site" (Appeal, at 11). Furthermore, CCSC asserts that the "Unconsolidated Aquifers in Upstate New York - Finger Lakes Sheet" by Todd S. Miller, United States Geological Survey (USGS) Water Resources Investigation report 87-4122 (Miller/USGS Map), should have been used, and that "this map indicates that a confined, unconsolidated aquifer capable of yielding 500 gpm [gallons per minute] is mapped on the site" (id.)<sup>8</sup>.

Based on the record before me, no evidence exists of a Principal Aquifer at the proposed mine site. The ALJ fully addressed this question, in reviewing the applicable Department guidance (see Issues Conference Exh 17 [DEC Division of Water and Technical Guidance Series (TOGS) memorandum dated October 23, 1990 ["Primary and Principal Aquifer Determinations"] [TOGS

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<sup>7</sup> A "principal aquifer" is defined as an aquifer "known to be highly productive or whose geology suggests abundant potential water supply, but which [is] not intensively used as [a] source[] of water supply by major municipal systems at the present time" (TOGS 2.1.3, at 2 [Issues Conference Exh 17]). The aquifer's area, thickness of saturated deposits, and obtainable well yields also help determine whether an aquifer is a principal aquifer (see id. at 6).

<sup>8</sup> I note also that applicant and the ALJ had considered USGS resource information (see, e.g., Issues Ruling, at 19 and DEIS, at 2-12 to 2-13; see also Seneca Meadows response, at 8).

2.1.3]) and properly found that no issue exists (see Issues Ruling, at 18-19). Department staff, in its response to the appeal, addresses the Miller/USGS map, and sets forth the reasons why any aquifer on the site does not meet the definition and guidance criteria for a Principal Aquifer (see Department staff response, at 5).<sup>9</sup>

Even assuming for the sake of argument that any aquifer at the site has a potentially high yield as CCSC contends, CCSC is unclear whether its alleged "principal" aquifer is in the unconsolidated deposits immediately beneath the ground surface or in the deeper bedrock (see Issues Ruling, at 19; see also CCSC Petition, Exh A [Issues Conference Exh 8] [discussion of potential impacts of mining on underlying bedrock aquifer at proposed mine site]). Bedrock aquifers, regardless of their potential yield, are not principal aquifers (see TOGS 2.1.3, at 4).

CCSC argues that the data in the DEIS indicates that the lower glaciolacustrine (LGL) unit's hydraulic conductivity is  $6.8 \times 10^{-2}$  centimeters per second (cm/s), and therefore is indicative of high permeability and yield (Appeal, at 12). The record, however, does not support CCSC's contention that a high yielding aquifer underlies the proposed mine site. Table 1-1 of Appendix N of the DEIS lists the LGL unit's horizontal hydraulic conductivity as  $6.8 \times 10^{-2}$  ft/day (feet per day) (see DEIS Appendix N, at 1-7), not cm/s as CCSC contends.<sup>10</sup> In fact, as Department staff notes, the LGL unit's hydraulic conductivity is indicative of an area of low permeability (see Department staff response, at 6; see also Tr 67-68 [well data does not support a finding that the aquifer on site is a Principal Aquifer]).<sup>11</sup>

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<sup>9</sup> CCSC misrepresents the Miller/USGS Map, as both it and DEIS Figure 2-5 depict a confined aquifer with a potential yield over a wide range -- from 5 to more than 500 gpm, and not at 500 gpm as CCSC contends (see DEIS Figure 2-5; DEIS 2-12; see also Department staff response, at 5).

<sup>10</sup> The LGL unit's vertical hydraulic conductivity is also listed in ft/day ( $2.3 \times 10^{-4}$  ft/day) (see DEIS Appendix N, Table 1-1, at 1-7). I note that Mr. Gould, CCSC's expert, "acknowledges . . . that the unconsolidated soils at the site are thick and exhibit low permeability" (Issues Ruling, at 19 [emphasis in original]).

<sup>11</sup> Although CCSC contends that high yielding deposits are located on property approximately 500 feet west of the proposed mine site (see Appeal, at 12-13), it fails to provide any support other than speculation that any such pocket demonstrates that a more extensive area of high yielding deposits exist.

CCSC also argues that, although the aquifer at the site is currently confined, the proposed mining activities will remove the confining layers, causing the aquifer to become unconfined. Once unconfined, CCSC argues that the aquifer will become a Principal Aquifer as defined in TOGS 2.1.3. CCSC contends that "high yielding unconsolidated deposits will be exposed at the mine floor and on the excavation walls, thus making the aquifer highly susceptible to contamination from human activities and fulfilling the definition of a principal aquifer" (Appeal, at 12).

CCSC's argument is speculative and fails to demonstrate how the removal of this amount of material would create a Principal Aquifer. Department staff, in its response to the appeal, has outlined the deficiencies in CCSC's argument. As Department staff notes, while removing confining layers in a portion of the aquifer area will create a surface water body (in this case, a pond), the aquifer would remain confined throughout its areal extent (see Department staff response, at 5). Department staff also underscores that no information supports CCSC's assumptions that the aquifer is high-yielding or would otherwise meet the criteria required for a Principal Aquifer (see id., at 5-6; see also Issues Ruling, at 18-19).

CCSC also alleges that the ALJ did not consider the boundary of the aquifer area when ruling that the aquifer does not comply with the guidelines for productivity of a Principal Aquifer (see Appeal, at 13 [referencing TOGS 2.1.3, at 5]). Department staff explains in detail how CCSC misapprehends TOGS 2.1.3 with respect to the applicable criteria at the aquifer boundary (see Department staff response, at 6-7).

Although CCSC seeks to have pumping tests performed, applicant did perform slug testing (see DEIS Appendix N, § 1.3.3, at 1-4 to 1-5). Results from the slug testing show that "the hydraulic conductivity data consistently demonstrate that the overburden soils are represented by low hydraulic conductivity values on the order of  $10^{-5}$  to  $10^{-6}$  cm/sec (on average) while the hydraulic conductivity of the bedrock is . . . approximately  $10^{-3}$  cm/sec" (id., at 1-4). CCSC has offered nothing to demonstrate that the slug testing that applicant conducted was inaccurate or deficient, or that pumping tests would be required.

Site-specific data in DEIS and detail in groundwater model

CCSC also maintains that the DEIS does not contain sufficient site-specific data, and that the groundwater model is not detailed. CCSC contends that, as a result, the DEIS cannot appropriately conclude that the adjacent water supply wells will not become contaminated from the proposed mine activities (see Appeal, at 13-15).

In contrast to CCSC's assertions, applicant's hydraulic modeling report includes site-specific data and data from over 200 monitoring wells located on the adjacent landfill site (see Tr, at 50-51; Department staff response, at 7).<sup>12</sup> As the record demonstrates, the DEIS analyzed the potential impacts to neighboring wells and found that they should not be affected (see Issues Ruling, at 25; DEIS, at 2-14 to 2-15 [discussion of hydrogeologic modeling at site, which concluded that dewatering activities at mine would not result in significant impact to adjacent water wells]; see also DEIS Table 2-2 [Well Data Table]; DEIS Appendix N, at 1-5 to 1-9 [discussion of groundwater flow at site and groundwater modeling]).<sup>13</sup>

CCSC seeks, on its appeal, to rely on a December 19, 2011, letter from Gerald Gould to Glen Silver (Gould Letter), to

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<sup>12</sup> The soil conditions and subsurface stratigraphy at the adjacent Seneca Meadows landfill are similar to the conditions at the proposed mine site (see Issues Ruling, at 12; Department staff response, at 7).

<sup>13</sup> The draft permit contains a special condition stating that if, after mining activities commence, the Department suspects that mining operations have impacted the quality or quantity of groundwater at or in the vicinity of the mine site, applicant "must immediately supply water at its expense to the impacted property or properties. . . . In the event that the impacted water supply is utilized as a drinking source, the permittee must connect any impacted property or properties to a municipal water supply system, if available, or, if a municipal water supply system is unavailable to the impacted property or properties, a permanent potable water source must be supplied" (Draft Permit Special Condition 8 [Issues Conference Exh 7]). In addition, the draft condition would require applicant to undertake such tests or investigations that Department staff deems necessary (see id.). This special condition was included in the event of any unforeseen or unexpected occurrence; however, Department staff does not anticipate any impacts to the groundwater (see Tr, at 85-92; see also Matter of Empire Bricks, Inc., Interim Decision of the Commissioner, Aug. 1, 1990, at 1 [Commissioner determined that adding special permit condition requiring mining applicant to provide potable water to adjacent landowners if water quantity became insufficient as a result of mining activities was an appropriate and adequate mitigation measure]). The DEIS also includes other mitigation measures during activities at the mine site (see, e.g., DEIS §§ 2.2.1.3, 2.2.2.3, & 2.2.2.3.2).

support its assertions that applicant's modeling is deficient (see Appeal, at 15). However, the ALJ properly granted applicant's request to disregard the modeling discussion in the letter as untimely (see Issues Ruling, at 28). Even if the letter were timely, no substantive and significant issue was raised. Mr. Gould challenges the groundwater model as faulty. However, Department staff noted that the model was an appropriate tool for use in the hydrogeologic investigations (see DEC staff letter to ALJ Buhrmaster dated January 18, 2012, at 3; Department staff response, at 7; see also letter from Scott M. Turner, Esq., to ALJ Buhrmaster dated December 28, 2011, at 3 [model was used "as an additional tool within which conservative assumptions were used based upon decades of hydrogeologic investigation at the nearby Seneca Meadows landfill"]]).

Department staff noted that monitoring wells at the site and adjacent landfill property are sufficient to detect movement of contaminants from the adjacent landfill and the closed Tantalio site (see DEC staff letter to ALJ Buhrmaster dated January 18, 2012, at 3). In addition, Department staff noted that the monitoring wells proposed for the site would be adequate to monitor the water levels on site and in the adjacent residential wells (see id.).

CCSC alleges, however, that applicant never positively identified the location of bedrock at the site (see Appeal, at 14).<sup>14</sup> I concur with Department staff that CCSC's allegations are misplaced. The DEIS addresses the bedrock geology at the site (see, e.g., DEIS, at 2-3 to 2-4; DEIS Figure 2-1 [Bedrock Contour Map]). Moreover, with respect to the bedrock, the draft permit was revised to include a new condition regarding final reclamation grades, requiring that a five-foot separation between the top of bedrock and the mine floor be maintained at all times (see Department staff letter to ALJ Buhrmaster, Dec. 6, 2011, at 2 [grade elevation stakes to be installed as pit floor approaches final grades and minimum five-foot separation between top of bedrock and mine floor must be maintained]).

As noted, this matter, with respect to air quality impacts, is the subject of adjudication as to whether applicant conducted a sufficient analysis of fine particulate matter, consistent with DEC policy. If, following the conclusion of the hearing, I determine that a permit should be issued for this project,

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<sup>14</sup> Although petitioners speculate as to the compositional nature of the material between the bottom of the borings and bedrock, they fail to make any adequate offer with respect to their assertions.

Department staff will be directed to include additional language in the permit requiring applicant to notify staff within two hours in the event that any test pit excavation or boring detects bedrock within five feet of the final mine floor.

In sum, CCSC's challenge to applicant's studies and analyses with respect to water resources that are set forth in detail in the DEIS (see DEIS § 2.2) or to Department staff's extensive review of that material is rejected. No substantive and significant issue has been raised.

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To the extent that petitioners have raised other issues in their appeal, these have been considered and are found lacking in merit.

**CONCLUSION**

I hereby affirm the ALJ's issues ruling and the appeal is rejected.

New York State Department of  
Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Joseph J. Martens,  
Commissioner

Dated: October 26, 2012  
Albany, New York