

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

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In the Matter of the Application  
of **SENECA MEADOWS, INC.**, for a  
Mined Land Reclamation Permit to  
develop and operate the Meadow  
View mine in the Town of Waterloo,  
Seneca County.

**RULINGS OF THE  
ADMINISTRATIVE LAW JUDGE  
ON ISSUES AND PARTY  
STATUS**

Application No. 8-4538-00094-00001

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**BACKGROUND AND BRIEF PROJECT DESCRIPTION**

Seneca Meadows, Inc. has submitted an application to develop and operate a new 120.8-acre clay mine, to be called the Meadow View mine, on the north side of State Route 96 between Burgess and Powderly Roads in the town of Waterloo, Seneca County, on parcels owned by Seneca Meadows totaling 252.8 acres. Over the course of the mine's operational life, estimated to be 11 years, approximately 3.4 million cubic yards of material would be excavated and used primarily for construction and operation of the adjacent Seneca Meadows landfill. Mining is proposed for below the local water table, and the excavation would be dewatered with an ultimate discharge to Black Brook or its tributaries during phased mining operations. No processing of excavated materials has been proposed for the site. Also, no vehicle maintenance or service activities would be conducted on the site. Final excavation would include the replacement of stockpiled topsoil and the creation of stabilized, revegetated open space and two large ponds.

To develop and operate the mine, Seneca Meadows has applied to the New York State Department of Environmental Conservation ("DEC") for a Mined Land Reclamation permit pursuant to Environmental Conservation Law ("ECL") Article 23, Title 27. As lead agency under the State Environmental Quality Review Act ("SEQRA"), DEC determined that the project may have a significant adverse environmental impact and issued a Positive Declaration on July 29, 2009. A public scoping meeting was held on August 19, 2009, and a final scope was issued on October 26, 2009. A two-volume Draft Environmental Impact Statement ("DEIS"), prepared for Seneca Meadows under the direction of Cornerstone Engineering and Land Surveying, was accepted by DEC Staff on September 28, 2011, after its revision in June 2011. Also on September 28, 2011, DEC Staff deemed the application complete in accordance with ECL Article 70 (Uniform Procedures)

and Part 621 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

### **LEGISLATIVE HEARING**

Upon this matter's referral to DEC's Office of Hearings and Mediation Services ("OHMS"), a combined Notice of Complete Application, Notice of Acceptance of DEIS, and Notice of Legislative/SEQRA Hearing and Issues Conference (Exhibit No. 1) was issued by DEC's Chief Administrative Law Judge, James T. McClymonds, on September 28, 2011, and mailed that same date to counsel for Seneca Meadows under a cover letter (Exhibit No. 2) containing instructions for its publication. The notice appeared in DEC's on-line Environmental Notice Bulletin on October 5, 2011 (see Exhibit No. 3, a print-out of the notice from DEC's website) and also was published as a legal notice on October 3, 2011, in the Finger Lakes Times (see Exhibit No. 4, an affidavit of publication provided by the newspaper). OHMS also distributed the hearing notice to various state and local officials (as shown in Exhibit No. 5), and DEC Staff sent the notice to others known to be interested in the project.

The notice announced scheduling of a legislative hearing on October 26, 2011, to receive oral comments on the permit application, the DEIS, and a draft permit that was produced by DEC Staff prior to the hearing. The notice also said that written comments on these same items would be accepted and considered equally with oral comments delivered at the legislative public hearing, provided those comments were received at OHMS by November 7, 2011.

As confirmed in a letter dated October 21, 2011 (Exhibit No. 6), I denied a request by Concerned Citizens of Seneca County ("Concerned Citizens") for a 60-day extension of the November 7 deadline for written comments. Concerned Citizens, which opposes the application, is a not-for-profit corporation formed in March of 2010, whose membership includes people living near the project site.

As scheduled in the hearing notice, the legislative hearing went forward at 7 p.m. on October 26, 2011, at the Holiday Inn in Waterloo. Two officials of Seneca Meadows spoke on behalf of the application, but all 24 speakers from the general public, almost all of them Waterloo residents, spoke against it. Nine of those speaking against the project identified themselves as members of Concerned Citizens. Not only did Concerned Citizens offer oral comments at the legislative hearing, it provided

extensive written comments on the application and DEIS, and filed a petition for party status (Exhibit No. 8) proposing various issues for formal adjudication, as discussed below.

At the legislative hearing, project opponents said that the proposed mine would have significant environmental impacts, particularly for those living closest to the site. Concerns were voiced about air quality impacts, particularly from fine particulate matter, dust and diesel fumes; drawdown-related impacts on water supplies, especially residential wells; noise, traffic and visual impacts; as well as impacts to the community's rural, scenic character. Particular concerns were expressed about the safety of a proposed crossing on Burgess Road, which separates the mine and the landfill, and whether heavy truck traffic at the crossing would create a safety hazard for people driving along the road.

In general, speakers said the adverse impacts of the mine's construction and operation would outweigh any economic benefit that would be derived from the project. In fact, people living near the mine expressed concern that the project would diminish their quality of life and drive down their property values. Some speakers suggested that any mining operation be moved elsewhere, especially further from the residential center of Waterloo.

Many speakers referenced the connection between the proposed mine and the adjacent Seneca Meadows landfill, arguing that Seneca Meadows and DEC were not doing enough to reduce the amount of waste that the landfill receives. One speaker said it was an environmental injustice that economically distressed, sparsely populated Seneca County should have to take in so much waste from the rest of the state. Another speaker said that Waterloo town residents had already "paid their dues" by living in the shadow of the landfill, which is located in the town of Seneca Falls.

Some speakers said their concerns had been ignored by Waterloo's town government, and noted the absence of town officials from the hearing. According to the DEIS, in a 2005 community benefits agreement between town officials and Seneca Meadows, the town agreed to support the application provided that the application met the standards and requirements of applicable regulations. Nevertheless, project opponents say the project does not meet the requirements of local zoning, particularly in relation to setbacks from residences.

Finally, some speakers expressed concerns about the two large ponds that would result from the mining operation. They said that these ponds would be incompatible with the surrounding countryside, remove valuable farmland from production, act as a breeding area for mosquitoes, and be an attractive nuisance to young people, creating a risk of accidental drowning.

At the public hearing, Concerned Citizens presented a petition it said was signed by more than 1,400 people. The petition called on DEC and elected officials to protect the public health and safety by stopping the proposed mine, the effects of which, the petition said, would include decreased property values, increased noise and air pollution from truck and tractor operations, creation of traffic and safety hazards, diminishment of quality and quantity of ground and surface water, and endangerment and destruction of farmland, forest and natural wildlife habitat.

As part of the public comment period, project opponents also submitted about 60 form letters stating that the location of the proposed mine close to Waterloo neighborhoods and schools was not acceptable. The letters said: "Seneca Meadows continues to try and convince us what a good neighbor they are to the community as they donate dollars to various organizations. But in the greater community we recognize that these donations are only a thinly veiled enticement to purchase compliance and support for their next project, a project that will intrude on the quality and beauty of our neighborhoods and community for 12 long years. The noise, dust, diesel fumes, and the project itself will change the landscape, the look, and the quality of life for those residents living closest to it."

While most of the written comments were against the application, many people wrote letters of support. Thirty-eight people, 24 of them employees of Seneca Meadows, submitted form letters stating their belief that "Seneca Meadows has always operated within the best interests of its neighbors, and always listens and responds to reasonable concerns of the community, especially individual property owners adjacent to any Seneca Meadows property lines." Project supporters said that Seneca Meadows has consistently demonstrated a conscientious approach to all of its operations, has operated other clay mines without complaint, and has maintained an exemplary compliance and safety record.

Various civic, church and educational organizations submitted letters praising Seneca Meadows for its financial

contributions, wetland preservation efforts, and environmental education program, among other things. The Seneca County Chamber of Commerce wrote that Seneca Meadows "has provided a positive impact to our local economy; they have enhanced our community through educational and charitable endeavors and they have proven to be a reliable and responsible corporate citizen."

Finally, at the legislative hearing, Don Gentilcore, Seneca Meadows' area manager, said that Seneca Meadows has always prided itself on being a good neighbor and environmental steward, always willing to be open and transparent in its operations. He said that Seneca Meadows had amassed an impeccable compliance record over the past 15 years while operating similar soil mines in the town of Waterloo and other local municipalities. According to Mr. Gentilcore, Seneca Meadows operated the Salcman Road Mine in Waterloo, across the street from the Meadow View mine site, for almost ten years, without any impacts or problems.

Mr. Gentilcore said that approval of the project would result in the removal of almost 24,000 truck deliveries through the village and town of Waterloo annually, reducing noise, emissions and highway maintenance, while enhancing public safety and removing inconvenience associated with the traffic load on the route currently used. According to Mr. Gentilcore, Seneca Meadows takes safety very seriously, and believes that its proposal would allow for the safe transport of material across a controlled intersection on Burgess Road.

Mr. Gentilcore said that with the soil mine taking up only 120 acres of more than 252 acres owned by Seneca Meadows at the project site, more than 50 percent of the property would remain untouched and act as a green buffer space through the course of the project. He said that reclamation would be ongoing as development proceeds, and would be completed within one year after the end of mining operations, providing a long-term benefit to the community through opportunities for passive recreation and interaction with wildlife once the mine site closes.

Mr. Gentilcore said that, partly as a result of feedback from various public meetings it conducted with DEC, Seneca Meadows incorporated various enhancements to the final application, including (1) a property value protection plan, (2) a reduced mining footprint, (3) landscape plantings adjacent to the most proximate residences, (4) vegetated screening berms along Burgess, Powderly and North roads, (5) increased setbacks

from nearby residences, (6) a community benefits agreement with the town of Waterloo, (7) a site design that avoids wetland areas and jurisdictional waterways, (8) a revised road alignment to maximize distances from adjacent residences, and (9) reduced operating hours.

### **ISSUES CONFERENCE**

As announced in the hearing notice, an issues conference was held on November 16, 2011, at the Holiday Inn in Waterloo. The conference was held to determine party status for any person or organization that had petitioned for it, and to narrow and define those issues, if any, that would require adjudication. Participating at the conference were Seneca Meadows, DEC Staff, and four petitioners for party status.

Seneca Meadows was represented by Scott M. Turner and Gregory R. Nearpass, Esqs., of Nixon Peabody LLP, in Rochester, New York.

DEC Staff was represented by Lisa P. Schwartz, Esq., of DEC's Region 8 Office of General Counsel, in Avon, New York.

There were four petitions for full party status. One petition (Exhibit No. 8) was filed by Concerned Citizens of Seneca County, which was represented by its president, Glen Silver, and vice president, Leland Henry, both of Waterloo. Two other petitions were filed by individuals - Dixie Lemmon and Richard Westfall - who identified themselves as owners of property immediately abutting the proposed mine site. (Dixie Lemmon's petition is Exhibit No. 9, and Richard Westfall's petition is Exhibit No. 10.) The fourth petition (Exhibit No. 11) was filed by Gary Westfall, who said he owns property not far from the proposed site. According to his petition, Gary Westfall's interest in the project is both personal and in his capacity as an elected official. Apart from being the clerk, treasurer and administrator of the village of Waterloo through the end of 2011, Gary Westfall was elected on November 8, 2011, to the post of Waterloo town supervisor, and took office at the start of 2012.

The petitions of Concerned Citizens, Dixie Lemmon and Richard Westfall were received in a timely manner, on the November 7, 2011, deadline that was set in the hearing notice. The petition of Gary Westfall, dated November 11, 2011, was received on November 14, 2011, after the filing deadline, and therefore must be considered in relation to the standards for

late-filed petitions under 6 NYCRR 624.5(c), which are discussed below in my rulings on party status. However, having petitioned prior to the issues conference, Gary Westfall was allowed to participate fully at the conference, in the same manner as the other petitioners.

By papers dated November 15, 2011 (Exhibit No. 12), Seneca Meadows moved to consolidate the petitions on the ground that they propose essentially the same issues, and to have the petitioners represented by one individual, in the interest of efficiency. Concerned Citizens filed a written response (Exhibit No. 13) in which it agreed to the consolidation of issues into one petition, provided this did not limit the petitioners' ability to represent themselves. Among its arguments, Concerned Citizens claimed that no one individual knows the interests of all the petitioners, no one petitioner is familiar with all issues sufficiently to speak to all of them, and all four petitioners bring a unique perspective to the issues that they share.

At the issues conference, I noted the commonality of the issues proposed by the petitioners, but did not formally consolidate the petitions. Each of the petitioners represented themselves, as none had retained legal counsel. For the purpose of a service list, and with their permission, I consolidated Dixie Lemmon and Richard Westfall with Concerned Citizens, as they are both members of that group. Gary Westfall was not consolidated with the other petitioners, because he is not a member of Concerned Citizens.

In his petition for party status, Gary Westfall wrote that his interest in this matter "is in both his personal as well as elected capacity, though if one need be chosen over the other, it is his elected capacity that should be viewed as paramount." In its pre-conference motion, Seneca Meadows maintained that the petition was improper, to the extent Gary Westfall was purporting to participate on behalf of the town of Waterloo, or with the town's apparent authority. At the issues conference, responding to my question, Gary Westfall said he was present as an individual, and not in a formal capacity representing town or village government. (Transcript ("T"): 8.)

The conference went forward initially with a discussion of the application and draft permit. Seneca Meadows said that it was standing by the application that it had submitted, which had been deemed complete by DEC Staff (T: 19). DEC Staff offered no amendments to its draft permit, dated October 13, 2011 (Exhibit

No. 7), though Staff added that it had started discussions with Seneca Meadows about some conditions it would like to suggest on the issue of hydrogeology. (T: 19 - 20.) DEC Staff said that, in its view, the project would meet applicable standards under the terms of its draft permit, and that it was proposing no issues of its own to adjudicate. (T: 20 - 24.) Seneca Meadows concurred that its project was permissible as proposed, and that it had met the regulatory and statutory criteria that would allow DEC to issue the draft permit, which it said it was prepared to accept. (T: 24.)

After completing its discussions with Seneca Meadows, and by letter dated December 6, 2011, DEC Staff provided new proposed conditions addressing final reclamation grades and groundwater sampling protocols, which it said were acceptable to Staff and Seneca Meadows. Upon receipt of letter, I offered the petitioners an opportunity to comment on the new permit conditions, which they did by letter of Gerald Gould, their geologist consultant. (The letter's first page contains a date of December 19, 2012, which I have corrected to December 19, 2011, consistent with the date on top of its subsequent pages.) Mr. Gould's letter not only addressed the permit conditions, it offered additional discussion of the alleged inadequacy of the groundwater modeling included in the DEIS. Seneca Meadows responded to Mr. Gould's submittal in a letter dated December 29, 2011. By memorandum of January 11, 2012, I granted DEC Staff's request for permission to respond to both the petitioners' and Seneca Meadows' submittals. DEC Staff's response, received on January 18, 2012, included a letter dated January 13, 2012, from Robert Holmes of Cornerstone Engineering, which performed Seneca Meadows' hydrogeologic investigation.

#### Standards for Adjudication

According to 6 NYCRR 624.4(c)(1), an issue is adjudicable if (1) it relates to a dispute between DEC Staff and an applicant over a substantial term or condition of the draft permit, (2) it relates to a matter cited by DEC Staff as a basis to deny the permit and it is contested by the applicant, or (3) it is proposed by a potential party and is both substantive and significant.

Because there were no disputes between the applicant and DEC Staff concerning the draft permit, and because Staff offered no basis to deny the permit, the discussion at the issues conference was focused on whether any of the issues proposed by the petitioners were substantive and significant. Neither DEC

Staff nor Seneca Meadows conceded that any issue proposed by the petitioners met this standard.

According to 6 NYCRR 624.4(c)(4), in situations such as the one here, where DEC has reviewed an application and finds that, as conditioned by its draft permit, the application conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue to demonstrate that it is both substantive and significant.

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

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).]

Where, as here, DEC, as lead agency, has required the preparation of a DEIS, the "substantive and significant" standard will be applied to the determination whether to adjudicate issues proposed by a potential party concerning the sufficiency of the DEIS or the ability of DEC to make the findings required pursuant to 6 NYCRR 617.9. [6 NYCRR 624.4(c)(6)(i)(b). See also Matter of St. Lawrence Cement Company, Second Interim Decision of the Commissioner, September 8, 2004, pages 90 and 91.]

As noted above, four separate petitioners filed for party status. However, among the petitions, the one filed by Concerned Citizens encompasses all the issues proposed by the other petitioners; the petitions of the three individuals basically adopt the wording of the Concerned Citizens' petitions, to make its issues their own. Therefore, for purposes of discussing the proposed issues, I am following the order in which they have been proposed by Concerned Citizens, while noting by number where they appear in the others'

petitions. Where an issue has been proposed by Concerned Citizens alone, I refer to it as their issue; where that issue is shared with other petitioners, I refer to them collectively.

Apart from the issues discussed in these rulings, the petitioners proposed additional issues concerning visual impacts (Concerned Citizens' Issue No. 6; also Issue No. 6 for Dixie Lemmon, Richard Westfall and Gary Westfall) and wetland mitigation (Concerned Citizens' Issue No. 18) that were withdrawn at the issues conference. (T: 337.)

**Failure to Fully Evaluate Impacts on Water Supplies**

(Concerned Citizens' Issue No. 1; also Issue No. 1 for Dixie Lemmon, Richard Westfall and Gary Westfall)

According to the petitioners, the DEIS inadequately addresses the project's potential impacts on local groundwater resources, including residential drinking water wells. They claim there is a "fundamental absence" of any analysis of groundwater drawdown and the impact it would have on water wells, wetlands and ponds. Furthermore, they say there is a principal aquifer located on the project site, and that this aquifer is not adequately protected from contamination. Finally, they say that water table descriptions, and therefore interpretations of groundwater flow, are based on flawed interpretations of water level measurements due to the faulty design of piezometers that were used in Seneca Meadows' hydrogeologic investigation.

**RULING:** No issue exists for adjudication. The DEIS (which consists of two volumes, marked as Exhibits No. 15 and 16) contains a thorough analysis of potential impacts on local groundwater resources, including residential water wells. That analysis includes an evaluation of impacts both to groundwater quantity, in relation to water table drawdown, and to groundwater quality, in relation to a possible contaminant release. The analysis in the DEIS has been adopted by DEC Staff, which agrees with Seneca Meadows that the mine poses no inherent risk of surface or groundwater contamination, and that no additional hydrogeologic characterization studies are necessary. Also, Seneca Meadows has accepted permit conditions drafted by DEC Staff to protect neighbors' water supplies. Finally, while the petitioners have offered criticism of Seneca Meadows' hydrogeologic investigation, they have provided no basis to conclude that the project would have significant adverse impacts. In particular, they have offered no evidence that there would be significant drawdown of the water tables in

the unconsolidated deposits or underlying bedrock. Finally, they offer no evidence that the site contains a principal aquifer deserving of special protection by DEC.

As background for discussion of the petitioners' claims, one must consider the investigation documented in the DEIS, the conclusions of that investigation, and the permit conditions advanced by DEC Staff at the issues conference and in a post-conference submittal.

According to the DEIS, the subsurface of the project site consists of bedrock topped by a soil overburden comprised of alternating layers of glaciolacustrine and glacial till deposits (DEIS, pages 2-3 to 2-6). Because mining would occur below the overburden water table, the excavation would be dewatered, which would involve the pumping of groundwater and its ultimate discharge to Black Brook or its tributaries. Water levels in the overburden deposits were determined from four groundwater monitoring wells installed in August 2005. The readings obtained from wells screened in the overburden soils indicated groundwater elevations from 1.5 feet to 40.8 feet below the existing ground surface, with the reading closest to the surface attributed to the proximity of the monitoring well to an irrigation pond and the cohesive nature of the at depth soils. (DEIS, page 2-13.)

The DEIS reports that the project is not anticipated to result in any significant adverse impacts to local groundwater resources, since the overburden soils are of generally low permeability and the effects of dewatering the mine would be localized. However, due to the proximity of offsite wells that draw from aquifers in the overburden and bedrock, a detailed analysis was performed to predict the amount of drawdown in the lower glaciolacustrine unit (the most permeable soil unit) and the bedrock unit. For this purpose, visual MODFLOW was used by experienced hydrogeologists familiar with the area's geology and groundwater. (DEIS, pages 2-13 and 2-14.) A detailed description of the hydrogeologic modeling is located in Appendix N of the DEIS, including model inputs, aquifer characteristics and other relevant groundwater and subsurface information.

To assist in evaluating impacts, hydrogeologic information developed in the context of the application for the recent expansion of the nearby Seneca Meadows landfill was used to supplement the information obtained from the test pits, soil borings and piezometers that were installed on the Meadow View mine property (as shown in DEIS Figure 2-4). It was reasonable

to use this information because the soil units at the mine and landfill sites are similar in origin and character (as noted in DEIS Appendix N, pages 1-1 and 1-2), and because the information concerning the landfill site is extensive. Borings conducted at the mine and landfill sites indicate that they share a common geology consisting of unconsolidated glacially derived sediments, typified by low permeability silt and clay, of comparable thickness, which were deposited in distinct layers by the advance, retreat and re-advance of ice sheets. These layers form distinct stratigraphic units that, together, constitute the soil overburden; from top to bottom, they are the upper glaciolacustrine unit, the upper glacial till, the lower glaciolacustrine unit, and the lower glacial till (described on page 1-2 of Appendix N in relation to the landfill site, and page 2-5 of the DEIS in relation to the mine site.)

Figures N-3 and N-4 in Appendix N illustrate the predicted drawdown in the lower glaciolacustrine unit (the likely source of shallow domestic water supply wells) and the underlying bedrock. The wells closest to the mine site in each unit are also identified. In the glaciolacustrine unit, these wells belong to Shervin and Mary Kate Martin (Wells 2 and 2-A, one of them used for drinking water), which are about 580 and 500 feet, respectively, from the nearest proposed excavation. (DEIS, page 2-13.) Drawdown of these wells, completed at depths of 39.6 and 27.4 feet, is expected to be about one-third of a foot, which the DEIS considers negligible when compared to normal well level fluctuations. In the bedrock, the well closest to the mine site is Well 3, the drinking water well of petitioner Dixie Lemmon, estimated in the DEIS to be about 375 feet from the mine. The model predicts that the drawdown in that well, completed at a depth of 168 feet, would be four tenths of a foot, which the DEIS also considers negligible. (DEIS, pages 2-14 and 2-15.) Figure N-4 depicts the projected drawdown of the Lemmon well, in addition to that of six other bedrock wells where drawdown is expected to range from 0.23 to 0.35 feet.

According to the DEIS, with the exception of the Martin wells, located near the corner of Powderly Road and State Route 96, all the wells located in close proximity to the project site (as shown in DEIS Figure 2-6, and listed in tabular form in DEIS Table 2-2) are terminated in bedrock. Although no significant impact on well water quantity is anticipated, the DEIS states that should a neighbor's well be impacted, Seneca Meadows would, at its expense, provide either a deeper well or access to the public water system. (DEIS, page 2-15.) Furthermore, DEC's draft permit (Exhibit No. 7) contains a special condition (No.

8) that Region 8 Staff says it uses for hard rock quarries where dewatering occurs. That condition, which Seneca Meadows has accepted, reads as follows:

"Without restricting the right of the Department to take any other alternative action it is authorized by law to take, if, after an initial assessment by the Department, it is suspected that mining operations have impacted the quantity or quality of groundwater at or in the vicinity of the mine site, the Department may direct the permittee to take any or all of the following steps to address the situation:

A. The permittee must immediately supply water at its expense to the impacted property or properties, and must continue to supply water to the impacted property or properties unless and until the permittee can demonstrate to the satisfaction of the Department that the mining operation is not a contributing cause to the identified impacts. In the event that the impacted water supply is utilized as a drinking water source, potable water must be supplied.

B. The permittee shall undertake tests or investigations as deemed necessary by the Department to aid in determining the cause of the identified groundwater impacts.

C. If the Department concludes that the mining operation has negatively impacted groundwater at or in the vicinity of the mine site, the permittee must, at its expense, and with consent of the landowner, provide an alternate, permanent source of water to the impacted property or properties. In the event that the impacted water supply is utilized as a drinking water 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."

To help determine whether any impacts are attributable to the mining operation, the DEIS states that groundwater elevations would be monitored in the four existing onsite piezometers (MW-1, MW-2, MW-3 and MW-4, all shown in DEIS Figure No. 2-4) for an indication of changing water levels in the overburden during the excavation. Furthermore, three additional monitoring wells (MW-5, MW-6S and MW-6D, as seen on Sheet No. C101 of the applicant's construction drawings) would be installed between the proposed mine limit and the most proximate water supply wells (the Martin and Lemmon wells). According to

the DEIS, monitoring would be performed quarterly at each location or until a monitoring well needs to be removed due to the progression of the excavation or operations at the site. (DEIS, pages 2-15 and 2-16.)

At the issues conference, DEC Staff expressed interest in adding a permit condition to address groundwater sampling protocols (T: 73 - 77). The special condition that it later developed, and that Seneca Meadows has accepted, is set forth in Staff counsel's letter of December 6, 2011. The condition provides that, unless the property owners deny consent, and prior to any disturbance of the mine site, Seneca Meadows shall collect groundwater elevation measurements and samples from the three closest off-site residential water supply wells (the deep well on the Lemmon property, and deep and shallow wells on the Martin property). Also, the condition states that prior to any disturbance of the site, three additional groundwater monitoring wells shall be installed at locations agreed upon by DEC Staff. Samples from these additional wells, along with samples from the Martin and Lemmon wells, would then be analyzed on a one-time basis for the expanded water quality parameters outlined in 6 NYCRR 360-2.11(d)(6). Thereafter, samples from the additional wells would be collected and analyzed annually for the baseline water quality parameters in 6 NYCRR 360-2.11(d)(6). The condition also confirms Seneca Meadows' commitment that groundwater elevations in the four existing piezometers, and the additional groundwater monitoring wells yet to be installed, be measured on a quarterly basis, with the additional understanding that the measurements be submitted to DEC within 60 days after they are obtained.

Seneca Meadows does not anticipate that the mining operation would affect groundwater quality. According to the DEIS, surface soil mining, by itself, does not impact groundwater quality, but, as with any activity, care must be taken that potential contaminants are not spilled or disposed of in a manner that would reduce the quality of groundwater. The DEIS indicates that the design, construction and operation of the mine consistent with DEC's mining regulations (at 6 NYCRR Part 420) would ensure against the release of any contaminants, and minimize the potential for any adverse impacts to groundwater resources. There would be no onsite storage of petroleum products (DEIS, page 1-8), and, consistent with special condition No. 16, fueling of equipment would be controlled to prevent spillage. Also, no processing of excavated materials, or vehicle maintenance or service activities, are proposed to occur onsite. The application

includes a stormwater pollution prevention plan that includes various good housekeeping measures, including a schedule for regular pickup and offsite disposal of waste materials, and the onsite location of staged construction equipment such that any leaks or spills would drain to protected sump areas (i.e., pumped sump locations). (Exhibit No. 14, pages 6-20 and 6-21.) Finally, the dewatering of the mine during operations would result in groundwater flow toward the mine, thereby eliminating the mechanism for any potential contaminant release to migrate away from the mining area and in the direction of neighbors' wells. (DEIS, page 2-13.)

As noted in Sheet No. C107 of the construction drawings, and confirmed during the issues conference (T: 78), the project is designed to ensure that there is at least a five foot separation between the mine floor and the top of bedrock. However, while the mine floor is fixed in the application, the top of bedrock can only be inferred, and there is a possibility that bedrock may be encountered before mining reaches the intended depth beneath the existing land surface.

To provide further assurance that the planned five foot separation of the final mine floor from the bedrock is maintained in a manner readily apparent during any DEC inspection, DEC Staff has developed an additional condition addressing final reclamation grades, which is also included in Staff counsel's letter of December 6, 2011. That condition, which has been accepted by Seneca Meadows, requires that the permittee install grade elevation stakes as the pit floor approaches the final grades as depicted on Sheet No. C105 of the construction drawings. It further requires that test pit excavations or borings be advanced within the limits of the mine floor on a grid no greater than 250 feet prior to the mine excavation extending within 10 feet of the final permitted grade elevations. If at any point bedrock is encountered within five feet of the final mine floor, the five foot separation must prevail, and final grades adjusted accordingly. Finally, test pits or borings are to be backfilled with re-compacted fill or bentonite as appropriate.

#### Petitioners' Claims

The petitioners claim there is a "fundamental absence" of any analysis of drawdown of surrounding groundwater and the impact this will have on wetlands, ponds, and the residential water wells of adjacent homeowners, most of which, the petitioners claim, are not acknowledged on DEIS Figure No. 2-6,

the location plan for water wells within one mile of the project boundary.

In fact, as noted above, a detailed analysis of groundwater drawdown was accomplished on the basis of the hydrogeologic modeling that is outlined in Appendix N of the DEIS. That modeling indicates that the effects of dewatering the mine would be limited to within a few thousand feet of the mine and that the overall groundwater flow directions outside this radius would not be impacted. Therefore, dewatering is not expected to have a significant effect on adjacent well users. (DEIS Appendix N, page 1-9.)

The offsite water wells within one mile of the project boundary are identified in DEIS Figure 2-6. In the overburden, the nearest wells are the Martin wells (Nos. 2 and 2A), and in the bedrock, the nearest well (No. 3) belongs to petitioner Dixie Lemmon. Because Ms. Lemmon did not allow Seneca Meadows' consultant, Cornerstone Engineering, access to her property, Cornerstone assumed the location of the well. However, even if, as Lemmon implied, the well is closer to the mine than depicted on the figure, her property is so small that it is not much closer, and the drawdown would be virtually the same as that projected in the DEIS, as shown in Figure No. 2-8. Furthermore, I pressed the petitioners to identify any wells that were not acknowledged in Figure 2-6, especially ones as close to the site as the Martin and Lemmon wells, and they were unable to do so. (T: 54 to 62.)

The petitioners were also unable to identify any offsite surface waters that might be affected significantly by drawdown. In the DEIS, Seneca Meadows acknowledges there are several small ponds on the site that were created for agricultural use or when the site was graded for use as a golf course. (DEIS, page 2-16.) However, these ponds would not exist after the project is implemented. At the end of the project, two new ponds would be created, and both would have designed outlet structures to provide optimal storm discharge into Black Brook. (DEIS, page 2-18.)

As noted in the DEIS, there are no mapped state wetlands on the project site. There are some federally regulated wetlands and water bodies in the northern and western portions of the property, but they are separated from the construction area by a drainage divide, and for that reason would not be impacted by the proposed mine or its construction. There are additional wetlands in the immediate vicinity of the project site, but they

are underlain by a layer of low permeability soil, generally on the order of 20 to 30 feet thick, which traps surface water and would minimize the potential for water loss due to drawdown in the pumped excavations. (DEIS, page 2-23.)

The petitioners offer the expert opinion of Gerald Gould, a certified professional geologist, that the bedrock aquifer beneath the site is inadequately addressed in the DEIS, and that the excavation plan does not adequately protect this aquifer, which provides potable water to nearby residents, including Ms. Lemmon. In a letter of October 31, 2011, attached as Exhibit A to Concerned Citizens' petition, Mr. Gould writes that the low permeability soils present in the Waterloo area, including the proposed mine site, provide a thick protective barrier to prevent contaminant migration into the bedrock aquifer, but that the removal of these soils as part of the excavation would significantly decrease the protection they provide. Furthermore, he writes that if a well intersects a bedrock joint that has been exposed to the ground surface, the joint can act as a conduit to quickly convey contaminants to a well.

No issue exists in relation to the bedrock aquifer because, as the DEIS points out, bedrock is not expected to be encountered during the base preparation of the mine development or any of the ancillary facilities. In fact, as explained above, the project is engineered to maintain a minimum five-foot separation from the surface of the bedrock to the lowest excavations of the mine. (DEIS, page 2-4.) To ensure this separation is maintained, DEC Staff has developed the special condition that requires additional exploration of the bedrock surface as the pit floor approaches the final grades shown on the construction drawings.

Mr. Gould writes that none of Seneca Meadows' nine test borings installed on the proposed mine property positively identified bedrock, and therefore, its reported bedrock elevations are unreliable. In particular, he notes that the borings were terminated without collecting bedrock cores to determine whether bedrock or boulders were encountered. Steve Army of DEC's Division of Mineral Resources acknowledged this criticism, but added that if what Seneca Meadows understood to be bedrock was actually a boulder, then the bedrock would, if anything, be deeper than depicted on its plans, thereby increasing the separation of the bedrock from the mine floor. (T: 83.)

The excavation of the mine would, as Mr. Gould points out, remove low-permeability deposits that help insulate the bedrock aquifer from surface contamination. However, under the proposed design, a five foot separation between the bedrock and the mine floor would be maintained. More important, as Seneca Meadows points out, the application includes measures such as spill prevention plans, secondary containment around critical facilities, and drainage controls to protect groundwater should a contaminant release occur. (T: 68.) Finally, dewatering of the mine during operations would result in groundwater flowing toward the pit, thereby eliminating the mechanism for contaminants to migrate away from the mine, into adjacent soil, and, from there, into the bedrock. (DEIS, page 2-13.) Dewatering would actually reverse the gradient in the bedrock aquifer, pulling water up and into the overburden, as discussed in the DEIS (at pages 2-14 and 2-15) and at the issues conference (T: 69).

According to Mr. Gould, protection of neighbors' wells requires that there be a five foot thick low permeability separation between the bedrock and the mine floor; however, given the effect of dewatering, I agree with Seneca Meadows and DEC Staff that this is not necessary. In fact, in its letter of January 18, 2012, DEC Staff denies Mr. Gould's claim that the purpose of the five foot separation is to provide a protective barrier to slow the transport of potential contaminants into bedrock; according to Staff, it provides an additional safeguard against potential groundwater contamination, but not a first line of defense.

Mr. Gould further states that, contrary to the conclusion in the DEIS, there is a principal aquifer located beneath the proposed mine site. According to the DEIS (at page 2-12), the project is not located over a principal aquifer listed by New York State, given the low permeability of the overburden soils. However, Mr. Gould writes that these soils, which confine the aquifer, would be removed as part of the mining operation, thus making the aquifer more vulnerable to contamination.

No issue exists with regard to existence of a principal aquifer at this site. According to the DEC Division of Water Technical and Operational Guidance Series ("TOGS") memorandum (2.1.3), "Primary and Principal Aquifer Determinations" (dated October 23, 1990, a copy of which was marked as Exhibit No. 17), principal aquifers, as defined for the purpose of the Upstate New York Groundwater Management Program, are those unconsolidated aquifers "known to be highly productive or whose

geology suggests abundant potential water supply, but which are not intensively used as sources of water supply by major municipal systems at the present time." (Exhibit No. 17, page 2.)

DEC considers a principal aquifer to be one mapped as an "Unconfined Aquifer 10 to 100 gallons per minute" or "Unconfined Aquifer more than 100 gallons per minute" on the USGS Division of Water plates depicting unconsolidated aquifers in upstate New York. (DEIS, page 2-12.) DEIS Figure 2-5 depicts a USGS-mapped unconsolidated aquifer across the southern half of the project site; however, this aquifer is identified as a confined aquifer and, therefore, it does not qualify as a principal aquifer. (DEIS, page 2-12.)

Furthermore, as Seneca Meadows points out, this aquifer does not comply with guidelines for productivity that are associated with principal aquifers. (Exhibit No. 17, page 6.) One guideline is that there be saturated deposits of highly permeable materials averaging at least 20 feet through much of the area of the aquifer, with some locations at least 50 feet thick. No such deposits have been identified at the project site; in fact, Mr. Gould acknowledges in his letter attached to Concerned Citizens' petition that the unconsolidated soils at the site are thick and exhibit low permeability. (Exhibit No. 17, page 2.)

Another guideline is that sustained yields to individual wells should be 50 gallons per minute or more from sizable areas (two square miles or greater) throughout the aquifer. Seneca Meadows points out that, based on the extensive well work it has done in connection with its landfill, no wells in the area yield anything close to that amount. (T: 67-68.)

In his letter, Mr. Gould does not specify whether his so-called principal aquifer is in the unconsolidated deposits immediately beneath the ground surface, or in the deeper bedrock. If he is referring to the aquifer in the unconsolidated deposits, it is a confined aquifer not sufficiently productive to qualify as a principal aquifer. If he is referring to the bedrock aquifer, it cannot be considered a principal aquifer; according to the TOGS memorandum, only unconsolidated aquifers may qualify as principal aquifers (Exhibit No. 17, page 2), and it is not appropriate to include bedrock aquifers within the meaning of that term. (Exhibit No. 17, page 4.)

Finally, Mr. Gould maintains that the applicant's water table descriptions, and therefore its interpretations of groundwater flow, are based on flawed interpretation of water level measurements stemming from Seneca Meadows' use of piezometers with excessively long screen lengths. According to Mr. Gould, these screens, with lengths from 24 to 34 feet, could not provide accurate water table or potentiometric surface measurements, as they likely crossed two or more hydrostratigraphic soil units, draining one unit into another and thereby causing wide variations from well to well. Mr. Gould contends that, given the presence of wetlands and ponds in the vicinity, it is likely that the water table in the overburden is more uniform than indicated in the DEIS, and only a few feet below the water surface.

At the issues conference, Seneca Meadows countered by noting that its water table interpretations and understanding of groundwater flow are based not only on its study of the mine site - which, in terms of borings and wells, DEC Staff said went "above and beyond" what it typically requires (T: 71) - but on the extensive hydrogeologic data Seneca Meadows has collected on the nearby landfill site over the years, including data from its array of monitoring wells. (T: 70.) As discussed above, this data (summarized in DEIS Appendix N) was reasonably used to supplement the information obtained from the test pits, soil borings and piezometers installed on the Meadow View mine property and to assist in evaluating the potential impacts associated with the mining operation. (DEIS Appendix N, page 1-1.)

As noted in the DEIS, for the purpose of constructing a localized groundwater flow model, the potentiometric surfaces in both the overburden and bedrock layers were developed by extrapolating the relationship between the various water-bearing units observed during the site investigation of the adjacent Seneca Meadows landfill. These data suggest that the water table is generally up to 10 feet below the ground surface, that the potentiometric surface of the lower glaciolacustrine ("LGL") layer - the most permeable layer and the likely water source of shallow domestic water supply wells - is generally 15 to 25 feet below the groundwater table, and that the bedrock potentiometric surface is typically on the order of two feet lower than the potentiometric surface of the LGL. (DEIS, page 2-14.)

In his letter of December 19, 2011, Mr. Gould noted instances where the input data used in the model is not specific to the mine site. However, as Seneca Meadows responds, its

intent was not to create a site-specific groundwater flow model, but rather to use the understanding of groundwater flow obtained from the detailed hydrogeologic work completed for the nearby Seneca Meadows landfill to assess how the groundwater flow regime would respond to dewatering of the proposed mine site. (DEIS Appendix N, page 1-6.) Seneca Meadows interpreted groundwater flow on the basis of potentiometric surface maps and hydrogeologic cross-sections prepared for the landfill. (DEIS Appendix N, pages 1-5 and 1-6.) That mapping illustrates a groundwater flow system dominated by downward vertical flow paths through the overburden, with discharge to the underlying bedrock water-bearing zone.

In his letter of December 19, 2011, Mr. Gould also asserted that this project is "far from typical and requires a higher standard of care" due to the proximity of the proposed mine to the Seneca Meadows landfill and the closed Tantalo landfill, located within the confines of the Seneca Meadows landfill property, which Mr. Gould described as a Class II hazardous waste site. Responding in a letter dated December 28, 2011, Seneca Meadows counsel noted that rigorous groundwater monitoring programs, conducted in accordance with DEC's Part 360 regulations, are in place for both the Seneca Meadows landfill and the Tantalo site, that groundwater is monitored at wells at the perimeter of the Seneca Meadows landfill (i.e., between the landfill and the proposed mine), and that potential changes in groundwater quality at these monitoring locations would be identified at these wells before there were impacts to private wells, including those south and west of the proposed mine. Therefore, the greater protection sought by Mr. Gould is already in place, as Seneca Meadows argues.

In his letter, Mr. Gould said that the Seneca Meadows landfill "has had documented leachate and groundwater contamination problems," but did not provide supporting documentation, or contend that these problems currently existed. At the issues conference, DEC Staff counsel confirmed that the landfill is ringed by monitoring wells that are checked for groundwater quality, and said that Staff was unaware of leachate breaking out from the containment system beneath the landfill. (T: 75.)

After the issues conference, DEC Staff asked Seneca Meadows to confirm that mining-associated drawdown could not influence groundwater flows at the landfill site generally and especially at the site of the closed Tantalo landfill, which is approximately 2700 feet from the proposed mine. By letter dated

January 13, 2012, Robert Holmes, senior project manager for Cornerstone Engineering, responded with a capture zone analysis indicating that mine dewatering would not influence a deep bedrock contaminant plume associated with the Tantalo landfill. (See Figure No. 1, attached to Holmes' letter, which illustrates the capture zone of the dewatered mine (in other words, that portion of the bedrock aquifer that contributes groundwater to the pumping center) as being directed away from the Seneca Meadows and Tantalo sites, both located to the east of the mine property.)

In his letter, Mr. Holmes writes that the contamination associated with the Tantalo landfill is actively managed by Seneca Meadows to keep its potential impact within the limits of the landfill site. He reports that the installation and maintenance of an engineered landfill cap and leachate collection system in the area of the contamination source and the injection of chlorinated solvent reductants have served to reduce the limits of the plume over the past five to seven years. Furthermore, he notes that regular groundwater monitoring of the plume takes place to track its movement and reduction.

According to Mr. Holmes, in the unanticipated event that the mine did have an influence on the Tantalo plume, that influence would be identified by the monitoring program well before the plume left the landfill site, and Seneca Meadows would be required to address the changes to the plume under the Tantalo monitoring program. Furthermore, he says, Seneca Meadows could employ various remedies to address the situation, including pumping wells along the landfill perimeter, injecting more reductants, or modifying mine dewatering operations.

Upon review of Mr. Holmes' letter, DEC Staff counsel reported in her letter of January 18, 2012, that Staff believes there is no significant possibility that mine dewatering would induce flow toward the mine from the Seneca Meadows landfill property. Staff says that the subject requires no further study, because of engineering controls at the landfill, especially the landfill's groundwater suppression system and the construction and operation of cells in the western part of the landfill site.

#### Special Permit Condition

Acknowledging concerns about water table drawdown and the potential for well contamination, DEC Staff included in its

draft permit a condition (No. 8) that would require Seneca Meadows, at DEC's direction, to supply water at Seneca Meadows' expense to properties whose quantity or quality of groundwater is impacted by the project. Similar conditions have been employed in other mining cases to eliminate the need to adjudicate groundwater impacts as an issue in permitting hearings.

This occurred for the first time in Matter of Empire Bricks, where an issue as to whether a proposed clay mining operation would adversely impact the quantity of water in neighboring wells was eliminated on the basis of a condition requiring the applicant "to provide potable water to adjacent landowners whenever the quantity of water in the wells of such landowners is insufficient unless and until the Applicant can demonstrate to the satisfaction of the Department that its mining operation is not a contributing cause to such problem." (Empire Bricks, Interim Decision of the Commissioner, August 1, 1990, page 1). In Empire Bricks, the ALJ noted that project opponents had made a "reasonable" offer of proof on the question of the mining operation's "possible interference" with area wells, and while the Commissioner, upon a review of the relevant submittals, found that such an impact was "not reasonably expected to occur," he added that the applicant's offer to provide potable water would adequately mitigate such an impact in the unlikely event it did occur. (Empire Bricks, Rulings of the ALJ, June 26, 1990, page 9, and Interim Decision of the Commissioner, August 1, 1990, page 1.)

The precedent set by Empire Bricks was followed in Matter of Gernatt Asphalt Products, Inc., where I identified as an issue whether mining below the water table, for sand and gravel, would draw down the water table and affect neighboring wells. In that case, the applicant said at the issues conference that it would agree to bear the cost for drilling a new well, deepening an existing well, or lowering the pump of an existing well for those residents who could demonstrate that the mining operation was responsible for a groundwater loss. I ruled that this contingency plan was insufficient, and not comparable to the one in Empire Bricks, because it shifted the burden of proof to the landowner, along with the requirement of initiating a civil suit, which I said for local residents could be prohibitively expensive. (Gernatt Asphalt Products, Rulings of the ALJ on Issues and Party Status, March 3, 1994, page 5 and 7.)

On appeal of my issues ruling, the applicant said it was willing to accept a contingency plan like the one proposed by

the Commissioner in Empire Bricks so long as it would remove groundwater quantity as a hearing issue. The Commissioner then said that if the applicant accepted such a contingency plan, it would eliminate the issue I had identified, even though he agreed that it was otherwise adjudicable, due to competing offers of proof and the potential for the issue to affect the permitting decision. (Gernatt Asphalt Products, Interim Decision of the Commissioner, April 29, 1994, pages 1 and 2.)

As the Commissioner noted in a subsequent interim decision, Matter of William E. Dailey (June 20, 1995, page 10) the Empire Bricks condition has been applied by DEC in situations where there have been "only concerns about potential drawdowns," as opposed to situations where "drawdowns are actually anticipated, and only the geographical and volumetric extent of the drawdowns are unknown." In Dailey, the applicant acknowledged in its DEIS that the potential drawdown attributable to its proposed limestone quarry could be as great as 70 to 80 feet at a neighboring well. According to the assigned ALJ, project opponents offered an expert offer of proof purporting to show that a much greater area than that predicted by the applicant could experience water table drawdown. More particularly, the DEIS projected drawdown effects up to about one quarter of a mile from the project site; however, the opponents predicted effects extending more than twice that distance. The ALJ ruled that the "extent of water table drawdown" was a substantive and significant issue that needed to be adjudicated, and the Commissioner agreed, despite inclusion in the draft permit of a condition requiring the permittee to provide potable water whenever the quantity and quality of water in wells within a half-mile of the life-of-mine boundary was found to be insufficient. (William E. Dailey, ALJ Rulings on Issues and Party Status, April 5, 1995, pages 16 to 18.)

I find that this matter differs from Dailey in that the applicant does not acknowledge more than a negligible drawdown at neighboring wells; in other words, it says that drawdown will not have a significant impact. Also, unlike in Dailey, the petitioners offer no evidence that drawdown would be greater or more far-reaching than Seneca Meadows has alleged. Nor have they offered any modeling to refute that performed by the applicant, unlike the petitioners in Dailey, whose proposed testimony was purportedly based on modeling of their own. (Dailey, ALJ Rulings on Issues and Party Status, April 5, 1995, page 17.) Finally, Staff's permit condition extends protection not just to properties within a certain distance from the mine

site; its protection extends to all properties in the site's general vicinity.

Even if there were an adjudicable dispute whether drawdown would have significant impacts, a condition like the one proposed here by Staff, similar to that introduced in Empire Bricks, would appear to resolve the issue satisfactorily, as it did in Gernatt Asphalt. While such a condition does not substitute for an analysis of groundwater impacts as part of the DEIS, it is not intended to; and in fact the DEIS does contain an analysis, adopted by DEC Staff, which concludes that the users of nearby residential wells should not be affected.

The DEIS (at page 2-15) indicates that should the mining project impact a neighboring well, Seneca Meadows would, at its expense, provide either a deeper well or access to the public water system, which runs along Burgess Road and North Road (State Route 96). The petitioners' geologist, Mr. Gould, writes that these measures are unacceptable because in general, deepening of bedrock wells reduces water quality, due to increased salinity and total dissolved solids. He adds that the switch to public water is also undesirable because the aesthetic value of well water to its user is a personal preference, and that replacing that source with bottled or municipal water is not replacing, in kind, the lost resource. (See discussion at page 3 of Gould's letter, Exhibit A of Concerned Citizens' petition, Exhibit 8.)

Ms. Lemmon, whose bedrock well is her only water source, also was dissatisfied with the proposals in the DEIS. She said that she already uses a softener to address sulfur and iron in her water, and added that if her well is dug deeper, it will be more expensive for her to have useable or potable water. If, in the alternative, she were supplied with municipal water, Ms. Lemmon said it would increase her property value and, with that, her taxes, while forcing her to pay for something she now receives at the cost of the electricity that operates her well pump. (T: 90 to 92.)

Addressing these concerns, DEC Staff counsel reiterated that Staff does not expect any impacts to offsite well water users, but that, as a "catchall" in case it is wrong, it had included special condition No. 8 in the draft permit. Under this condition, if DEC concludes that the mining operation has negatively impacted groundwater in the mine site vicinity, Seneca Meadows must, at its expense, and with the consent of the affected landowner, provide an alternate, permanent water source

to any impacted property. Because Ms. Lemmon's well is used for drinking water, Seneca Meadows would be obliged to connect her to the municipal water supply system, which runs along the road in front of her house. This would avoid all issues associated with deepening her well and presumably provide her some benefit, assuming, as she does, that it would raise the value of her property. Once connected to the municipal water supply system, Ms. Lemmon would bear whatever costs are associated with the use of municipal water, but no differently than others already using it.

Staff's permit condition protects adjacent well water users against water supply disruption or contamination that could be associated with the mining operation. It places the Department, as a neutral party, between Seneca Meadows and its neighbors to determine whether the mine has caused or contributed to offsite impacts. To make such determinations, Staff would have data from new wells installed between the mine and the nearest offsite wells, such data addressing groundwater elevations (on a quarterly basis) and water quality (on an annual basis), consistent with the sampling protocols set out in the new condition proposed in Staff's letter of December 6, 2011. Provided the property owners consent to its collection, Staff would also have groundwater elevation and water quality data for the Martin and Lemmon wells, collected prior to any site disturbance, for comparison with subsequent data if impacts are alleged. Offsite well users would continue to receive water that is potable (i.e, suitable for drinking), even if it comes from another source. The preservation of potable water is the intent behind conditions such as the one in Empire Bricks; the Department does not protect one's aesthetic choice for well water as opposed to water derived from some other source.

In his letter of December 19, 2011, Mr. Gould proposes that the permit condition for groundwater sampling protocols be augmented, consistent with DEC's Part 360 regulations governing landfills, with additional pre-disturbance analyses of water in the Martin and Lemmon wells, and the installation of additional monitoring wells for investigative purposes. I agree with Seneca Meadows that because the application here is for a clay mine, not a landfill, the suggestion that Part 360 groundwater monitoring requirements should automatically apply has no technical or regulatory basis. According to Seneca Meadows, to the extent it agreed to use Part 360 water quality analysis parameters and well construction techniques identified in Staff's permit condition, it did so not because Part 360 has any regulatory import, but rather because these are familiar

components of the monitoring program at the Seneca Meadows landfill. In its letter of January 18, 2012, DEC Staff says that its use of Part 360 sampling parameters is more than adequate to evaluate groundwater quality in residential wells and wells at the mine site, and sufficient to detect potential contamination from petroleum fuels used in vehicles operating at the mine site.

Mr. Gould writes that because the residential wells to be protected supply drinking water, New York State Department of Health ("NYSDOH") Part 5 drinking water analyses should be performed. However, DEC Staff maintains that such analyses are not required and are not necessary, and that the list of parameters that are addressed by its permit condition is more comprehensive than that recommended (but not required) by NYSDOH for the type of residential well at issue, without requiring sampling and analysis for NYSDOH parameters that could have no relationship to potential contamination from mining (e.g., coliform bacteria, nitrate and nitrite). Seneca Meadows agrees with Staff on the issue of Part 5's non-applicability, arguing that the monitoring requirements in 10 NYCRR 5-1.43 do not apply to private wells serving individual residences (see 10 NYCRR 5-1.40).

In his letter furnished with Concerned Citizens' petition, Mr. Gould writes that the DEIS should provide for installation of acceptable backup water supplies before excavation begins. I disagree. Because impacts are not anticipated, measures to secure water now in the unlikely event it is needed later, are unnecessary. Also, the monitoring, on a periodic basis, of wells between the mine and adjacent offsite wells should provide an early warning of any impacts that are not now foreseen, so that Seneca Meadows, working with DEC, can take corrective measures before offsite groundwater users are affected.

At the issues conference, Ms. Lemmon expressed particular concern that the mine's operation would facilitate the spread of contaminants to her well from the Seneca Meadows landfill. No evidence was offered to support this concern, and it also ignores the fact that the landfill has its own monitoring wells to detect potential groundwater contamination. Finally, the modeling performed as part of the DEIS indicates that dewatering associated with the mine's operation would have negligible impacts to groundwater flow patterns in the landfill's vicinity. (DEIS Appendix N, page 1-9.)

In his letter of December 19, 2011, Mr. Gould includes a discussion (at pages 3 to 5) addressing groundwater modeling in the DEIS, which he says is inadequate to support a determination of minimal impact on water supply wells in the vicinity of the proposed mine. In his letter of December 28, 2011, Seneca Meadows counsel objects to this discussion as raising new points that were not advanced in the letter Mr. Gould provided with Concerned Citizens' petition. On that basis, Seneca Meadows requests that I disregard this discussion as having been submitted in an untimely manner. I hereby grant this request, in relation to Mr. Gould's specific criticisms of the modeling that was performed. My allowance for a post-conference submittal by the petitioners was limited to comment on any new permit conditions that DEC Staff proposed, and did not extend to criticisms of Seneca Meadows' hydrogeologic modeling, which was available to the petitioners and their expert in the DEIS before the petition filing deadline.

To the extent that, on any appeal of these rulings, the Commissioner chooses to entertain Mr. Gould's specific criticisms of the groundwater model, Seneca Meadows' substantive response to those criticisms is contained on pages 3 and 4 of its counsel's letter dated December 28, 2011, and DEC Staff's response, reiterating its view that no additional hydrogeologic studies are necessary, is contained on page 2 of its counsel's letter dated January 18, 2012.

**Air Quality Impacts** (Concerned Citizens' Issue No. 2; also Issue No. 2 for Dixie Lemmon, Richard Westfall and Gary Westfall)

According to the petitioners, the DEIS contains an inadequate analysis of the project's air quality impacts, particularly those impacts associated with fine particulate matter and carbon dioxide emissions. The petitioners claim that there is erroneous information in the DEIS and that air quality impacts need to be addressed more thoroughly as a basis for findings under SEQRA.

**RULING:** As explained below, an issue exists as to whether a sufficient analysis of fine particulate matter has been performed, consistent with DEC policy. However, no issue exists in relation to impacts of carbon dioxide emissions.

Air quality impacts are addressed at pages 2-24 through 2-30 of the DEIS. As part of the DEIS, Conestoga Rovers Associates ("CRA") completed a detailed analysis of potential

impacts of greenhouse gases and particulate matter emissions associated with the project. An emissions inventory (DEIS Appendix H) was prepared, and, according to the DEIS, the potential impacts on air resources were conservatively estimated based on activities that could be expected to occur simultaneously during a peak year of activity. A series of U.S. Environmental Protection Agency ("USEPA") published emission factors and emission factor equations presented in the "Compilation of Air Pollutant Emission Factors," also known as AP-42, along with engineering calculations, were used in the performance of this work. (DEIS page 2-24.)

For the purpose of addressing the petitioners' claims, the analysis of fine particulate matter, as to which an issue has been raised, is considered first, followed by the analysis of greenhouse gases, as to which no issue exists.

#### Fine Particulate Matter (PM-2.5)

On December 29, 2003, DEC issued Commissioner's Policy CP-33, "Assessing and Mitigating Impacts of Fine Particulate Matter Emissions," a copy of which has been marked as Exhibit No. 18. The policy provides direction to DEC Staff for evaluating the impacts of fine particulate matter emissions from proposed facilities that require one or more permits from DEC, and specifically, provides a mechanism for complying with the provisions of SEQRA as it relates to the impact of such emissions.

As discussed in the policy, particulate matter is a generic term for a broad class of chemically and physically diverse substances that exist as discrete particles (liquids or solids) over a wide range of sizes. For regulatory purposes, particulate matter has been classified in terms of the particle's aerodynamic diameter. PM-2.5 is particulate matter with an aerodynamic diameter of 2.5 microns or less, while PM-10 includes all particulate matter with an aerodynamic diameter of 10 microns or less. Thus, PM-2.5 is, by definition, a subset of PM-10. In general, the term "fine particulate matter" is used to describe PM-2.5, while "coarse particulate matter" describes particulate matter with an aerodynamic diameter of greater than 2.5 microns and equal to or less than 10 microns. (CP-33, Exhibit No. 18, page 2.)

DEC's policy notes that elevated levels of PM-2.5 in the atmosphere have been linked to serious health conditions in humans. Exposure to PM-2.5 has been closely associated with

increased hospital admissions and emergency room visits for heart and lung disease, increased incidence of respiratory disease, including asthma, decreased lung function and premature death. Sensitive groups that appear to be at greatest risk of such effects include the elderly, individuals with existing cardiopulmonary disease, and children. (Exhibit No. 18, page 2.)

PM-2.5 can be emitted as a primary pollutant directly from stationary (i.e., fixed site or non-moving) sources as well as mobile sources (such as motor vehicles, engines and equipment that can be moved from one place to another). Sources of primary PM-2.5 include, among others, stationary and mobile sources that burn fossil fuels, as well as unpaved roads. PM-2.5 may also form in the ambient air, a process called secondary formation, from or as a direct result of the emission of PM-2.5 precursors from stationary and mobile sources. (Exhibit No. 18, pages 2 and 3.)

DEC's policy mandates that permit applicants quantify emissions of PM-10 from a proposed project and assume that all measured or estimated PM-10 emissions are PM-2.5. If primary PM-10 emissions from the project do not equal or exceed 15 tons per year, then the PM-2.5 impacts from the project shall be deemed insignificant under SEQRA and no further assessment shall be required. If, however, there is an annual potential to emit PM-10 of 15 tons or more, the policy requires modeling analyses of PM-2.5 impacts for both stationary and mobile sources attributable to the project consistent with DEC's existing practice for PM-10 modeling. The results of the air quality impact analyses must include a reasonably accurate measure of the project's expected contribution to annual and 24-hour ambient air concentrations in the area where the project is proposed to be built. In addition, DEC Staff may require that community-wide impacts be provided using isopleths showing expected concentrations at various distances modeled from the source. (Exhibit No. 18, pages 3 and 4.)

A factual issue exists as to whether the 15 ton per year threshold would be exceeded for this project. According to the DEIS, emissions of PM-10 (and therefore, PM-10 and PM-2.5) are predicted to be less than 15 tons per year by approximately 4.3 tons, and therefore, in accordance with the policy, are deemed insignificant with no further assessment necessary. (DEIS, page 2-29.) However, Dr. Cynthia Hsu, an expert retained by the petitioners, says that emissions would easily exceed the 15 ton per year threshold upon correction of an error she perceives in the calculations performed by CRA on Seneca Meadows' behalf. (A

letter of Dr. Hsu, dated November 2, 2011, is Exhibit B of Concerned Citizens' petition for party status, which is part of the issues conference record as Exhibit No. 8.)

According to the DEIS, potential project impacts from particulate matter include fugitive dust and vehicular emissions, soil handling and stockpiling, and dust from wind erosion from the open areas of the mine itself. Operational vehicles and soil hauling trucks stir up particulate emissions by the action of vehicle tires on the surfaces of paved and unpaved roads at the facility. Particulate emissions from operational and construction activities are primarily caused by the moving and handling of soil by heavy equipment such as excavators, loaders, and bulldozers. Emissions were calculated based on the equipment and hours of operation for both construction and operational vehicles. CRA's emissions calculations, shown in Table 6 of DEIS Appendix H, are based on USEPA emission factors and modeling equations detailed in the emissions inventory.

As noted in the emissions inventory, PM-10 emissions for the proposed project were estimated based on routine operations for a typical year of mining operation assuming two scenarios: a construction season running from May to October, and an off-construction season running from November to April. PM-10 was estimated for excavation, truck loading and unloading, vehicle traffic and soil stockpiles.

Particulate emissions of road dust stirred up by vehicle tires were calculated by CRA from a survey of vehicles on a typical operational day and information provided by Seneca Meadows, which included vehicle traffic data, such as types and numbers of vehicles, distances traveled by those vehicles while on site, and hours of operation. The types of vehicles looked at and the assumptions about them that were made to estimate particulate emissions are set out on pages 4-2 and 4-3 of the emission inventory. Also, CRA used a series of USEPA-published emission factors and emission factor equations presented in the "Compilation of Air Pollutant Emission Factors," also known as AP-42, in the performance of its work.

DEC's draft permit (Exhibit No. 7) contains, as special condition No. 7, a requirement that water or other approved dust palliatives be applied to haulageways and other parts of the mine, as often as necessary, to prevent visible dust from leaving the mine property. According to the DEIS, road dust particulate would be controlled primarily by water application

by truck on both paved and unpaved roads, as well as water application on unpaved and unvegetated surfaces in the mining and stockpile areas, as needed. Also, a street sweeper would be used to remove dust on the paved road surfaces between the mining area and the landfill that could be entrained by vehicle traffic. (DEIS, pages 2-29 and 2-30.) Finally, a facility to wash truck tires prior to trucks leaving the site and/or the landfill is mentioned as an additional road dust control measure at page 4-3 of the emissions inventory, though not in the DEIS. A dust suppression/control plan is included as DEIS Appendix I; it outlines additional measures to control dust in the excavation and stockpile areas, including, if feasible, the vegetation of soil stockpiles not accessed regularly.

To address the benefit of a watering system for paved and unpaved roads, CRA applied in its emissions calculations a control efficiency of 90 percent, as referenced in Table B.2.3 of Appendix B of AP-42, thereby reducing by a factor of 10 the PM-10 that would otherwise be generated from the road traffic in the mine area. Whether this was appropriate has been called into question by Dr. Hsu in her letter attached to Concerned Citizens' petition.

As noted by Dr. Hsu, Table B.2.3 gives a list of "typical collection efficiencies of various particulate control devices" as percentages. The type of collector identified as "AIRS Code 061 - Dust suppression by water sprays" has a 90 percent control efficiency; however, according to the table, it applies to particles 6 to 10 microns in size. There is also a 65 percent control efficiency for particles 2.5 to 6 microns in size, and a 40 percent control efficiency for particles smaller than 2.5 microns in size. Given that this is a clay mine, and asserting that clay has a particle size of less than 2 microns, Dr. Hsu concludes that the appropriate standard should be a 40 percent control efficiency, markedly less than the 90 percent control efficiency applied by CRA. She argues that if a 40 percent control efficiency is applied and all else remains the same in CRA's analysis, then the mining operations would produce an estimated 43 tons per year of particulate matter, well above the 15 ton per year threshold. Even if a 65 percent control efficiency is used, she adds, the mining operations would produce 26.9 tons of particulate matter per year. (Hsu letter, Exhibit B of Concerned Citizens' petition, at page 10 of the letter.)

According to Dr. Hsu, Seneca Meadows provides no justification for applying a control efficiency of 90 percent,

appropriate for particulate matter between 6 and 10 microns in size, to clay dust that she says would be 2 microns or smaller in size. CRA's emission inventory states: "A control efficiency for watering systems published in AP-42 (90 percent for PM-10) was applied to the emissions for each of the roads. AP-42 does have an alternate equation that can account for local precipitation; however, since the road watering is not conducted during precipitation events, the control efficiency above was deemed sufficient."

While no further explanation is provided, it appears that the 90 percent figure was used by CRA on the understanding that the particles being controlled are PM-10. That understanding is not in dispute; what is in dispute is whether the particles are also PM-2.5. CP-33 states that in assessing a project's primary emissions, DEC Staff shall require that permit applicants quantify emissions of PM-10 from a proposed project "and assume that all measured or estimated PM-10 emissions are PM-2.5." A footnote then adds that USEPA has indicated that this is a conservative approach to analyzing impacts from a stationary source, and DEC will apply the same conservative approach to mobile source emissions in analyzing project impacts.

At the issues conference, DEC Staff said that its regional air pollution control engineer, Tom Marriott, had reviewed the DEIS and concluded that CP-33 was applied correctly in this case, and that the numbers provided were consistent with a determination that the 15 ton per year threshold had not been exceeded, and, therefore, nothing further was necessary. (T: 119.) However, Staff did not address Dr. Hsu's argument about the control efficiency in particular.

Responding for Seneca Meadows, its counsel took issue with Dr. Hsu's contention about the size of clay particles, saying "it's a misstatement that clay is ubiquitous to 2.5 microns or less. That simply is not true." (T: 130.) However, this does not settle the issue; it merely highlights a difference in opinion. Also, counsel for Seneca Meadows said that Dr. Hsu is not competent to offer testimony about air pollution issues, and that there is no evidence that she has any working experience in that area. (T: 132) In her letter, Dr. Hsu admits having no specialty in particulate matter, fluid dynamics, mining or geology, but claims an above average understanding of soils and soil properties, and an understanding of the movement of airborne particles in the atmosphere, derived from her research on pesticide drift, among other things. (Exhibit B, pages 1 and 2.) As a soil scientist, Dr. Hsu is certainly competent to

address questions about particle size, and, therefore, how the AP-42 table should be applied, regardless of whether she is competent to address any modeling of PM-2.5 impacts that may yet be required for this project.

In sum, an issue has been raised whether the project exceeds the 15 ton per year PM-10 threshold and therefore requires additional assessment of PM-2.5 impacts, consistent with CP-33. This issue is substantive because sufficient doubt has been raised whether potential PM-2.5 impacts are significant and, if they are significant, whether they have minimized to the maximum extent practicable, consistent with social, economic and other essential considerations. This issue is significant because it has the potential to result in denial of the permit, a major modification of the project or the imposition of significant permit conditions in addition to those proposed in DEC Staff's draft permit.

Examination of this issue, which arises under SEQRA, must consider the reasonableness of the emissions calculations in Table 6 of DEIS Appendix H, as well as the alleged conservatism of the analysis. Apart from the conservatism claimed by Seneca Meadows, some additional conservatism may possibly be afforded by DEC's interpretation of CP-33 in the context of Matter of Cobleskill Stone Products, another mining matter also before the agency. At the issues conference for that project, a hard rock mine in Schoharie County, DEC Staff interpreted the 15 ton per year cap as applicable only to stationary sources, and the ALJ adopted Staff's analysis in his issues ruling. (Matter of Cobleskill Stone Products, Ruling on Issues and Party Status, July 23, 2008, pages 56 and 57.) When I brought this ruling to the parties' attention, Seneca Meadows' counsel said that if it is correct, Seneca Meadows' emissions inventory is conservative because that inventory included mobile as well as stationary sources. (T: 105 - 106.) However, whether the ruling is correct is the subject of an appeal now pending before the Commissioner, and the ruling is based on an interpretation of CP-33, but not a statement in the policy itself, which stresses that both stationary and mobile sources can emit PM-2.5 as a primary pollutant.

Dr. Hsu argues that the mine, as a potential source of particulate matter, needs to be evaluated in the context of other nearby sources of particulate pollution, namely the Seneca Meadows landfill, the Seneca Energy landfill-to-gas facility, and Evans Chemetics. The mine's contribution to annual and 24-hour ambient air concentrations in the project area has not been

determined, consistent with CP-33, because the project has not been deemed by either Seneca Meadows or DEC Staff to have an annual potential to emit 15 tons or more of PM-10.

Dr. Hsu also argues that further analysis is required under 6 NYCRR 200.6, which says that "no person shall allow or permit any air contamination source to emit air contaminants in quantities which alone or in combination with emissions from other air contamination sources would contravene any applicable ambient air quality standard and/or cause air pollution." I disagree, given that the mine is not an "air contamination source," which is defined in 6 NYCRR 200.1(f) as "an apparatus, contrivance or machine capable of causing emission of any air contaminant to the outdoor atmosphere." That definition of "air contamination source" explicitly excepts an indirect source of air contamination as defined in 6 NYCRR Part 203 to mean "a facility, structure or installation" such as a high-volume road or parking area "the construction or operation of which results or may result directly or indirectly in associated vehicular movements which contribute to ambient concentrations of any air contaminant for which there is an ambient air quality standard." [6 NYCRR 203.2(a).]

Noting that the mine will generate particulate matter from the actual clay that is mined, from the clay dust kicked up by vehicles traveling the roads, and from the vehicles themselves, Dr. Hsu claims there is no documentation illustrating the quantities or size breakdown of the particulate matter that would be released by the vehicles in their emissions. (Exhibit B to Concerned Citizens' petition, at page 5.) However, in the emission inventory, CRA reports that separate calculations for engine combustion emissions were not performed because the AP-42 equations used to estimate particulate matter from vehicle/equipment traffic over unpaved roads implicitly included the emissions from vehicles in the form of exhaust, brake wear, and tire wear, as well as resuspended road surface material. According to the emissions inventory, these sources are included in the AP-42 emission factor equation for paved and unpaved roads since the field testing data used to develop the equation included both the direct emissions from vehicles and emissions from the resuspension of road dust. In addition, CRA notes that the data was collected based on 1980s equipment, and that there have been significant measures put in place under the vehicle emission standards in the federal Clean Air Act since then to regulate and subsequently force manufacturers to reduce engine combustion emissions. According to the emissions inventory, vehicle emissions standards were to be reduced further by June

2010, and Seneca Meadows committed to using low sulfur diesel by April 2010, which would further reduce particulate emissions. (See discussion at pages 4-6 and 4-7 of DEIS Appendix H.)

The petitioners assert that the DEIS does not give added weight to the fact that diesel fumes and particulates would be concentrated in the small area of the mine, or to the additive exposure risks posed to children attending a nearby school, pregnant women, the sick and the elderly. (Exhibit No. 8, page 10.) Seneca Meadows dismisses this concern, arguing that emissions associated with the diesel exhaust of equipment operated in the mine constitute just one ton of the 10.7 tons per year of PM-10 that it estimates the project would generate.

Finally, the petitioners assert that Seneca Meadows should specify the number of vehicles by kind, manufacturer model and date, emissions at maximum revolutions, and maximum number that would be operating at one time, as a basis for calculating particulate and other emissions. (Exhibit No. 8, page 9.) In fact, the emissions inventory includes extensive information about the vehicles that would contribute to road dust emissions (which are determined on the basis of vehicle weight), and the equipment that would operate at the mine during both the construction and off-construction seasons. (DEIS Appendix H, pages 4-2 to 4-6.) The petitioners question whether it is appropriate, for analysis purposes, to evaluate particulate emissions on an annual basis, when most of the emissions would occur during the construction season. However, as Seneca Meadows points out, the analysis is structured to meet the requirements of CP-33, in relation to a ton per year threshold. (T: 132.)

Because CRA calculated that the project's PM-10 emissions would be 10.7 tons per year, below the 15 ton per year threshold of CP-33, a more refined assessment and modeling of PM-2.5 impacts was not performed by Seneca Meadows. (DEIS Appendix H, pages 4-1 and 4-7). At issue is whether this analysis, adopted by DEC Staff, is correct and in fact conservative, as CRA maintains, and whether, in particular, the proper control efficiency for water spraying has been applied. Until these questions are answered, one cannot determine whether PM-2.5 impacts would be insignificant, and whether additional investigation is reasonably necessary to determine those impacts. (See 6 NYCRR 621.14(b), which provides that at any time during the review of an application for a new permit, DEC may request in writing any additional information which is

reasonably necessary to make any findings or determinations required by law.)

As noted above, the DEIS includes methods proposed by Seneca Meadows to mitigate impacts from dust and particulate matter. While these include the imposition of speed limits to control dust on roadways and surfaces, Dr. Hsu also proposes consideration of road bumps or other physical structures that slow traffic. Dr. Hsu also proposes that mining operations be stopped during a two to three hour period on days when the nearby school lets out, due to the large population of children and parents outside. Until it is determined whether project-related PM-2.5 impacts would be significant, it cannot be determined whether these or other additional measures are warranted. However, if significant impacts are anticipated, SEQRA requires that they be mitigated to the maximum extent practicable.

#### Carbon Dioxide Emissions

As a separate proposed issue, the petitioners are concerned about the project-related generation of carbon dioxide, a greenhouse gas, at a site proximate to a concentration of residences in the village of Waterloo. The DEIS (at pages 2-25 to 2-27) includes a discussion of greenhouse gases that would be generated from the project as a result of the combustion of fossil fuels from direct and indirect sources. Direct sources of greenhouse gases include mining equipment used to excavate and remove soils such as dozers, excavators, and loaders, and the transportation of these soils to the Seneca Meadows landfill. Indirect emission sources include vehicle emissions from employees traveling to and from the site at the beginning and end of their workshift. Greenhouse gas emissions were evaluated in accordance with a DEC policy dated July 15, 2009, entitled "Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement." Emissions calculations for these sources were based on USEPA emission factors and modeling equations detailed in the emissions inventory, DEIS Appendix H. Factors considered in calculating greenhouse gas emissions included type of vehicle, fuel consumption, hours of operation, and distances traveled.

Currently, soils required by the Seneca Meadows landfill for routine operations (daily cover, construction and operations) are received via tandem-axle dump trucks from off-site permitted mine locations west of the landfill, as shown in DEIS Figure 2-11. CRA calculated that about 3,038 tons per year

of greenhouse gas are generated from this soil importation, while about 2,888 tons per year of greenhouse gas would be generated as a result of the proposed Meadow View mine.

On the understanding that operation of the Meadow View mine would eliminate the need for trucking soils to the landfill from off-site mines further away, and eliminate the need for some on-site handling, CRA estimates that this project would reduce overall carbon dioxide emissions by about 150 tons per year. (DEIS, page 2-27.) However, the petitioners point out that it would concentrate carbon dioxide emissions in the mine site, just north of a large residential area that the DEIS acknowledges experiences good overall air quality. (DEIS, pages 2-24 and 2-25.)

The petitioners say this is a serious issue because it has the potential to destroy the quality of life for neighboring residents, inflict serious depreciation of property values and, most important, create a substantial change to ambient air quality with resulting health problems. These claims were challenged at the issues conference by Seneca Meadows counsel, who argued that carbon dioxide is not regulated and evaluated because of localized health impacts, but rather because of its impact on global climate change. (T: 112 - 114.) He said that if carbon dioxide was associated with localized health effects, USEPA would be required under the Clean Air Act to establish a national ambient air quality standard for it, which it has not done. (T: 112.)

That carbon dioxide is assessed in relation to global climate change, and not localized health impacts, is borne out by DEC's greenhouse gas policy, which emphasizes (at page 3) that there is scientific consensus that human activity is increasing the concentrations of greenhouse gases in the atmosphere, and that this, in turn, is leading to serious climate change, which is emerging as one of the most important environmental challenges of our time.

The policy points out (at page 4) that carbon dioxide is one of six main greenhouse gases, and that carbon dioxide emissions, the overwhelming majority of which result from fuel combustion, account for an estimated 89 percent of the total annual greenhouse gas emissions in New York State. The policy provides instructions to DEC Staff for reviewing an EIS pursuant to SEQRA when the EIS includes a discussion of energy use or greenhouse gas emissions, as this one does.

In conclusion, no issue exists in relation to greenhouse gases generally or carbon dioxide in particular. In particular, there was no showing that the generation of carbon dioxide within the mine site would have any adverse impacts on health, property values or quality of life in the vicinity of the mine. In fact, carbon dioxide is reviewed under DEC's policy not for the protection of public health, but in relation to climate change, a matter of global, not localized, concern.

**Community Character** (Concerned Citizens' Issue No. 3; also Issue No. 3 for Dixie Lemmon and Richard Westfall, and Issues No. 3 and 13 for Gary Westfall)

The petitioners contend that the proposed mine would adversely impact the character of the surrounding community because it is not compatible with the town of Waterloo's comprehensive plan and is prohibited by town zoning. They propose to show through the town's comprehensive plan that local residents value the scenic and rural qualities of the area in which they live, and that these qualities, and the general character of the community, would be adversely affected by this project. Also, they claim that most of the town and village buildings are historic, and must be analyzed and addressed as part of a community character assessment.

**RULING:** No issue exists for adjudication, and no supplementation of the DEIS is required.

As Seneca Meadows argues, the proposed Meadow View mine is consistent with both the existing character of the surrounding community, and the community character as envisioned by town officials through their land use planning.

Community character, as an aspect of the environment subject to SEQRA review, was discussed in the Commissioner's second interim decision addressing St. Lawrence Cement Company's application to construct and operate a cement manufacturing facility in Columbia County, as follows:

"SEQRA defines "environment" to mean the "physical conditions which will be affected by a proposed action, including . . . existing community or neighborhood character" (ECL 8-0105[6]; 6 NYCRR 617.2[1]). In guidance, the Department states that the characteristics of an existing area include "size, location, the mix of its land uses and amenities and existence of architectural elements or structures representative of the community" (SEQR Handbook, November 1992, at 43; see also

SEQRA Environmental Assessment Long Form, Part 2, "Impact on Growth and Character of Community or Neighborhood" [listing examples of community character]).

"The Department, to a large extent, relies on local land use plans as the standard for community character. Adopted local plans are afforded deference in ascertaining whether a project is consistent with local character (see Matter of Lane Constr. Co., Interim Issues Rulings, February 22, 1996, at 16 [local zoning ordinance as "the expression of the community's vision of itself"]; Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, June 20, 1995, at 8 ["If a zoning ordinance or other local land use plan exists, it would be evidence of the community's desires for the area and should be consulted when evaluating the issue of community character as impacted by the project"]; Matter of Miracle Mile Assocs., Decision of the Commissioner, December 6, 1979, at 3 ["[t]he Department will not intrude its judgment . . . in matters which have properly been the subject of definitive local governmental determinations of patterns of land use])."

(Matter of St. Lawrence Cement Company, LLC, Second Interim Decision of the Commissioner, September 8, 2004, pages 115 and 116.)

#### Existing Community Character

As noted in the DEIS, the project site is an undeveloped, gently sloping area currently covered with brush, meadow, and shallow ponds. Most of it was graded and disturbed over the last 10 to 15 years as part of a proposed golf course development that the previous owner ultimately abandoned; another portion of the site has been used agriculturally, most recently for soybean plantings. (DEIS, pages 1-2 and 2-53.) The project area is bounded on the north by the John Brewer and Quentin Good properties, to the west by Powderly Road, to the south by North Road (State Route 96), and to the east by Burgess Road. (DEIS, page 2-53.) Surrounding land uses consist primarily of undeveloped land to the north and west (with scattered residential and agricultural development), the Seneca Meadows landfill and a reclaimed mine site to the east, and residential areas to the south (including the village of Waterloo). (DEIS, page 2-53.) The residential uses to the north, east and west of the site consist of large lot, rural residential areas, while other residential/commercial uses along State Route 96 consist of unconsolidated surface mines (similar

to what is proposed), automobile repair shops, and excavation contractors. (DEIS, page 2-53.)

#### Town's Land Use Planning

The DEIS (at page 2-54) indicates that the town of Waterloo has a comprehensive land use plan, dated August 2000, which was prepared by Planning/Environmental Research Consultants in Ithaca. That plan, a copy of which was marked as Exhibit No. 19, is also referenced by the petitioners, one of whom, Gary Westfall, cites particular provisions of it in his petition (Exhibit No. 11, Issue No. 13).

Also, the DEIS addresses the zoning of the project site, consistent with the town's zoning law, a copy of which was marked as Exhibit No. 23. According to the DEIS, most of the site acreage is zoned Agricultural (A), and excavation would take place only in that zone, although the parcels comprising the project extend outside of the zone. (DEIS, page 2-54.) A zoning map that is part of the DEIS (Figure No. 1-4) illustrates how the affected, or Life-of-Mine, area, consisting of 120.8 acres, is entirely within an agricultural zoning district, while outside of that area, closer to Powderly and Burgess roads and State Route 96, there are strips of land zoned for commercial and residential purposes, which are also part of the site.

As Seneca Meadows argues, and as confirmed in the DEIS, the Meadow View mine is consistent with the town's comprehensive land use plan and town zoning, for the following reasons:

- The commercial excavation of soil is identified in the zoning law as a land use or activity that is permitted by special permit in a town agricultural district (See Item No. 58 in Schedule I, Land Uses or Activities, in the town zoning law, Exhibit No. 23.)

- The project site is not within a Seneca County agricultural district (as seen in DEIS Figure 2-2).

- The project layout allows future residential, commercial and agricultural uses in the buffer surrounding the Life-of-Mine area. Furthermore, the residentially and commercially zoned areas are not within the proposed excavation areas and generally not part of the mine project (with the exception of the access road area).

- Final reclamation of the mine site would involve the creation of stabilized, revegetated open space and two large ponds, suitable for recreational use.

- The area between Burgess and Powderly roads, north of Route 96 (in other words, the area of the proposed mine) is identified in the comprehensive plan (at page 26) as one where recreation is, or could be, the preferred land use.

- Another area, along the town boundary north of Balsey Road, which was being mined in 2000 to supply cover for the Seneca Meadows landfill, is identified in the plan (at page 26) as a possible important recreation area serving both Waterloo and Seneca Falls upon completion of mining and the site's restoration.

Though DEC Staff directed that the town's comprehensive plan be utilized in a discussion of community character (see page 7 of DEIS final scoping outline, dated October 26, 2009, included in DEIS Appendix B), Seneca Meadows' counsel said the plan should not be given much weight, due to its age and the fact that the town did not adopt regulations to follow through on it. (T: 143 - 145.) Regardless of the plan's significance, the project is consistent with the plan, certainly to the extent it allows for potential recreational use of the site once mining is completed. Even if no recreational use is realized, final reclamation calls for the establishment of stabilized, revegetated open space, essentially returning the site to something comparable to its existing condition.

The project's consistency with the town's comprehensive plan is not diminished by statements from the plan extracted by Gary Westfall to indicate that the plan and the project are "completely out of sync" (Issue No. 13 in Gary Westfall's petition, Exhibit No. 11). Those statements, which Mr. Westfall says clarify the town's official position, are as follows:

- The most favorable land for farming in Waterloo lies north of Route 96 or in the western third of the town (page 12);

- The town has a goal of taking a reasoned approach to future growth that acknowledges the value of preserving the town's rural character but responds positively when opportunities for development arise (page 17);

- The town has an objective to strike a balance between expanding the town's tax base through new development and preserving the rural, open qualities of agricultural land (page 17);

- The town intends to foster a climate of interdependence between farm and nonfarm residents but will continue to support measures that protect viable farm land, encourage normal farming practices and prevent unreasonable nonfarm encroachment (page 17);

- The town has an objective to enact and enforce measures that can minimize adverse impacts of nonfarm development in agricultural areas (page 18);
- The town recognizes the importance of a balanced community that offers attractive, well located residential neighborhoods and adequate living facilities (page 18);
- The town has a goal of achieving housing development patterns that help retain open space and preserve the traffic-carrying function of major roads (page 19);
- The town has a goal of maintaining a highway system that will facilitate traffic movement and minimize points of conflict and delay (page 19);
- The town has an objective of providing incentives aimed at minimizing the number of driveway cuts and other potential conflicts on the most important traffic carriers [identified in the plan as Routes 5 and 20, neither of which are affected by this project] (pages 19 and 20);
- The town will strongly pursue new industrial development in an economic development zone and in other locations where regional transportation systems and public utilities are available [mining is a commercial, not industrial, activity] (page 20); and
- The town has an objective to support agricultural and private sector efforts to minimize negative environmental impacts on sensitive areas, including wetlands, that are often subject to development pressures [as noted above, there are no state regulated wetlands on the project site, and the federally regulated wetlands in the northern and western portions of the site are separated from the construction area by a drainage divide] (pages 20 and 21).

Read together, these statements from the town's plan affirm a general intent to maintain open space and rural, residential character, historically associated with agricultural uses, while allowing appropriate, targeted development. The plan does not speak directly to this project, which was not proposed at the time the plan was prepared, or mining in particular; it is, as it states, "a group of broad policy statements" (page 1)," "just a guide formulated at one point in time" for the town's development (pages 1 and 2), with "limited value" in the absence of regulations that determine how land is used and how development should occur (page 28).

Because, under town zoning law, mining is permitted under a special use permit in a town agricultural zone, such activity cannot be considered incompatible on its face with local land use policy. Furthermore, as Seneca Meadows points out, the town

and DEC have previously permitted an unconsolidated sand and gravel mine, Dendis Sand and Gravel, along State Route 96, also in an agricultural zone. (DEIS, page 2-55.) According to representations by DEC Staff and Seneca Meadows at the issues conference, that mine was permitted by the town planning board in 2006 or 2007 under a special use permit, the same type of permit Seneca Meadows intends to request for this project. (T: 171 - 174.)

Finally, on the issue of consistency with local land use policy, Seneca Meadows references in the DEIS (at page 2-54) a community benefits agreement it entered into with the town of Waterloo in August 2005, a copy of which was marked as Exhibit No. 20. Under the agreement, in consideration for community benefits fees, the town made commitments that, in effect, bound itself to support this mining application, though Seneca Meadows remains subject to any or all existing local laws or zoning ordinances in place at the time the agreement was executed. (Exhibit No. 20, page 12 of 16.) As DEC Staff points out (T: 148), the agreement contains a map (Appendix F) that identifies sites, including this one, where the town would allow Seneca Meadows to develop a surface mine. At the issues conference, the petitioners questioned whether Appendix F was part of the agreement when the town entered into it (T: 176 - 184), but I can only presume that it was, since it is referred to in the body of the document.

The town itself did not comment on the complete application and did not petition for party status or otherwise involve itself in this proceeding, despite being informed of it by DEC Staff's letter to its chief executive officer, dated September 28, 2011. (Exhibit No. 22.) Pursuant to ECL 23-2711(3), the local government is afforded an opportunity, upon receipt of notice of a complete mining permit application, to notify DEC whether mining is prohibited at the proposed location; however, in this case, the local government did not take that opportunity. (T: 154 - 158.) In its mining permit application, Seneca Meadows says that mining is not prohibited at its proposed location, but requires a permit from the local government. (The application, a one-page form signed in June 2011, is Appendix B to the mined land use reclamation plan and stormwater pollution prevention plan, in a binder marked as Exhibit No. 14.)

In proposing community character as an issue, the petitioners stress the value that the town places on its scenic character, with unlimited rural views. Though, at the issues

conference, the petitioners withdrew a separate issue concerning visual impacts, they still express concern that the project will, as Gary Westfall says in his petition, generate "a depressive landscape of artificial mechanically engineered mounds, creating a dreary atmosphere hiding something no one wants" and thereby redefine the surrounding community's scenic character.

These criticisms ignore the information in the DEIS, which states that the low profile of the proposed mining project would limit off-site visibility to the immediate vicinity. To mitigate visual impacts for nearby residents and motorists along the bordering roads, six-foot tall berms, vegetated with grasses, would be constructed around much of the perimeter of the excavation area, with substantial landscape planting offered as an option for nearby properties, including that of Ms. Lemmon. The majority of project activities would occur below current grade, allowing existing topography to screen these activities from view, and topsoil stockpiles would be limited to about 20 feet in height, subtly contoured and vegetated with grasses to minimize visual contrast with surrounding meadows and background woodlots. (See discussion of visual resources and proposed mitigation measures at DEIS pages 2-41 to 2-46.)

As a final point, no additional study of historic structures is required, given the petitioners' failure to offer evidence suggesting potential impacts to particular buildings outside the project site. Furthermore, the State Historic Preservation Office, having reviewed the project in accordance with Section 106 of the National Historic Preservation Act of 1966, has concluded that it will have no effect upon cultural resources in or eligible for inclusion in the National Register of Historic Places. (See letter from the state's Office of Parks, Recreation and Historic Preservation to Seneca Meadows, dated August 21, 2007, included in DEIS Appendix G.)

**Traffic Impacts Related to Burgess Road Crossing** (Concerned Citizens' Issues No. 4 and 13; also Issues No. 4 and 11 for Dixie Lemmon, Richard Westfall and Gary Westfall)

Access to the Meadow View mine would be provided by a two-lane haul road constructed from the southeast corner of the mine to the southwest corner of the Seneca Meadows landfill, as shown in DEIS Figure No. 1-11. The haul road would exit the mine and extend east where it would cross Burgess Road, a county road, and then continue east to the landfill. The Burgess Road crossing, about 150 feet north of the intersection of Burgess

and Salcman roads, would be used for mine-related traffic only, and would not be used by waste trucks traveling to and from the landfill, construction traffic associated with the landfill, or delivery vehicles traveling to the landfill. All soil transported to or from the mine, including soils to be used at non-landfill projects, would be required to travel along this road. (DEIS, pages 1-8 and 1-9.)

According to the petitioners, various issues exist with regard to the Burgess Road crossing and the impact it would have on traffic along that road, which is along the mining site's eastern boundary. They assert that the proposed truck route (in particular, the Burgess Road crossing) has numerous geometric sight distance deficiencies and is unsafe. They contend that the application in its current form is insufficient to make findings under SEQRA, and that Seneca Meadows has not adequately provided information required by the final SEQRA scoping document and requested by Seneca County officials. Finally, given the large volume of trucks that would use the Burgess Road crossing, the petitioners say consideration must be given to the impact of this traffic "on accident rates, infrastructure repair costs, local parking, restaurant, fuel, vehicle repair and other service and retail facilities located along routes into and out of the county," and the impact of diesel exhaust on indoor air quality at facilities, including Waterloo's schools, that are along these routes.

**RULING:** No issue exists for adjudication. Furthermore, no supplementation of the DEIS is required.

The final scoping outline for the DEIS, dated October 26, 2009, identified impacts to traffic and transportation as one of the significant environmental impacts to be evaluated. (See page 6 of the final scoping outline, included in Appendix B of the DEIS.)

More particularly, the outline directed that Seneca Meadows inventory existing traffic conditions in the vicinity of the mine, and describe and evaluate proposed modifications to the existing local traffic infrastructure. Seneca Meadows was instructed to identify and evaluate access points to the mine from local roads, and the potential impacts related to the type and volume of traffic that the mine would generate. Finally, Seneca Meadows was told to identify potential mitigation measures that could include road maintenance, signage and other improvements as might be appropriate to maintain the existing level of highway service.

The complete discussion of these issues is set out at pages 2-36 to 2-41 of the DEIS, and fully meets the requirements of the scoping outline. While the local road network is explained, the DEIS points out that the project would not use a local roadway for hauling soils; instead, Seneca Meadows would create a separate access road with an improved road crossing at Burgess Road. The number of daily crossings of Burgess Road associated with this project has been estimated in the DEIS (page 2-39), and measures have been identified to mitigate impacts to both traffic flow and the structural integrity of the pavement. The Burgess Road crossing would consist of a graded haul road crossing Burgess Road at a 90 degree angle, with drainage controls, installation of a four-way stop intersection, and improved pavement sections. (DEIS, page 2-40.)

As seen in the construction drawings (in particular, C-108, C-109 and C-113, part of DEIS Appendix C), mine-related traffic would approach Burgess Road from both the east and the west and would stop prior to crossing the road, along which "Stop Ahead" signs would be posted to provide additional safety. According to the DEIS, stopping sight distance (for wet pavement) for a design speed of 55 miles per hour (current posted speed limit on Burgess Road) is 495 feet, as recommended by the American Association of State Highway Officials. The proposed sight distance is more than 550 feet, which exceeds that recommendation. (DEIS, page 2-40.)

According to the DEIS, the pavement section for Burgess Road at the crossing would be reconstructed to accommodate the loads associated with the off-road mine traffic, while accounting for the rural highway traffic loading associated with current road conditions. Based on similar loading conditions involving loaded mine vehicles at the Seneca Meadows landfill and success with similar pavement sections for these conditions, a pavement section consisting of ten inches of asphalt over 12 inches of crushed stone and a stabilization fabric has been selected for the paved access road and the Burgess Road crossing. The haul road would be constructed of asphalt pavement for a distance of 350 feet on either side of the Burgess Road centerline, to minimize trucks from tracking dirt onto Burgess Road at and in the vicinity of the haul road crossing. (DEIS, page 2-41.)

## Petitioners' Claims

The petitioners claim that the proposed truck route (by which they mean the Burgess Road crossing) has numerous geometric and sight distance deficiencies and is unsafe. Asked about this at the issues conference, they were unable to specify these deficiencies or explain their alleged safety concern. (T: 187.) Furthermore, they do not have a traffic expert who would testify on these matters. (T: 214.) As noted above, Seneca Meadows has established that its crossing would have more than adequate stopping sight distance for local traffic moving along Burgess Road. Furthermore, the proposed design of the crossing, as developed for Seneca Meadows by Hydroqual, has been found acceptable by the Seneca County engineering and highway departments, as confirmed in a letter, dated February 9, 2009, from county officials to Seneca Meadows. (The letter is included in Appendix G of the DEIS, and referenced at page 2-40 of the DEIS.)

As the petitioners point out, this letter was not intended to constitute an approval to construct the crossing, something that was confirmed to the petitioners in a letter dated March 28, 2011, from Jason McCormick, the county engineer (Exhibit No. 27). Nevertheless, according to a letter provided to me by DEC Staff counsel on December 7, 2011, there does not appear to be any reason why the county would deny Seneca Meadows a construction permit when application is made for it.

According to DEC Staff, Mr. McCormick has told Staff since the issues conference that Seneca Meadows is required to submit a county road work permit application for the stop sign and intersection construction work proposed for the crossing. Mr. McCormick indicated to Staff that he had reviewed traffic count data collected for Seneca Meadows in November 2009 (which includes data for Burgess Road; see letter from Timothy R. Faulkner, dated December 4, 2009, included in DEIS Appendix G) and that the County had done its own count, which found comparable data. (See Exhibit No. 24, a memorandum dated November 1, 2011, to Mr. McCormick and others from Roy Gates, the county highway superintendent, addressing this issue.) Mr. McCormick confirmed to Staff that the design of the crossing was not merely acceptable, but exceeded the standards that the county would normally require of work permit applicants. While he stressed that a permit application remains to be submitted, he was not aware of any reason why the county highway department would disapprove the application, though he could not speak for

the county planning board, whose approval of the application would also be required.

As Seneca Meadows' counsel explained at the issues conference, the traffic counts that Seneca Meadows had done in November 2009 were performed to confirm the accuracy of prior judgments about traffic in the area, and for use in a noise assessment. The traffic data collection consisted of the installation of automatic traffic recorders at six locations, including Burgess Road north of Salcman Road. The recorders collected 24-hour traffic volumes by hour so that daily traffic variations could be quantified. Along Burgess Road, the count showed an average seven-day traffic volume of 1,406 cars per day; the average five-day traffic volume (Monday to Friday) was 1,493 cars per day. At the issues conference, Seneca Meadows' counsel said that seven-day and five-day average traffic counts are consistent with standard engineering practice for traffic studies. (T: 206.)

Based on the estimated mine life of 11 years, the total volume of soil to be excavated, and the estimated phased mining schedule, the DEIS estimates there will be, on average, 105 daily deliveries (amounting to 210 road crossings) between the mine and the adjacent landfill, likely evenly distributed throughout a 12-hour workday. Increased crossings of Burgess Road during peak construction season and during good weather could exceed the estimated average, but this peak activity is not anticipated to be a regular occurrence. (DEIS, page 2-39.)

At the issues conference, the petitioners said that the combination of soil trucks crossing Burgess Road and local traffic on that road during rush hours is a "prescription for disaster" (T: 218). However, they offered no evidence to support this; beyond that, the safety of the crossing design has been confirmed by the county, on which DEC relies, having no expertise of its own on this issue.

In a letter dated January 31, 2011 (Exhibit No. 25), DEC Staff requested that Seneca Meadows provide the results of a NYSDOT traffic study and speed limit evaluation for inclusion in the DEIS. Seneca Meadows responded by letter dated June 16, 2011 (Exhibit No. 26) that the crossing design and the county approvals were based on the current Burgess Road speed limit, and that no NYSDOT study was included in the DEIS because such a study is not relevant to approval of the crossing on a county road, for which NYSDOT is not an approving agency.

At the issues conference, DEC Staff said it requested the traffic study and speed limit evaluation because in its letter of February 9, 2009, the county engineer, Mr. McCormick, had said that the county highway department would request them from NYSDOT. Staff wanted copies for inclusion in the DEIS; however, they do not exist, because the county later decided against making the request, apparently on the belief that NYSDOT would not do the study, according to Seneca Meadows' counsel. (T: 204, 206.) As noted in its letter of December 7, 2011, Staff now maintains that, on the existing record, it can make positive SEQRA findings on the issue of traffic. In light of the county's approval of the crossing design, DEC Staff does not believe that later submission of the county highway permit application carries significant risk of a project modification or selection of another construction option that would require a negative SEQRA finding. Staff's position reflects an understanding that minor alterations of the Burgess Road crossing design as it relates to traffic control devices (i.e., stop signs vs. traffic signals) or speed limits could be required by the county in the formal approval of Seneca Meadows' application for a county work permit.

The petitioners claim there is no consideration of impacts of peak truck traffic associated with this project, both at the Burgess Road crossing and in the community generally. In a letter dated January 23, 2009, to Mr. McCormick, the county engineer, from Robert Holmes of Hydroqual Environmental Engineers and Scientists, Seneca Meadows' traffic consultant, a peak day scenario was described as one based on a landfill construction schedule requiring placement of up to 10,000 cubic yards of material from the mine. The letter (included in DEIS Appendix G) says that this volume of soil would result in a peak number of 500 trips per day; assuming a 12-hour work day, the peak hour trips would be on the order of 42 and peak hour crossings would be on the order of 84.

This peak activity is not discussed further in the DEIS because it is not expected to be a regular occurrence and because it was addressed with the county engineer, who then found the design of the proposed crossing acceptable. (See DEIS, page 2-39; and Mr. McCormick's letter of February 9, 2009, included in DEIS Appendix G.) To warrant further investigation of this matter, the petitioners would need to make some expert offer of proof; however, as noted above, they have none. The petitioners anticipate that the peak hour traffic would have an impact on accident rates, ignoring the stopping sight distance evaluation that was performed. They also argue

that it would impact infrastructure repair costs, ignoring the information in the DEIS that the proposed crossing would result in minor impacts to the maintenance and quality of Burgess Road due to the planned pavement reconstruction to accommodate the haul trucks' heavy loads. (DEIS, pages 2-40 and 2-41).

Not only do the petitioners foresee traffic-related impacts at the Burgess Road crossing, they foresee such impacts in the wider community as well, extending even to air quality along traffic routes in and out of the county. This ignores a major environmental benefit of the project, which is a net reduction of traffic along the local road network. As noted in the DEIS, the soil obtained from the Meadow View mine would offset soil that is currently being delivered along the local road systems to the Seneca Meadows landfill from remote mining sources. Currently, mined soil material for the landfill is being hauled in from offsite locations to the west, mostly along the Route 96 corridor. The use of soil from the mine would result in decreased traffic on the local and state highways around the project site, and less air pollution associated with that traffic. Furthermore, the use of off-road vehicles to transport soil between the mine and the landfill would have an additional benefit, since the off-road vehicles can carry a larger volume of soil than the on-road trucks currently used, by a factor of about 1.5 times. (DEIS, 2-36 to 2-38.) This means fewer trucks to convey the same amount of soil, which means less truck-related air pollution.

The petitioners suggest that truck traffic at the Burgess Road crossing would have some adverse environmental impact on residential, school and commercial buildings located along the county's existing truck routes, citing SEQRA's definition of "environment" as encompassing "existing patterns of population concentration, distribution or growth," and "existing community or neighborhood character." [6 NYCRR 617.2(1).] The nature of this impact, which the petitioners say was not analyzed in the DEIS, was not explained by them either. The petitioners rely on the public's comments on this project as showing overwhelmingly that substantial adverse traffic impacts can be expected from this project; however, those comments, including statements made at the legislative hearing, do not constitute evidence (6 NYCRR 624.4(a)(4)), and must be made part of a petition to be addressed as an offer of proof. Otherwise, consistent with SEQRA, they will be addressed in a response to comments that must be developed before DEC can make its SEQRA findings.

Finally, the petitioners say that the DEIS does not explain how Seneca Meadows intends to maintain the existing level of highway service. In fact, the Meadow View mine would result in a reduction of traffic loading along nearby roads with the highest volumes, including North Road (Route 96). (DEIS page 2-36 and DEIS Table 2-6, which has local traffic counts.) Burgess Road, where the crossing is proposed, is a county road characterized as a secondary road in the town of Waterloo's comprehensive plan. (DEIS, page 2-36.) Not part of the highway network, it would be crossed at the designated area but not traversed by soil hauling traffic. By reducing traffic on major roads, the project would appear to maintain, if not improve, the level of service on local highways, despite the potential for congestion at the controlled Burgess Road crossing. At any rate, the petitioners have made no offer of proof to the contrary.

**Noise Impacts** (Concerned Citizens' Issue No. 5; also Issue No. 5 for Dixie Lemmon, Richard Westfall and Gary Westfall)

As part of the DEIS, Seneca Meadows retained Angevine Acoustical Consultants, Inc., to perform a community noise assessment (DEIS Appendix J) studying the existing background noise environment around the project site and the potential noise impacts related to construction and operation of the proposed Meadow View mine. Though the assessment has been accepted by DEC Staff, the petitioners allege that it overestimates the existing ambient noise level, particularly at Ms. Lemmon's property; overestimates the amount of attenuation possible from the use of earthen berms; and fails to properly estimate the noise from trucks traveling along the proposed truck route. For these reasons, they claim that the information in the assessment needs to be verified by independent analysis. Furthermore, they propose that continuous noise monitoring be conducted by an independent agency, given the proximity of residents to the project site.

**RULING:** No issue exists for adjudication.

The noise assessment performed by Angevine Acoustical Consultants, and included in the DEIS, provides an adequate basis for DEC to make findings on this project. The petitioners lack an offer of expert proof that would call into question the findings of that assessment, or the conclusion that impacts have been mitigated to the maximum extent practicable.

As part of the noise assessment, potential offsite impacts were evaluated in relation to Waterloo's town noise ordinance as well as noise assessment guidelines contained in DEC's program policy (DEP-00-1), "Assessing and Mitigating Noise Impacts," dated October 6, 2000, as revised February 2, 2001. (A copy of the policy was marked as Exhibit No. 28.) Unlike for landfill noise, DEC has no regulation setting numerical limits for noise from a mining operation; however, DEC's policy, which applies to all regulated facilities, incorporates thresholds for increases in sound pressure level, which are associated with perceived loudness. According to DEC's policy, the goal for any permitted operation should be to minimize increases in sound pressure level above ambient levels at chosen points of sound reception. In non-industrial settings, the sound pressure level should probably not exceed ambient noise at any receptor by more than 6 dB(A), the threshold above which complaints may be generated, although the policy acknowledges that greater increases might be acceptable under certain situations. Furthermore, the policy states that the addition of any noise source, in a non-industrial setting, should not raise the ambient noise level above a maximum of 65 dB(A), the "upper end" limit that allows for undisturbed speech at a distance of approximately three feet. (See noise policy, Exhibit No. 28, pages 13 and 14.)

The noise assessment in the DEIS evaluated existing levels of community background noise based on surveys and modeling, and compared potential noise levels from project operations based on modeling. Background noise levels were measured in the adjoining community at nine locations along the boundaries of the project site in the period from October 20 to 25, 2009. In addition, automatic noise loggers were installed at six of the locations and operated continuously for several days. (DEIS, page 2-31.) At the times of the surveys, traffic flows on the local roadways were in relative correspondence with counts determined by CHA (and documented in DEIS Appendix G), and the Seneca Meadows landfill was operating as well (as explained on DEIS page 2-32). According to the DEIS, the background noise environment in the residential community around the project site is dominated by noise from local traffic, rather than landfill activities. (DEIS, page 2-31.)

Modeling was employed to assess the noise environment around the project site over the life of the mine. Represented scenarios included the initial site preparation and construction phase as well as the four subsequent phases of development. For each phase of operation, three separate stages were modeled, the inputs including the noise contributions from traffic in the 7

a.m. hour that is representative of the daytime period, in the 7 p.m. hour that is representative of the evening period, and in the 6 a.m. hour that is representative of the nighttime period. The times were chosen to coincide with the start and end of daily mine operations as well as off-peak traffic periods with maximum background noise levels, which may be associated with periods of maximum community annoyance. (DEIS, pages 2-32 and 2-33.) Under DEC Staff's draft permit (Exhibit No. 7, special condition No. 11), maximum operating hours for the mine are between 7 a.m. and 7 p.m. on Monday through Saturday, and between 7 a.m. and 3 p.m. on Sunday.

Background sources represented in the model included traffic on local roadways and equipment at the landfill, which consisted of bulldozer-type equipment and haul vehicles operating at the current landfill areas and western development areas. The community receptor locations represented by the noise model are described in Figure 2-13 of the DEIS. The modeled daytime average noise level increases associated with each location for each represented stage of development are summarized in DEIS Table 2-5.

The town noise ordinance limits noise levels generated in residential areas to 85 dBA in the daytime and 75 dBA in the nighttime at the property line of the emitting source. All activities proposed at the project site would occur during daytime hours, which are defined in the ordinance as the period between 7 a.m. and 10 p.m. Sunday through Thursday, and the period between 7 a.m. and 12 midnight on Friday and Saturday. As noted in the DEIS, the noise assessment determined that the noise levels received at residential-use properties on the facility boundary would not exceed the limits set in the noise ordinance either during initial site preparation activities or during any of the mining operational phases. (DEIS, page 2-33.)

In relation to DEC's noise policy, the DEIS states that mining operations that involve excavation and transport of soil product from the site to onsite storage areas and offsite locations would not increase the daytime background noise levels along the project boundary adjoining residential-use properties by more than 6 dBA. In addition, the overall noise levels would not exceed 65 dBA, and would not exceed 61.9 dBA at all receptors off the Seneca Meadows property. As a result, the noise level increases at each residential receiving location are not expected to cause significant noise impacts. (DEIS, page 2-33.)

The DEIS acknowledges that along the boundaries of the haul road parcel east of Burgess Road, noise levels may increase by more than 6 dBA (in fact, by as much as 10 to 14 dBA) opposite certain unoccupied properties due to haul road traffic between the mine and the landfill. However, because there are no residences on these properties, and because the overall received noise levels from the haul traffic would not exceed 65 dBA, these potential increases are not considered significant. (DEIS, pages 2-33 and 2-34.)

According to the DEIS, during initial construction activities that include the creation of access roads and drainage basins and the transport and depositing of soils for berm construction, noise level increases from peak mining operations in comparison to the projected minimum daytime background noise levels would be less than 6 dBA along the boundaries with residential-use properties, with exceptions at locations 10 and 11, as shown in DEIS Figure 2-13. Location 10, where the greatest increase would occur, is the boundary with Ms. Lemmon's property, to the south of the project site. At that location, the DEIS predicts, noise levels may at times increase by more than 10 dBA during initial construction. However, these increases are expected to be temporary and limited to the time required to construct nearby berm and haul road segments, after which the berming would shield the noise from subsequent construction. The DEIS says that construction noise impacts would be minor and limited given that the average noise levels generated during construction would not exceed 65 dBA at any receptor location, that construction would proceed as quickly as possible, and that construction would be limited to certain hours, fewer than allowed for subsequent operations. (DEIS, page 2-34). (Under special condition No. 12 of the draft permit, berm construction along North Road would be limited to the period between 9 a.m. and 5 p.m. Monday through Friday, and prohibited on Saturday, Sunday and specified legal holidays.)

According to the petitioners, Seneca Meadows' noise assessment overestimated existing ambient noise levels, which would have the effect of understating the increase in noise associated with the mining project. The only support for this contention was offered by Ms. Lemmon at the issues conference, where she questioned the accuracy of the modeled 7 a.m. background noise level of 44.4 dBA assigned to the boundary between her property and the mining site, as shown in DEIS Table 2-5. Ms. Lemmon said she had done her own decibel readings and found that her home is normally below a decibel reading of 40 dBA. (T: 239.) Actually, her readings (taken on various dates

in August 2010, and reflected in a chart marked as Exhibit No. 29) indicate dBA readings for each sampling period in a range with "low" ones below 40dBA and high ones more in line with what the noise assessment modeled. (See, for instance, a reading taken at her picnic table between 6:05 and 6:10 a.m. on August 5, 2010, during a period with traffic on Route 96 but no landfill activity, where the low reading is below 40 dBA and the high reading, which Ms. Lemmon attributed to birds, is between 45 and 47 dBA.)

Seneca Meadows offered no response to Ms. Lemmon other than to question her qualifications to operate a decibel meter, and to defend its own noise assessment as scientifically based, applying international standards. (T: 240 - 241.) Even so, the background noise level assigned by the assessment (44.4 dBA) is consistent with the value of "about 45 dBA" that DEC's noise policy assigns to a quiet, seemingly serene setting such as rural farm land. (Noise policy, Exhibit No. 28, page 20.) Whether or not it overstates ambient noise at Ms. Lemmon's property, the noise assessment concedes that during initial road, berm and drain construction, the daytime average noise level increase there would be significant (13.5 dBA, according to DEIS Table 2-5), and that during subsequent operations, especially for the first two phases, the daytime average noise increases would be close to, even if they do not exceed, the 6 dBA threshold that DEC's policy (at page 14) says may cause complaints, even if they would not violate the town's noise ordinance.

Because Seneca Meadows identified a significant noise impact at Ms. Lemmon's property, weighing her noise readings against the values assigned in the noise assessment is unnecessary. The fact of the matter is that the DEIS includes measures that would mitigate this impact to the maximum extent practicable (as described at pages 2-34 to 2-36), and there is no offer of proof to the contrary.

As indicated in the DEIS, noise mitigation has been incorporated into the project design to reduce equipment noise and to shield residential properties, including that of Ms. Lemmon. Mitigation measures include the following:

- Constructing a six-foot-high screening berm along the project boundaries adjoining residential-use properties, to attenuate noise over the long term, even though berm construction would have its own unavoidable noise impacts;

- Locating mine and soil stockpile haul roads as close to the north mine edge as practical, to maximize separation distances between transport equipment and receptors, like Ms. Lemmon, along the southern boundaries;
- Depressing by several feet below existing grade the haul road segment located west of Burgess Road, to maximize the shielding of truck noise;
- Limiting early-hour construction activities and the total numbers of construction equipment used simultaneously, to the extent practical, specifically in the vicinity of Ms. Lemmon's property; and
- Beginning mining along the north part of the mine and progressing to the south in a manner that would maintain the excavation face between the operating equipment and receptors to the south, to the extent practical.

According to the petitioners, Seneca Meadows, as part of its noise assessment, overestimated the amount of attenuation possible from use of earthen berms, and failed to properly estimate the noise from trucks traveling along the proposed truck route. However, the bases for these contentions were not explained, nor were they supported by an offer of expert proof; for that reason, there is no basis to adjudicate the conclusions of the noise assessment. The petitioners would like the conclusions of the noise assessment verified by independent analysis; however, where the analysis has been accepted by DEC Staff, the burden is on them to produce evidence casting doubt on those conclusions. For its part, Seneca Meadows defended the attenuation factors it attributed to its berms, claiming they are realistic and based on international standards that are utilized to predict noise propagation. (T: 228.) Seneca Meadows also claimed that, for truck noise, it assumed maximum hourly values for two-way traffic, used truck speeds that are consistent with observations of similar equipment at the landfill site, and compared predicted noise levels to actual measurements, finding them to be congruent and representative. (T: 229.)

At the issues conference, Ms. Lemmon questioned whether Seneca Meadows would employ best management practices set out in DEC's noise policy (at page 23) to reduce equipment noise. As noted in the DEIS, all equipment would be properly maintained and will include appropriate exhaust mufflers, in accordance with applicable mining and vehicle regulations. Ms. Lemmon proposed that back-up beepers be replaced with strobe lights, to eliminate annoyance for neighbors. However, according to the DEIS, directional backup alarms are required by mining safety

regulations for operating equipment with output levels audible above surrounding noise. The DEIS states that to limit unnecessary noise increases at the property boundaries, alarm output levels would be determined based on the operating noise environment, or alarms would be selected with self-adjusting output levels, as appropriate. In the alternative, alarms that are chosen would have sensing capabilities that activate only when objects are behind the vehicle. Finally, use of backup alarms would be minimized by designing haul road traffic patterns to minimize the need for mine vehicles to back up. (DEIS, pages 2-35 and 2-36.)

According to the DEIS, Seneca Meadows would maintain a hotline by which members of the public could phone in nuisance complaints, including complaints about noise. The phone number, which would be publicized to residents on neighboring roads, is currently in use and allows people to notify Seneca Meadows about concerns related to its landfilling operations. (DEIS, pages 2-30 and 2-36.) The petitioners claim the hot line number is of no use, because Seneca Meadows does not acknowledge the landfill odors about which they have previously filed complaints. However, Seneca Meadows said it would use the hotline to investigate complaints and see what can be done to ameliorate problems, including nuisance noise derived from construction and operation of the Meadow View mine. The hotline is not a DEC permit requirement, and calls to it are not routed to DEC Staff, though DEC's on-site landfill monitor may review the complaint log. The hotline exists as part of the community benefits agreement between Seneca Meadows and the town of Waterloo. (Exhibit No. 20, pages 8 and 9.) However, nothing prevents the public from lodging complaints directly with DEC, which has the prerogative to investigate alleged non-compliance with the permit and applicable regulations.

Concerned Citizens' petition includes (as Exhibit D) a letter of Matthew Traister, senior managing engineer with O'Brien & Gere, a Syracuse engineering firm, which reviewed the DEIS on Concerned Citizens' behalf. Mr. Traister writes that although Seneca Meadows has taken certain steps to reduce noise from project activities, both the proximity of residents to the project site and the "strained relationship" between Concerned Citizens and Seneca Meadows suggest that continuous noise monitoring by an independent agency should be considered in order to confirm that applicable noise ordinances are not violated. I see no reason to require such monitoring in DEC's permit, for the simple reason that the only applicable noise ordinance is that of the town of Waterloo, which is not

enforceable by DEC. Throughout their discussion of the alleged noise issues, the petitioners refer to DEC's noise policy as a regulation, but it is not; it contains guidance to identify when noise levels may cause a significant environmental impact, but no enforceable noise limits. DEC Staff does not have a noise expert, but reviewed the data in Seneca Meadows' noise assessment in accordance with DEC's noise policy, and concluded that the noise policy had been properly applied. (T: 233.)

As Seneca Meadows points out, Mr. Traister is not included in Concerned Citizens' list of proposed witnesses, nor have the petitioners provided any indication of expertise he may have in the assessment of noise impacts. (T: 224.) Concerned Citizens said that Mr. Traister purports to be an expert, but could not explain his credentials at the issues conference. (T: 224, 225.) Concerned Citizens said that it would have brought his resume to the issues conference if it thought that I would be requesting it. (T: 224.) However, as the hearing notice states, if a petitioner intends to rely on expert testimony, the petitioner must identify the name of that expert, as well as the expert's qualifications. (Hearing notice, Exhibit No. 1, page 3.) At any rate, Mr. Traister's letter does not include substantive criticisms of the noise assessment, only a recommendation that continuous noise monitoring be considered. The petitioners' substantive criticisms of the noise assessment are not credited to any expert witness; they are merely stated as contentions that they believe would be verified by some independent analysis that has not yet been performed.

Finally, addressing comments in the petitions about the noise assessment included in the DEIS:

The petitioners say that Seneca Meadows' conclusion that only some noise at certain times may be above legal limits is self-serving, evasive and conclusive, and that Seneca Meadows should not be able to generalize about such an important issue. In fact, as Seneca Meadows points out, the DEIS does not concede that any noise would be above legal limits; the only applicable legal limits are in the town's noise ordinance, and the DEIS says that the noise assessment determined that the noise levels received at residential-use properties on the boundary of the mine facility would not exceed the noise level limits in the noise ordinance either during initial site preparation activities or during any of the mining operational phases. (DEIS, page 2-33.)

The DEIS does concede that truck traffic on the haul road east of Burgess Road, and initial site construction activities west of Burgess Road, may raise noise levels by more than 6 dBA at particular receptor locations. However, these are not generalizations; they are backed up by data in DEIS Table 2-5 that quantify each increase, for the purpose of impact analysis.

Also, the petitioners question how equipment operating at the Seneca Meadows landfill enters into the noise to be generated by this project, when considering noise in the project area. As Seneca Meadows explains, to the extent that the landfill was operating when background noise levels were measured, the landfill noise was included in the ambient background. (T: 231.) As the DEIS indicates, activities at the landfill are typically not perceptible along Powderly Road and North Road due to masking and distance effects, but are on occasion minimally perceptible along Burgess Road. (DEIS, page 2-31.)

**Public Need and Benefits** (Concerned Citizens' Issue No. 7; also Issue No. 7 for Dixie Lemmon, Richard Westfall and Gary Westfall)

According to the petitioners, neither the need nor benefits of the Meadow View mine have been adequately addressed or proven in the DEIS, thus creating the false impression that mining at this location is necessary for the further operation of the Seneca Meadows landfill, that the soils there are "specific" to others that Seneca Meadows has been using for more than 15 years, and that these soils are "necessary for the protection of emissions or other uses at the landfill." To the contrary, the petitioners claim that the soils Seneca Meadows needs are ubiquitous in the surrounding area, and that Seneca Meadows, historically and currently, has obtained soils from permitted mines west of the landfill. The petitioners assert that land in the surrounding area is still available from willing sellers, that the quality of soil mined from other locations would meet Seneca Meadows' requirements, and that mining in most of these locations would not be a threat to established communities, as this mine is a threat to the town and village of Waterloo.

**RULING:** No supplementation of the DEIS is required on the issue of public need for, and benefits of, the Meadow View mine. Furthermore, no issue about need or benefits of the mine exists for adjudication.

As noted by Seneca Meadows and DEC Staff, the discussion of need and benefits of this project is not required in relation to DEC's mining statutes and regulations; instead, it is required by SEQRA, which states a draft EIS must include "a concise description of the proposed action, its purpose, public need and benefits, including social and economic considerations" [6 NYCRR 617.9(b)(5)(i); emphasis added). Because of this requirement, DEC Staff said in its scoping document that need and public benefit must be addressed in the DEIS for this project.

The discussion of purpose, public need and benefit is on DEIS pages 1-12 to 1-14. According to the DEIS, the purpose of the Meadow View mine is to obtain soils from a permitted source for the operation of the Seneca Meadows landfill and other Seneca Meadows projects in the most environmentally protective and cost-effective manner. (DEIS, page 1-12.)

The DEIS says that Seneca Meadows needs soils for the adjacent landfill and for its other off-site developments and mine reclamation projects. As part of the landfill's operation, soils are used within the engineered system that protects the environment; they are used for cover, structural fill, and, to the extent they offer low permeability, the liner and cap systems. The use of the soils provides environmental protection of air and water resources not only at the landfill but on a community and regional level. (DEIS, page 1-12.)

The DEIS identifies as a principal benefit of the project the elimination of an existing need to import certain types of soils from permitted mines further to the west of the Seneca Meadows landfill. To obtain these soils from a mine located adjacent to the landfill would reduce the impact of dust, noise, greenhouse gas emissions, and road damage associated with the transport of soil to the landfill from a greater distance. (DEIS, page 1-12.)

Other project benefits set out in the DEIS include mining operations that are done in an "environmentally sensitive" manner, at the conclusion of which affected areas would be reclaimed so that a new "passive recreational resource" is made available to Waterloo town residents. (DEIS, pages 1-12 and 1-13.) The DEIS says that the development of the Meadow View mine would be a cost-effective alternative to the current practice of purchasing and transporting soils over a significant distance, and that the savings realized from the mine would help Seneca Meadows remain competitive with its customer base, which would facilitate continued economic benefits, as described in the

DEIS, to the residents and businesses of the town and surrounding community. (DEIS, pages 1-13 and 1-14; see also DEIS pages 2-46 and 2-49, regarding particular economic benefits.)

SEQRA requires that when an agency decides to carry out or approve an action which has been the subject of an EIS, it shall make an explicit finding that "consistent with social, economic and other considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided" (ECL 8-0109(8)).

As explained in DEC's SEQR Handbook:

"Before making a decision on an action which is the subject of an EIS, each involved agency is required to weigh and balance the public need and other social, economic and environmental benefits of the project against identified environmental harm. This balancing process is accomplished in the written SEQR findings that each involved agency is required to make for a project that has been the subject of an EIS. In this balancing, the greater the potential for environmental damage from a project and the more important the affected resource, the more attention must be given to satisfying public need and benefits. Failure to identify public needs and benefits necessary to outweigh the environmental risks of a project could result in denial of the project." [SEQR Handbook (November 1992), page 60.]

Contrary to the petitioners' contention, the public need for, and benefits of, the Meadow View mine project have been adequately demonstrated in the DEIS. Regardless of how one views the project's environmental impacts, the need of the adjacent landfill, as a permitted disposal facility, for the soils that the mine would afford is uncontestable, as are the benefits that would be derived from mining those soils at this site, rather than from more distant locations, with the associated impacts of trucking them over the regional highway network.

The DEIS does not give a "false impression" on issues of need and public benefit. It acknowledges that the Meadow View mine is not indispensable to the landfill's operation; it merely compares the benefits of the project to continuation of the existing practice of mining soil at more distant locations and then hauling it to the landfill over the regional highway network. As the DEIS acknowledges, the low-permeability, high-

strength soils needed by the landfill remain available at permitted mines west of the facility, so that the existing practice could continue, at least as long as those mines remain open or others are permitted to replace them. (DEIS, page 1-12.)

The petitioners argue that the proposed Meadow View mine does not necessarily provide a benefit to residents of the town and village of Waterloo, since soil trucked to the landfill does not necessarily have to follow existing routes through their communities. This is true, but the soil would still have to travel on the regional highway network, and, on a regional basis, the environmental impacts (from air pollution, road damage, etc.) would still be experienced. The petitioners say that land for mining is available from willing sellers in towns outside Waterloo, mostly in locations outside established communities like their own. This may or may not be true; the petitions contain no evidence to back up these claims.

Finally, in her comment letter attached to Concerned Citizens' petition, Cynthia Hsu says that Seneca Meadows has not produced any data demonstrating an economic justification for this project. In particular, she says that if this project is disallowed, so that mining has to be relocated to another site, it is doubtful that the extra cost to Seneca Meadows would force it to raise its tipping fee to one that would make the landfill uncompetitive for the waste it now imports. (See page 11 of Exhibit B, Ms. Hsu's letter, attached to Concerned Citizens' petition, Exhibit No. 8.)

The DEIS says that development of the Meadow View mine would be a cost-effective alternative to its current practice of purchasing and transporting over a significant distance the soils that are required by the Seneca Meadows landfill. (DEIS, page 1-13.) While the cost savings are not documented, one may presume such savings are real, simply by the avoidance of costs associated with long-distance trucking. On the other hand, there is no evidence what impact there would be on Seneca Meadows if this project is not approved and those savings are not realized. At best, this is a matter of speculation, not something that can be adjudicated.

**Consistency with State Solid Waste Management Policy and Planning, and Impacts on Other Solid Waste Management Facilities**  
(Concerned Citizens' Issue No. 8)

According to Concerned Citizens, permitting the Meadow View mine would be a disincentive to reduce waste in the state,

contrary to the State Legislature's preference for waste reduction over land disposal. Concerned Citizens says that the mining project makes no meaningful effort to promote the state's solid waste management plan's goal of diverting waste from disposal, and that the mine is not designed for local and regional needs, to the extent that the landfill is used for disposal of waste from outside the area, including New York City and other states. Concerned Citizens claims that the landfill is over-designed for the region in which it is sited, and that it creates excess disposal capacity. Concerned Citizens claims that the DEIS should be supplemented to include consideration of the mine's impacts on publicly and privately owned municipal solid waste management facilities, consistency with state and county solid waste management plans, and actual market need.

**RULING:** No supplementation of the DEIS is required, and no issue exists for adjudication. To the extent these claims relate to the Seneca Meadows landfill, which operates under a separate solid waste management facility permit, they have no bearing on this application for a mining permit, regardless of the fact that the mine is intended primarily as a soil source for the landfill.

As Concerned Citizens points out, New York has a state solid waste management policy that sets forth the following priorities:

- First, to reduce the amount of solid waste generated;
- Second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
- Third, to recover, in an environmentally acceptable manner, energy from solid waste that can not be economically and technically reused or recycled; and
- Fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by DEC. (ECL 27-0106(1).)

However, this policy is intended to guide DEC's solid waste management programs and decisions (ECL 27-0106(1)), including its decisions on applications for solid waste management facility permits. The Seneca Meadows landfill has a current DEC permit; in fact, a 178-acre expansion of the landfill, to provide about 14 years of additional capacity (for the years 2009 through 2023) at a disposal rate of 6,000 tons per day, was approved in 2007. (See Matter of Seneca Meadows, Inc., ALJ's

Issues Ruling, Summary Report, and Order of Disposition, dated June 6, 2007.)

As discussed above, to operate under its permit, the landfill needs soil for various purposes. If the soil does not come from the Meadow View mine, it will come from other sources, including permitted mines now in use. For that reason, the decision whether to permit this mine has no bearing on the landfill as a separate project, or on achieving the state's solid waste management planning goals.

At the issues conference, I questioned Concerned Citizens about the relevance of its claims to this mining application, and their timeliness as well, given the past approval of the landfill expansion application, as to which these claims were not proposed as hearing issues by Concerned Citizens or, for that matter, by anyone else. Concerned Citizens said it understood my questions, and expressed the wish that the landfill expansion and mining applications had been linked together, in which event they would have raised their claims for both. (T: 266 - 267.) Whether the two applications should have been linked and reviewed as one, and whether the failure to do so constitutes improper segmentation, are separate issues discussed below. However, as a practical matter, they were not linked, and these claims have no relevance to the application now pending before DEC.

As legal justification for the consideration of its claims, Concerned Citizens cites the Commissioner's November 19, 1982, interim decision in Matter of Multi-Town Solid Waste Management Facility to consider issues of excess capacity and over-design in relation to need for a proposed resource recovery facility that would incinerate solid waste. (Interim Decision, page 5.) These issues are relevant to incinerators, whose efficient operation depends upon a reliable stream of waste, but not to landfills, and they have no relevance whatsoever to mines.

Also, Concerned Citizens cites the Commissioner's May 15, 1996, decision in Matter of Integrated Waste Systems to consider project need, consistency with state and local solid waste management plans, and impact on other solid waste management facilities in relation to an application to site a new landfill in the Town of Farmersville, Cattaraugus County. (Decision of the Commissioner, page 6.) Again, these issues were deemed relevant to an application for a solid waste management facility, not a mining application.

In her letter attached as Exhibit B to Concerned Citizens' petition, Cynthia Hsu writes that Seneca Meadows needs to demonstrate compliance with the state's "Beyond Waste" solid waste management plan before it is allowed to receive permits that enable it to continue importing garbage at the current rate. However, it already has a permit to accept up to a certain amount of waste per day; any adjustments to that permit would have to be made through a proceeding to modify that permit, and cannot be accomplished through this proceeding.

Ms. Hsu also writes that if less garbage were imported to the landfill, there would be less need for clay cover, which would allow for less intensive mining, over a smaller area and over a longer time. However, for the purpose of presenting this mining application, Seneca Meadows is entitled to consider its need in relation to landfill operations at the disposal rate established in its existing permit. Also, even if the disposal rate were curbed, and the landfill filled more slowly, in the end it will still need the same amount of soil for the build-out of its permitted expansion.

**Breach of Obligation to Town under Community Benefits Agreement** (Concerned Citizens' Issue No. 9; also Issue No. 8 for Dixie Lemmon, Richard Westfall and Gary Westfall)

The petitioners claim that Seneca Meadows has breached an obligation under the 2005 community benefits agreement with the town of Waterloo (Exhibit No. 20, provision XIV(F), on pages 11 and 12) by seeking to site the Meadow View Mine in violation of Section 80-7(B) of the town's mining and excavation law (Exhibit No. 21), which says no excavation shall be permitted within 1,000 feet of an existing residence. According to the DEIS, there are three residences along Burgess Road to the northeast and east of the site, the closest of which is approximately 375 feet from the excavation limits and haul roads. Also, to the south, there are residences approximately 300 feet from the excavation limits, along State Route 96/North Road. Finally, along Powderly Road, there is one residence 500 feet to the southwest of the site. (DEIS, pages 2-53 and 2-54.)

Seneca Meadows claims that the local law (Chapter 80) in which the setback requirement is contained is inapplicable to its project for a number of reasons, including preemption by the state's Mined Land Reclamation Law (ECL Article 23, Title 27). Seneca Meadows says that, when the community benefits agreement was negotiated, the town's representatives concurred that projects that were subject to the Mined Land Reclamation Law, as

this one is, would not be subject to Chapter 80 of the Waterloo's local law. (T: 272 - 273.)

**RULING:** No issue exists for adjudication with regard to interpretation and application of the community benefits agreement.

The community benefits agreement indicates that enforcement of its terms is through the courts. (Provision XIII, Enforcement of Restrictions, at page 10.) DEC has no role in the enforcement of the agreement, nor has the town sought to involve DEC on this issue. The petitioners, not representing town officials, are not in a position to stand in for them.

**Failure to Mention All Required Permits** (Concerned Citizens' Issue No. 10)

According to Concerned Citizens, the DEIS fails to mention all the local permits and approvals that are required for the Meadow View mine. The DEIS indicates that the project requires two DEC permits: a Mined Land Reclamation Permit, for the overall project, and a SPDES permit for stormwater discharges. Because the project site is located in an agricultural zoning district in the town of Waterloo, the DEIS also says that a special use permit is required from the planning board of the town of Waterloo, which will afford the Seneca County planning board an opportunity to review and comment on the project. (See discussion of permits and approvals at DEIS page 1-11.)

At the issues conference, there was a dispute between Seneca Meadows and the petitioners as to whether the mine requires and would be able to receive a permit from the town board under Chapter 80 of the town Law, known as the Mining and Excavation Law of the Town of Waterloo, a copy of which was marked as Exhibit No. 21. According to the petitioners, such a permit is necessary for this project; according to Seneca Meadows, it is not.

Seneca Meadows says that the Meadow View mine is exempt from the requirements of Chapter 80 pursuant to Section 80-4.B(1), as an "excavation activity that is, or would be, regulated by the State of New York . . . and is not otherwise regulated by local zoning law." In other words, as indicated in the DEIS, Seneca Meadows believes that the requirement in Chapter 80 that certain excavation activities obtain a permit from the town board is preempted by the state's Mined Land Reclamation Law. (DEIS, page 1-11.)

In the DEIS, Seneca Meadows said it had agreed to apply for a Chapter 80 permit while reserving its rights to assert that no such permit is required. (DEIS, page 1-11.) However, at the issues conference, Seneca Meadows reversed its position, and said the town should not be expecting such an application to be filed. (T: 291.)

Concerned Citizens argue that because there are residences as close as 300 feet from the mine's proposed excavation limits, the project cannot meet the requirements of Section 80-7.B, which, unless modified by Town Board resolution, says that no excavation of more than 100 cubic yards of fill in any calendar year shall be permitted within 1,000 feet of an existing residence. (T: 159.) Therefore, they claim, there is an issue whether the mine should be permitted under the town's Mining and Excavation Law.

Furthermore, Concerned Citizens argue that the mine requires various other county and town approvals, particularly in relation to the Burgess Road crossing, which they say requires town rezoning of an area restricted to single-family housing to an industrial use, or issuance of a use variance by the town's zoning board of appeals.

Finally, Concerned Citizens maintains that until needed local approvals are granted, DEC should withhold issuance of its mining permit.

**RULING:** No issue exists in relation to what local permits and approvals are required, or whether they should be granted.

DEC's draft mining permit contains a notification to the permittee that it is responsible for obtaining any other permits and approvals that may be required to carry out the activities that are authorized by DEC's permit. (See Item C on page 7 of the draft permit, marked as Exhibit No. 7.) As Staff counsel pointed out, this is to advise that because DEC issues a permit, a permittee is not relieved of other applicable requirements, including those of the town and the county. (T: 151.)

What permits the localities require, and whether an applicant should receive them, is not for DEC to determine. As I have said in another permitting matter, DEC's hearing is "concerned only with whether the permits requested from DEC should be granted. It is not the appropriate forum to determine what other permits might be needed, since this would involve DEC

in interpreting local law." (Matter of Waste Management of New York, ALJ's Rulings on Party Status and Issues, December 31, 1999, pages 47 and 48.)

As DEC Staff confirmed at the issues conference, applicants are able to seek permits in any order they choose, and are not required to have local approvals in hand before they approach DEC. (T: 293 - 204.) Furthermore, the lack of these approvals has not impeded DEC Staff in terms of its own permitting review. (T: 294.)

**Impacts on Property Values** (Concerned Citizens' Issue No. 11, also Issue No. 9 for Dixie Lemmon, Richard Westfall and Gary Westfall)

The petitioners claim that the Meadow View mine would have an adverse impact on the value of adjacent real property, and that a property value protection plan offered by Seneca Meadows is inadequate to address this impact. In particular, they argue that the plan is too limited in terms of its area of coverage, and that impacts may be experienced more widely in the community due to a cascading (or domino) effect of lower sales prices affecting the value of adjoining property.

**RULING:** No issue exists in relation to property values impacts, or in relation to the property value protection plan.

While maintaining that the mine would have an overall positive economic impact for the local community, the DEIS (at page 2-50) acknowledges that it could potentially have an adverse economic impact on the value of properties in the site vicinity. To address community concerns in this regard, Seneca Meadows has agreed to implement a property value protection plan, which is set forth in DEIS Exhibit L.

Eligibility for this plan is restricted to owners of real property located within a 1,000-foot offset from the proposed limits of excavation. Eligible properties must have an occupied dwelling unit which is used for residential purposes on or before the date that the last required approval for the mine is issued by the town of Waterloo, and only current owners of record as of that date are eligible to participate.

According to the plan, in the event an eligible property owner determines to sell his or her property, he or she must notify Seneca Meadows in writing of his intention to sell. Within 30 days after receipt of the notice, Seneca Meadows will

arrange and pay for two appraisals to determine both the fair market value of the property (that is, the value of the property considering the presence of the mine site) and the hypothetical value of the property (the value of the property considering the mine site was not present).

If the property is sold during the period of the mine's operation, the plan is that Seneca Meadows will compensate the owner for the difference between the hypothetical and fair market values of the property. If the hypothetical value of the first appraisal is greater than 10 percent above the hypothetical value of the second appraisal, then Seneca Meadows will compensate the owner based on the average of the difference between the fair market value and the hypothetical value of the two appraisals. If the hypothetical value of the first appraisal is equal to or less than 10 percent greater than the hypothetical value of the second appraisal, then Seneca Meadows will compensate the owner based on the greater of the two appraisals. In the event that the purchase price exceeds the fair market value, Seneca Meadows will pay compensation in the amount of the difference between the purchase price and the hypothetical value. To the extent that the purchase price exceeds the hypothetical value, no compensation will be paid.

To be eligible to receive compensation under the plan, the property owner must notify Seneca Meadows prior to the sale of the property to allow Seneca Meadows sufficient time to arrange for the appraisals. Also, prior to the owner's acceptance of any offer for the property, the owner must provide Seneca Meadows the right to purchase the property. Seneca Meadows will not be obligated to purchase the property, but will exercise its right of first refusal within 48 hours after it receives notice.

According to the petitioners, the inclusion of the property value protection plan in the DEIS is proof of the depreciation of property values that may be expected if the mining project goes forward. I disagree, because, as Seneca Meadows points out, the plan was developed only to allay community concerns; because Seneca Meadows anticipates that the mine will have no significant environmental impacts considered detrimental to community character and quality of life, it does not expect there will be adverse impacts to property values. (T: 31-318; DEIS, pages 2-50 and 2-51.)

The petitioners also claim that the plan is inadequate because, as properties adjacent to the mine are sold at depressed prices, the value of properties next to them, but

further from the mine and outside the zone of the plan's protection, will also lose value. Asked how they would support this claim at a hearing, the petitioners said they had intended to retain a real estate appraiser, but did not have time to locate one. I responded that this was a serious deficiency, because, in the absence of an expert offer of proof, their claim could be considered only speculative. (T: 320 - 321.)

At the issues conference, DEC Staff said that it addresses a project's impacts on property values only indirectly, by the mitigation of environmental impacts. (T: 321 - 322.) This is consistent with the Commissioner's interim decision in Matter of Red Wing Properties, which involved another mining application. In that case, the Commissioner explained that, in the broadest sense, property value impacts are within the ambit of the "economic, social or other essential considerations" to be taken into account in the balancing that occurs under SEQRA, in situations where adverse environmental impacts have not been completely mitigated or avoided. Quoting from the decision, one of the first to face the issue squarely: "To the extent that the underlying causes of potential property value changes may be related to the environmental impacts of [a] project, they are reviewable under SEQRA . . . The reduction of property values, considered in isolation, cannot, however, be considered an environmental impact even under the broad definition of "environment" contained in ECL Article 8." (Red Wing Properties, Interim Decision of the Commissioner, January 20, 1989, pages 1 and 2.)

To the extent property value impacts may be looked at as an economic consideration, those impacts must be verified, which requires expert evaluation. No such evaluation has been offered by the petitioners, only what they describe as "plain common sense" that would deter a reasonably responsible person from purchasing property "anywhere near" this mine. In the absence of an expert offer of proof, there is no evidentiary basis to adjudicate claims as to whether or over what area property values may be impacted.

Furthermore, as I ruled in Matter of Oneida-Herkimer Solid Waste Management Authority, involving an application to construct and operate a landfill in Ava, Oneida County:

"Past Commissioner's decisions indicate that issues of host community benefits and property value protection are not the Department's appropriate concern, and that affected parties should address them directly with the project sponsor, outside

the hearing process. In the July 24, 1990 interim decision in Matter of the Application of the Development Authority of the North Country for permits to construct and operate a landfill in Rodman, Jefferson County, the Commissioner said that a community impacts and benefits package "is essentially a matter that must be resolved between the Applicant and the community," and that no issue concerning the contents of such a package is therefore appropriate in the context of the DEC permitting proceeding. Likewise, in the July 2, 1991 interim decision in Matter of the Application of Monroe County for construction and operation of the Mill Seat Landfill in the Town of Riga, the Commissioner said that the "the terms of agreements that are reached between project applicants and host communities relate to rights among third parties and, as such, are generally apart from the regulatory permitting process," citing Matter of Wilmorite, Inc., Interim Decision of the Commissioner, October 7, 1981, page 8." [Matter of Oneida Herkimer Solid Waste Management Authority, Rulings of the ALJ on Issues and Party Status, January 30, 2001, page 57.]

In Matter of Oneida-Herkimer Solid Waste Management Authority, an owner of property adjacent to the project site sought the development of a property value protection plan under which he would be compensated. No such plan existed in the application, and I found no legal authority under which DEC could require that one be developed.

In the pending matter, there is no indication that the property value protection plan was developed at DEC's insistence; in fact, a similar plan, to protect property values in relation to the Seneca Meadows landfill expansion, was included as Appendix C of the community benefits agreement between Seneca Meadows and the Town of Waterloo (Exhibit No. 20). The development of a property value protection plan as part of a community benefits package appears consistent with the understanding, reflected above, that property value protection is a matter to be worked out directly between a locality and a permit applicant, not by DEC as part of its permitting process. On that basis, the adequacy of Seneca Meadows' property value protection plan would not be an issue suitable for adjudication in this hearing.

**Failure to Address Alternative Project Locations** (Concerned Citizens Issue No. 12; also Issue No. 10 for Dixie Lemmon, Richard Westfall and Gary Westfall)

According to the petitioners, the DEIS does not provide adequate information by which one can evaluate alternative locations for the project, including locations not in the immediate vicinity of the town of Waterloo.

**RULING:** No issue exists for adjudication, and no supplementation of the DEIS is required.

Seneca Meadows' analysis of alternatives to its proposed action includes a discussion of alternative sites. According to that discussion, as part of its long-term planning process, Seneca Meadows evaluated its options for mining operations within its landholdings to secure the soils necessary for the construction and operation of its landfill. During this process, Seneca Meadows' landholdings were evaluated as to their overall suitability at meeting a variety of technical, economic and environmental criteria. These criteria included natural resource system and capacity, coordination with existing development sites, traffic, utility easements, employment, land use restrictions, proximity to residents, fiscal balance, and environmental assets such as wetlands, streams and floodplains.

Based on these criteria, Seneca Meadows concluded that the only reasonable site for surface mine development is the one it has chosen. According to Seneca Meadows, this site provides the optimal natural resources necessary for the landfill while minimizing impacts upon wetlands, streams, easements, floodplains and adjacent residents.

Seneca Meadows found that the other sites within its landholdings contain delineated wetlands, are constrained by easements, encroach upon the 100-year flood plain, and/or are not appropriately sized or zoned for mining. Additionally, it found these sites do not provide as significant a benefit to the local traffic and transportation infrastructure as the proposed project. For these reasons, Seneca Meadows found that development of a surface mine at any of these sites is not feasible.

Seneca Meadows' discussion of alternative sites is at page 3-2 of the DEIS. The location of five potential sites owned by Seneca Meadows, four in the town of Seneca Falls and one in the

town of Waterloo, can be seen in DEIS Figure 3-1, and their limitations as site alternatives are listed in DEIS Table 3-1.

The petitioners offer no information challenging the limitations described by Seneca Meadows for its five alternative sites, nor do they indicate that one of these other sites would be preferable for mine development. Instead, they claim that the evaluation is too narrow, to the extent it does not account for locations outside the immediate vicinity of Waterloo, in more rural settings with fewer neighbors to be impacted.

The discussion of alternatives in the DEIS is guided by SEQRA, which requires that it include "a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." (6 NYCRR 617.9(b)(5)(v).) The range of alternatives may include, as appropriate, alternative sites; however, for a private project sponsor, site alternatives may be limited to parcels owned by, or under option to, the applicant. (6 NYCRR 617.9(b)(5)(v).)

Seneca Meadows' limitation of its alternative site evaluation to sites included in its landholdings was consistent with SEQRA and its status as a private project sponsor. The petitioners have not shown that any other property held by Seneca Meadows would be more appropriate for mine development.

The petitioners say that, to evaluate site alternatives, Seneca Meadows has to be clearer about its objectives, and the economic considerations that affected its analysis. However, Seneca Meadows' objective is clear enough in its statement of project purpose, which is to obtain soils from a permitted source for the operation of the Seneca Meadows landfill and other Seneca Meadows projects in the most environmentally protective and cost effective manner. (DEIS, page 1-12.) Seneca Meadows says that the development of the project at its chosen site would be a cost-effective alternative to the current practice of purchasing and transporting over a significant distance the soils that it requires, and that the savings realized by development of this project would help Seneca Meadows remain competitive with its customer base. (DEIS, page 1-13.) The actual cost savings are not quantified in the DEIS, but one may reasonably conclude that by operating its own mine adjacent to the landfill, savings would be realized in the cost of soil delivery, and there is no evidence to the contrary.

The petitioners point out that there is no discussion of the economics of the alternative sites that Seneca Meadows considered; however, these sites, also close to the landfill, were rejected according to environmental, zoning and size considerations, as discussed in DEIS Table 3-1.

According to the petitioners, the public should have received full information from which it could independently evaluate the alternatives to the project, including all locations not in the immediate vicinity of Waterloo. However, I find that the information provided in the DEIS is adequate for a comparison of sites that Seneca Meadows actually controls. Because Seneca Meadows is not a public entity, with the power of eminent domain, consideration of sites that it does not own or have under option is unnecessary.

Finally, the petitioners argue that Seneca Meadows must show that the mining project is identified in a DEC-approved solid waste management plan, and prepare studies examining the hydrogeology of alternative sites, consistent with 6 NYCRR 360-2.12(b)(1) and (2). In fact, there are no such requirements in DEC's regulations. As I noted at the issues conference (T: 299), the requirement cited by the petitioners is from DEC's Part 360 regulations governing landfills, not the mining operations. According to 6 NYCRR 360-2.12(b), new landfills and lateral or vertical expansions of existing landfills may be located on sites that do not exhibit certain siting characteristics provided that the proposed landfill is identified in a DEC-approved local solid waste management plan and the applicant goes through a site selection process that evaluates a reasonable range of alternatives, considering factors some of which are related to hydrogeology. Because these requirements are not relevant to the mining application, no issue about them exists.

**Impact on Tourism-Related Commerce** (Concerned Citizens' Issue No. 14)

According to Concerned Citizens, the mining project would adversely affect local tourism-related commerce, and the DEIS does not account for this and the associated potential loss of tax base in its consideration of economic and social impacts.

**RULING:** No issue exists for adjudication, and no supplementation of the DEIS is required.

The final scoping outline for the DEIS (included in DEIS Appendix B) states that, in the discussion of impacts to human, economic and community resources, there should be an identification and discussion of the demographic, social and economic changes attributable to the project over the operational phases of the mine. (Final scoping outline, October 26, 2009, page 7.) The discussion of project-related impacts on the local economy occurs on pages 2-46 to 2-51 of the DEIS, and indicates that the project would result in an overall positive economic impact for both the local community and local economy. (DEIS, page 2-49.) There is no discussion of tourism-related impacts; however, such impacts were not identified in the scope as requiring attention in the DEIS, and Concerned Citizens has not identified why such impacts might be expected, and has offered no evidence that they would occur. To the extent that Concerned Citizens may be arguing that mining is incompatible with tourism, they disregard the measures that have been taken to mitigate the project's environmental impacts.

As noted in the DEIS, Seneca Meadows' benefit to the local economy includes providing jobs, paying taxes and making community benefits payments to local governments. Seneca Meadows is also developing a 576-acre educational and recreational wetlands complex with nature trails, boardwalks, observation stations and a visitor's center, which it expects could be a potential tourism destination as it ties into the Montezuma Wildlife Refuge. (DEIS, pages 2-47 to 2-49.)

While the wetlands complex has not been developed as mitigation for the mining project, it is referenced in the DEIS to show how Seneca Meadows already contributes to the community. Because the mine is expected to reduce the landfill's operating costs, Seneca Meadows argues reasonably that it would make the landfill more competitive with its customer base, which would facilitate continued economic benefits to the residents and businesses of the town of Waterloo and surrounding communities. (DEIS, page 2-50.)

#### **Absence of Approved Local Solid Waste Management Plan**

(Concerned Citizens' Issue No. 15)

According to Concerned Citizens, the mining application cannot be determined to be complete in the absence of an approved local plan for solid waste management. The petition states that Seneca County does not have an approved plan, and that until a plan is approved by DEC, DEC's consideration of the application is in violation of ECL 27-0707.

**RULING:** No issue exists as to the completeness of the mining application, in relation to lack of an approved solid waste management plan for the local planning unit.

ECL 27-0707(2)(b) states that an application for a permit to construct a solid waste management facility made by or on behalf of a municipality in a planning unit shall not be complete until a local solid waste management plan which contains all of the elements set forth in ECL 27-0107(1)(b) is in effect for such municipality. This provision is inapplicable here because the application is to construct a mine, not a solid waste management facility. The provision does not even apply to the Seneca Meadows landfill, because it is not a municipal solid waste management facility, but rather one that is privately owned and operated.

At the issues conference, DEC Staff verified that Seneca County, as the designated local planning unit, does not have an approved solid waste management plan. (T: 332.) However, this has no relevance to consideration of the pending application.

**Project Segmentation under SEQRA** (Concerned Citizens' Issue No. 16)

According to Concerned Citizens, DEC's review of this mining project separate from its review of the expansion of the Seneca Meadows landfill constitutes improper segmentation, in violation of SEQRA. Concerned Citizens questions why DEC did not conduct its environmental review of the mine in 2007, when its review of the landfill expansion was completed.

**RULING:** No improper segmentation has occurred.

As a practical matter, the mining and landfill expansion applications could not have been reviewed together since the landfill expansion application was approved by DEC in 2007, two years before the mining application was submitted to DEC. At the time the landfill expansion was considered, it was not known whether or where this mining application would be undertaken, as Seneca Meadows counsel explained at the issues conference. (T: 308.) DEC Staff counsel also said that, when DEC approved the landfill expansion, DEC was not aware of a firm or even inchoate plan for this mine (T: 310), and that the information in the EIS for the landfill expansion referred only generally to the importation of soils from off-site sources. (T: 311.)

Concerned Citizens says that Seneca Meadows must have anticipated this project as far back as 2005, when it executed the community benefits agreement with the town of Waterloo. That agreement (Exhibit No. 20) identified the proposed mine site as one of many owned or under negotiation for ownership by Seneca Meadows, where the Town agreed to limit its authority to restrict the siting or operation of surface mines.

Seneca Meadows counsel responded that that it is clear from the agreement that, in 2005, Seneca Meadows was considering locations in the town of Waterloo for a soil mine nearer than the ones it was then using. However, he added that at that time, no final plan had been determined or committed to. (T: 315.)

At any rate, the issue of segmentation has been raised against DEC, so to the extent any plans were not communicated to DEC, it makes no difference what Seneca Meadows may have had in mind.

Under SEQRA, reviewing an action in its entirety is an important principle; interrelated or phased decisions should not be made without consideration of their consequences for the whole action. Except in special circumstances, considering only a part, or segment, of an overall action is contrary to SEQRA's intent.

Segmentation is defined, for purposes of SEQRA, as "the division of the environmental review of an action such that various activities or stages are addressed . . . as though they were independent, unrelated activities, needing individual determinations of significance." (6 NYCRR 617.2(ag).) The review of this mining project has not been segmented, because all aspects of it have been considered in tandem. DEC Staff is unaware of any mining plan beyond what has been presented (T: 309), and the application, as submitted, has not been reviewed piecemeal. While the mining would be phased, all phases have been considered together.

**Adequacy of Reclamation Plan** (Concerned Citizens' Issue No. 17; also Issue No. 12 for Dixie Lemmon, Richard Westfall and Gary Westfall)

The petitioners allege that there is no reclamation plan to restore the mine site to its original condition.

**RULING:** No issue exists for adjudication.

There is no question that the mine site would not be restored to its original condition. However, it is not required that this occur.

Under DEC's mining regulations, acceptable basic reclamation requirements "shall provide for the development of the affected land either to a condition or physical state which is similar to and compatible with that which existed prior to any mining or which encourages the future productive use of the land" [6 NYCRR 422.3(b); emphasis added.] Seneca Meadows' reclamation plan (on pages 7-1 to 7-3 of Exhibit No. 14) is intended not to restore the mine site to its original condition, but to make it suitable for open space, wildlife habitat, or a passive recreational use, consistent with existing land use patterns in the site vicinity.

Final reclamation is intended to restore the site to graded, stabilized and revegetated land containing two large ponds. These ponds would be designed to be aesthetically pleasing, to incorporate moderate slopes around the perimeter to allow for the establishment of vegetation, and to allow for the settlement of sediment in runoff prior to its discharge from the site. (Exhibit No. 14, page 7-1.)

As noted in the DEIS, the mining project does not prohibit the development of the site into either a recreational or residential use in the future. The final reclamation would be suitable for a wide variety of land uses in accordance with local zoning, including residential development, agriculture and open space. Although approximately 69.6 acres would be covered by water, the residentially zoned areas along Powderly and Burgess Roads that are not in the affected area would be reserved for potential housing development. (DEIS, page 3-5.)

As Seneca Meadows points out, water impoundments constructed during mining may be incorporated into the final use of the land, consistent with 6 NYCRR 422.3(d)(2)(iv). The petitioners question whether these impoundments constitute a productive use of the land, especially because there are no definite plans for their conversion to recreational use. On the other hand, the regulations require only that the site be returned to a condition that encourages productive use. As the property owner, Seneca Meadows said that it was open to discussing with the town of Waterloo possible future uses, including an arrangement under which the town's residents could use the property for recreational purposes. However, as Seneca Meadows also explained, this would be one of many possible uses;

others would be rental of the property for agricultural purposes, or residential development. (T: 281 - 282.)

#### **ISSUES RULING SUMMARY**

A substantive and significant issue exists as to whether Seneca Meadows has performed a sufficient analysis of fine particulate matter that would be emitted by the Meadow View mining project. In particular, there is an issue whether the project has an annual potential to emit PM-10 of 15 tons or more, and therefore requires additional assessment of PM-2.5 impacts, consistent with CP-33.

The other issues proposed by the intervenors are not substantive and significant, and therefore are excluded from adjudication. Furthermore, these issues do not warrant supplementation of the application or DEIS.

#### **RULINGS ON PARTY STATUS**

As noted above, timely petitions for full party status were filed by Concerned Citizens, Dixie Lemmon and Richard Westfall. An untimely petition for full party status - submitted after the deadline set in the hearing notice - was filed by Gary Westfall.

According to 6 NYCRR 624.5(d)(1), the ALJ's ruling of entitlement to full party status will be based upon a finding that the petitioner has filed an acceptable petition pursuant to 624.5(b)(1) and (2), a finding that the petitioner has raised or can meaningfully contribute to the record on a substantive and significant issue, and a demonstration of adequate environmental interest. At the issues conference, neither Seneca Meadows nor DEC Staff objected to the environmental interests claimed by the petitioners (T: 45); however, they said the petitions raised no substantive and significant issues, and therefore no adjudicatory hearing is required.

Seneca Meadows also argued that Gary Westfall's petition should be denied because it does not make the demonstrations that are required under 6 NYCRR 624.5(c) for granting a late-filed petition. In the event that I found any issues for adjudication, Seneca Meadows argued that the petitioners should be consolidated to the extent that their claims on these issues are identical.

### **Late-filed Petition from Gary Westfall**

Gary Westfall's petition (Exhibit No. 11) was received at the Office of Hearings and Mediation Services on November 14, 2011, a week after the filing deadline of November 7, 2011, which was set in the hearing notice (Exhibit No. 1), but two days before the issues conference on November 16, 2011.

According to 6 NYCRR 624.5(c), a petition filed after the date set in the notice of hearing will not be granted unless, in addition to the required contents of a petition for party status, it includes:

(1) A demonstration that there is good cause for the late filing;

(2) A demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and

(3) A demonstration that participation will materially assist in the determination of issues raised in the proceeding.

Seneca Meadows says that Gary Westfall's petition does not make the first and third of these demonstrations. I agree. There is no good cause for his late filing, and his participation will not materially assist in the determination of the issue I have identified pertaining to fine particulate matter.

In his petition, Gary Westfall says that he filed late because his capacity as supervisor-elect for the town of Waterloo was not realized until November 9, 2011, two days after the filing deadline. (Exhibit No. 11, page 2.) At the issues conference, however, he acknowledged that he was petitioning strictly as an individual, and had no authority to speak for the town government. He also acknowledged that he could not appear on the town's behalf until January 2012, when he became supervisor, and that even then, such an appearance would require approval of the new town board. Finally, he acknowledged that as a person who lives a half-mile from the project site, he had been following this application in the newspaper, and had read what was required to request party status. (T: 33 - 35.)

After finding out about the filing deadline and who the petitioners would be, Gary Westfall said he petitioned himself because he felt that the opposition should be represented by more than just Concerned Citizens and its members. (T: 35.) Even so, there is no good cause why he could not have met the same filing deadline that they did, particularly because, in

relation to his proposed issues, the wording of his petition closely tracks theirs. Furthermore, his election as supervisor-elect has no bearing on his status as an individual petitioning for party status; therefore, the election was not relevant to his ability to file a timely petition. The petition states that Mr. Westfall's interest in this matter relates to both his personal and elected capacities; however, until taking office, Mr. Westfall could not represent the town in any official way, which he conceded at the issues conference. (T: 34.)

Gary Westfall's petition proposed thirteen issues for adjudication, the first twelve of which were proposed in the same manner by the other petitioners. Also, his proposed issue No. 13, that the project is "completely out of sync" with the town's comprehensive plan, is encompassed by his and the other petitioners' Issue No. 3, community character, where it is alleged that mining is "incompatible" with that plan. At the issues conference, Gary Westfall agreed it would be fair to state that the issues in his petition are basically also in Concerned Citizens' petition (T: 36). Furthermore, in the petition itself, he describes his issues as "a subset of issues already submitted," to show that his participation would not significantly delay this proceeding or unreasonably prejudice the other parties. (Exhibit No. 11, page 2.)

Gary Westfall's further participation would not assist in the determination of issues because his petition is basically duplicative of those filed by Concerned Citizens and its members. With the exception of some citations to the town's comprehensive plan, it contains no additional offers of proof, and it lists no proposed witnesses beyond those identified by the other parties. On air quality impacts, the only issue I have identified for further consideration, Gary Westfall's argument and offer of proof are identical to those of Concerned Citizens; in fact, given the timing of the petition's submittal, they appear to have been copied from Concerned Citizens' petition. For that reason, there appears to be nothing that Gary Westfall could add to this issue's development.

In summary, Gary Westfall's late-filed petition must be denied because it does not include a demonstration that there is good cause for late filing, consistent with 6 NYCRR 624.5(c)(2)(i), and does not include a demonstration that his participation will materially assist in the determination of issues raised in this proceeding, consistent with 6 NYCRR 624.5(c)(2)(iii).

## **Consolidation of Remaining Petitioners**

By motion dated November 15, 2011, Seneca Meadows requested that the petitions for party status be consolidated for the sake of hearing efficiency, consistent with 6 NYCRR 624.8(b)(1)(xv). Pursuant to 6 NYCRR 624.8(b)(1)(xi), the ALJ in a permitting hearing has the power to direct the consolidation of parties with similar viewpoints and input. I find that this is warranted because on the issue of air quality impacts, the only issue I have identified for further consideration, the petitions of Concerned Citizens, Richard Westfall and Dixie Lemmon are essentially the same. They contain the same argument and identify the same witness, Dr. Cynthia Hsu, as a proposed witness. In fact, Richard Westfall and Dixie Lemmon propose the same twelve issues for adjudication, and each of these issues is also included in the petition of Concerned Citizens, though that petition also includes other issues that were not proposed by Mr. Westfall and Ms. Lemmon.

Because Richard Westfall and Dixie Lemmon are both members of Concerned Citizens, and because their petitions offer the same input and viewpoint as the group itself, not only on the issue I have identified but on the other issues they have proposed, I hereby order their consolidation under the name of Concerned Citizens, for the purpose of future proceedings in this matter. This will enhance hearing efficiency by having one identified intervenor with whom hearing arrangements and conference calls will be arranged.

Concerned Citizens filed a response to Seneca Meadows' motion (Exhibit No. 13) in which they endorsed consolidating the issues into one petition, but opposed having the petitioners represented by one individual. Concerned Citizens opposed consolidation of the petitioners because it said no one individual knows the interests of the other petitioners, no one petitioner is familiar enough with the issues to speak to all of them, and the petitioners each bring a unique perspective to the issues. For the purpose of the issues conference, these concerns were addressed by having Concerned Citizens take the lead on the issues in its petition, then letting the other petitioners be heard, to the extent they shared those issues. Based on the issues conference record, whatever different perspectives the petitioners bring to the table, their positions on the issues are essentially the same, which indicates that consolidation is appropriate.

Concerned Citizens also points out that the petitioners are not paid to participate in this hearing, and that some have sacrificed pay to attend. This also supports the idea of consolidation, since it frees individuals from having to appear and participate, as long as there is one person who can speak on behalf of the group. Concerned Citizens points out that the petitioners in this matter are lay people, without benefit of an attorney or paid staff. However, that should not impede their ability to work together, and to make a common presentation, as they did at the issues conference.

### **Summary of Rulings**

I hereby grant the petitions of Concerned Citizens, Dixie Lemmon and Richard Westfall, though I direct their consolidation for the purpose of future proceedings. These petitioners have made filings providing the information required by the Part 624 regulations, they have raised a substantive and significant issue in relation to PM-2.5 impacts, and their demonstration of environmental interest is not contested by Seneca Meadows or DEC Staff.

I hereby deny the petition of Gary Westfall, as it does not contain all the demonstrations required under Part 624 for a petition filed after the date set in the notice of hearing.

### **APPEALS**

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis [6 NYCRR 624.8(d)(2)]. Ordinarily, such appeals must be filed in writing within five days of the disputed ruling [6 NYCRR 624.6(e)(1)]. Allowing extra time due to the length of these rulings, any appeals must be received no later than 4 p.m. on Tuesday, April 17, 2012. Any responses to appeals must be received no later than 4 p.m. on Tuesday, May 1, 2012.

The original and three copies of each appeal and response thereto must be filed with Commissioner Joseph J. Martens (attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway (14<sup>th</sup> Floor), Albany, New York 12233-1010. The copies will be forwarded to me and Chief ALJ James T. McClymonds. One copy of each submittal must be sent to all others on the service list at the same time and

in the same manner that the submittal is sent to the Commissioner. Service of papers by facsimile transmission (FAX) or e-mail is not permitted, and any such service will not be accepted.

Appeals should address my rulings directly, rather than merely restate a party's contentions. To the extent practicable, submittals should include citations to transcript pages and exhibit numbers. A list of the marked conference exhibits is attached to these rulings. The record also includes all the aforementioned post-conference submittals and all other correspondence between me and the conference participants.

#### **ORDER OF DISPOSITION**

DEC's permit hearing procedures state that there will be no adjournment of the hearing during appeal except by permission of the ALJ [6 NYCRR 624.8(d)(7)]. Recognizing Seneca Meadows' interest in securing a timely decision on its application, adjudication of the PM-2.5 issue shall not be stayed pending resolution of appeals to these rulings, unless a stay is requested from and ordered by the Commissioner.

Seneca Meadows shall have the burden of proof on this issue, consistent with 6 NYCRR 624.9(b)(1). Seneca Meadows shall also have the burden of going forward with a presentation affirming the reliability and conservatism of the particulate matter emission calculations in Table 6 of DEIS Appendix H, which are the basis of its conclusion that project-related PM-10 emissions would not exceed the 15 ton per year threshold triggering additional analysis under CP-33. DEC Staff's input on this issue shall also be solicited, given Staff's position that CP-33 was applied correctly by Seneca Meadows, and that no further analysis is necessary. There shall be particular attention to the dust suppression that can be expected from water spray, a point on which the petitioners disagree with Seneca Meadows and DEC Staff.

Should it be concluded that primary PM-10 emissions from the project would not equal or exceed 15 tons per year, it shall be deemed, consistent with CP-33, that the PM-2.5 impacts from the project are insignificant, and no further assessment shall be required. In such event, there being no other issues to adjudicate, permit issuance shall be warranted.

On the other hand, should it be concluded that the project has an annual potential to emit PM-10 of 15 tons or more, additional analysis of PM-2.5 impacts, including modeling of such impacts for both stationary and mobile sources, shall be required of Seneca Meadows pursuant to CP-33. Prior approval of the modeling protocol by DEC Staff shall be required before this analysis is conducted, and, once the analysis is performed, the issues conference shall be reconvened to consider this new information.

In lieu of going to hearing on the issue identified in these rulings, Seneca Meadows shall have the option of proceeding directly to the additional analysis outlined in CP-33, as if PM-2.5 impacts are potentially significant, in which case the only remaining consideration will be whether such impacts have been minimized to the maximum extent practicable, consistent with SEQRA.

Should it be requested by Seneca Meadows, I am willing to discuss this option further in a conference call that would also include the other issues conference participants, such call to be held before the deadline for appeals of these rulings. In any event, once the deadline has passed, and unless a stay of the adjudicatory hearing has been requested and granted, I will conduct a call among the parties to discuss hearing procedures and timetables.

Finally, I am separately mailing to Seneca Meadows, DEC Staff, Concerned Citizens and Gary Westfall a paper copy of the issues conference transcript, on which I have marked proposed corrections. Objections to any of these corrections, and additional corrections that any participant may propose, shall be due on April 10, 2012. Objections to corrections proposed by any conference participant shall be due on April 17, 2012. Correspondence addressing corrections shall be addressed to me directly, and e-mail may be used to meet the deadlines in this paragraph. For the most part, my proposed corrections are minor; however, they are offered in the interest of making the transcript as accurate as possible for reviewing authorities.

Albany, New York  
March 26, 2012

\_\_\_\_\_/s/\_\_\_\_\_  
Edward Buhrmaster  
Administrative Law Judge

## ISSUES CONFERENCE EXHIBIT LIST

### SENECA MEADOWS, INC. (MEADOW VIEW MINE) DEC Project No. 8-4538-00094-00001

1. Notice of Complete Application, Notice of Acceptance of Draft Environmental Impact Statement, Notice of Legislative/SEQRA Hearing and Issues Conference (9/28/11)
2. Letter from ALJ Edward Buhrmaster to Scott Turner (9/28/11), with copy of hearing notice and instructions for publication
3. Copy of hearing notice as published in DEC's on-line Environmental Notice Bulletin (10/5/11)
4. Affidavit of publication of hearing notice in The Finger Lakes Times (10/3/11)
5. Hearing notice distribution list (9/28/11)
6. Letter ruling of ALJ (10/21/11) denying Concerned Citizens' request for 60-day extension of public comment period, with attached correspondence from Leland Henry (10/12/11) and Scott Turner (10/18/11)
7. Draft permit for Meadow View Mine (10/13/11), as prepared by DEC Staff
8. Petition for party status filed by Concerned Citizens of Seneca County (11/4/11), with four attached exhibits
9. Petition for party status filed by Dixie Lemmon (11/4/11)
10. Petition for party status filed by Richard W. Westfall (11/4/11)
11. Petition for party status filed by Gary Westfall (11/11/11)
12. Motion by Seneca Meadows to consolidate requests for party status (11/15/11)
13. Response to motion to consolidate requests for party status, filed by Concerned Citizens (11/16/11)
14. Mined Land Use Reclamation Plan and Stormwater Pollution Prevention Plan for Meadow View mine, as revised June 2011 (including construction plan drawings, as revised May 2011, referenced in Appendix A)
15. Volume I of Draft Environmental Impact Statement for Meadow View mine, as revised June 2011
16. Volume II of Draft Environmental Impact Statement for Meadow View mine, as revised June 2011
17. DEC Division of Water Technical and Operational Guidance Series memorandum (2.1.3) regarding primary and principal aquifer determinations (10/23/90)
18. DEC Policy CP-33: Assessing and Mitigating Impacts of Fine Particulate Matter Emissions (12/29/03)

19. Town of Waterloo Comprehensive Plan, prepared by Planning/Environmental Research Consultants (August 2000)
20. Community Benefits Agreement between Town of Waterloo and Seneca Meadows, Inc. (August 2005)
21. Chapter 80, Mining and Excavation Local Law of Town of Waterloo, adopted by Town Board 9/19/00
22. Letter from David Bimber, DEC Deputy Regional Permit Administrator, to Supervisor Mooney of Town of Waterloo (9/28/11)
23. Chapter 135, Zoning Law of Town of Waterloo, adopted by the Town Board 3/15/11
24. Memorandum of County Highway Superintendent Roy Gates to County Board of Supervisors (11/1/11)
25. Letter from David Bimber, DEC's deputy regional permit administrator, to Thomas Hasek of Seneca Meadows (1/31/11) regarding review of the Draft of Environmental Impact Statement
26. Letter from Robert A. Holmes, senior project manager, to David Bimber, DEC's deputy regional permit administrator (6/16/11) responding to DEC Staff's comments on Draft Environmental Impact Statement
27. Letter from Jason T. McCormick, Seneca County Engineer, to Leland C. Henry (3/28/11) regarding proposed stop signs on Burgess Road
28. DEC Program Policy DEP-00-1, "Assessing and Mitigating Noise Impacts," as revised 2/2/01
29. Decibel Readings at 1569 North Road, Waterloo, as recorded in August 2010