

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

In the Matter

- of -

the Modification of a Mined Land Reclamation
Permit pursuant to Article 23 of the
Environmental Conservation Law and Title 6 of
the Official Compilation of Codes, Rules and
Regulations of the State of New York

-by-

BUFFALO CRUSHED STONE, INC.,

Applicant.

DEC Application No: 9-1430-00014/00011

DECISION OF THE COMMISSIONER

November 17, 2008

DECISION OF THE COMMISSIONER

Buffalo Crushed Stone, Inc. ("Applicant") submitted an application to the New York State Department of Environmental Conservation ("Department" or "DEC") to modify its Mined Land Reclamation Permit for an existing limestone quarry located in Cheektowaga, Erie County, New York ("facility"). Applicant proposes to mine approximately 40 acres of land between the east and west basins of the quarry and relocate its stone-processing plant and two of its asphalt plants to the bottom of the eastern quarry basin, which is approximately one hundred fifty feet below grade ("proposal"). As a result, the life of the mine would be extended by approximately twenty years.

On August 29, 2007, the Department, which is serving as the lead agency pursuant to the State Environmental Quality Review Act (article 8 of the Environmental Conservation Law ["ECL"], "SEQRA"), accepted a draft environmental impact statement ("DEIS") for the proposal.

Following an issues conference, in which applicant, Department staff, Depew/Cheektowaga Taxpayers Association, Inc. ("TA"), Cheektowaga Citizens Coalition, Inc. ("CCC") and the Town of Cheektowaga ("Town") participated, Administrative Law Judge ("ALJ") Molly T. McBride issued a Ruling on Issues and Party Status ("Ruling") on April 28, 2008. The ALJ concluded that no adjudicable issues had been raised and remanded the application to Department staff for further processing in accordance with the Ruling.¹

By letter dated June 1, 2008, TA filed its appeal from the Ruling ("TA Appeal"). Based on my review of the record, I affirm the Ruling. I direct however that TA's appeal, as well as the replies to the appeal that CCC and the Town filed, be considered as comments on the DEIS and addressed to the extent appropriate in the FEIS on the proposal.

¹ Department staff prepared a draft mined land reclamation permit that was forwarded to the ALJ under cover of a letter dated August 29, 2007 from Regional Permit Administrator Steven J. Doleski ("Draft Permit"). During the issues conference, agreement was reached on additional permit conditions to address environmental concerns (see, e.g., Issues Conference Transcript, at 66-68, 70-71 [truck wash and tarping requirements]). Department staff agreed to confer with TA, CCC and the Town regarding the language for these new conditions (see id., at 73-74).

PROCEEDINGS

ALJ McBride established that any appeal from the Ruling was to be filed by May 12, 2008.

Extension Requests

TA made a timely request to extend the time for it to file an appeal. By letter dated May 19, 2008, TA's request was granted and the other participants in the issues conference (applicant, Department staff, CCC and the Town) were authorized to file replies to any appeal that TA filed. No other party requested an extension prior to the close of the appeal period on May 12, 2008.

Several weeks after the close of the appeal period, the Department received on June 4, 2008 a request for extension of the appeal period from CCC, and on June 9, 2008 from the Town. Both requests were untimely made and were denied (see Memorandum dated June 12, 2008 to the service list from Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services).

TA Appeal and Replies

In its appeal, TA raises two issues, air quality and hydrogen sulfide odors (which it denominated as "Issue One") and traffic impacts (which it denominated as "Issue Two").

TA argues that the potential for hydrogen sulfide emissions from the facility's operation should be adjudicated, and with respect to air quality and odors, submits the following exhibits to its appeal papers:

- seven complaints about odor and asphalt fumes made by a Mr. Frank Sikorski (three of the complaints were from 2003, one from 2004 and three from 2005);
- a copy of section 211.2 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") relating to air pollution;
- a letter from Joseph A. Gardella, Jr., Professor of Chemistry at the University of Buffalo, State University of New York, in which Professor Gardella addresses various aspects of the Ruling (including air sampling techniques and air quality issues, in addition to traffic); and
- a copy of a May 31, 2008 article from the Tonawanda News that reports on the award of a grant to the Department to complete a year-long air study in the Town of Tonawanda.

With respect to traffic impacts, TA argues that the entrance to the facility should be moved from Como Park Boulevard to Indian Road. TA also raises concerns relating to a planned Rails to Trails Project (bike path) along Como Park Boulevard and the potential hazards to bikers, as well as other impacts of vehicular traffic associated with the facility.

In addition to the two denominated issues, TA also contends that: applicant needs to identify the type of asphalt processing equipment to be used at the facility; information is lacking regarding possible contamination at the base of the facility; documentation is lacking from the U.S. Occupational Safety and Health Administration regarding facility worker health and safety; and further documentation is necessary to demonstrate that the facility's operation would not impact nearby landfills and Cayuga Creek. Attached to its appeal, TA includes the following documents as exhibits on traffic and these other matters:

- letters from Assemblyman Paul A. Tokasz and others relating to the mining operation, including the relocation of the facility's entrance;
- a compilation of traffic counts from the Greater Buffalo-Niagara Regional Transportation Council ("GBNRTC"), Niagara Frontier Transportation Committee, and the New York State Department of Transportation from various months in 1997, 1998, 2001, and a period referenced as "8/1/0";
- three e-mails relating to traffic accident data (one of the e-mails provides accident statistics for 1993 through 1995 and for 2000 through 2007);
- a copy of an article from The Buffalo News dated April 29, 2004, entitled "Como Park Boulevard will be resurfaced," which notes discussions concerning the relocation of the facility's entrance to Indian Road; and
- an article from the internet on asphalt plant pollution.

Replies to TA's appeal were received from the Town, CCC, applicant and Department staff.

The Town, in its reply dated June 26, 2008 ("Town Reply"), states that it concurs with the issues that TA raised in its appeal. The Town notes that it had received complaints from Town residents regarding hydrogen sulfide odors from the facility, and it attached copies of these complaints to its reply.² The Town

²Attached to the Town's reply were complaints from 1999, 2000, 2001, six from 2002 (two of which related to a December 18, 2002

also contends that the access point to the facility should be relocated from Como Park Boulevard to Indian Road, and requests that this relocation be considered in a supplemental environmental impact statement for the proposal or, alternatively, that the relocation of the entrance be adjudicated.

The Town contends that the traffic study upon which the environmental impact statement relies "is flawed" (Town Reply, at 2), and that the DEIS should be supplemented with a new traffic study. The Town maintains that the traffic study should be updated to reflect existing conditions, including the increase of vehicular accidents on Como Park Boulevard. The Town further contends that the relocation of the facility's entrance from Como Park Boulevard to Indian Road should be made a condition of the proposed mining permit. The Town notes that Como Park Boulevard is now a component of the Town's pedestrian trail, and that the truck traffic on the boulevard that the facility generates "conflicts with the Town's plans and goals" (Town Reply, at 2). The Town also questions the air quality modeling in the DEIS, particularly in light of the proposed below grade operation of facility activities (see Town Reply, at 3). Finally, the Town contends that Appendix DD to the DEIS does not conform with the Department's current standards relating to stormwater management design (see Town Reply, at 4).³

CCC, in its reply dated June 30, 2008 ("CCC Reply"), notes its efforts to address environmental and health issues with respect to the facility and the area in general. CCC concurs with TA and the Town regarding odors emanating from the facility and alleged deficiencies in the DEIS. CCC, however, expresses its opposition to the relocation of the facility entrance to Indian Road, contending that this relocation would result in adverse environmental impacts. CCC also maintains that the facility needs to institute better dust controls (including but not limited to placing covers on the rock crushers and conveyor systems, and adding filtering systems) and better controls on

incident), one from 2003, one from 2004, two from 2005, two from 2006 and two from 2007.

³The Town states that land development activity requires approval from the Town (see Town Reply, at 4). The Draft Permit includes a provision that requires applicant to obtain any other permits, approvals, lands, easement and rights-of-way that may be required to carry out the activities that are authorized by the Department's permit (see Draft Permit, Item C, at 5; see also Issues Conference Transcript, at 81-82).

fumes resulting from its operations.

In addition, by letter dated June 1, 2008, Kelly A. Robinson, a member of CCC, expresses support for granting TA party status in this proceeding because of deficiencies that TA had identified in the DEIS. Her letter provided no further details. Ms. Robinson, however, has not filed an individual petition for party status and was not authorized to file a reply separate and apart from the reply submitted by CCC through its president John C. Stonefield. Accordingly, her submission has not been considered on this appeal.

Applicant, in its reply dated July 2, 2008 ("Applicant Reply"), contends that TA failed to identify any substantive and significant issue for adjudication and that its offer of proof is insufficient. Accordingly, applicant urges that the appeal be rejected. In this regard, applicant references various sections of the DEIS that addressed issues that TA is raising.

Department staff, in its reply dated July 3, 2008 ("Department Staff Reply"), contends that the Ruling should be affirmed on the ground that TA has not raised any substantive and significant issues for adjudication.

DISCUSSION

As established by Part 624 of 6 NYCRR, the issues conference has, among other purposes, to determine whether party status should be granted to a petitioner and to hear argument on whether any disputed issues of fact meet the standards for adjudicable issues.

An individual or entity, such as TA, seeking full party status in a Part 624 proceeding is required to file a petition that:

"(i) identif[ies] an issue for adjudication which meets the criteria of section 624.4(c) of this Part [which sets forth the standards for adjudicable issues]; and

(ii) present[s] an offer of proof specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect to that issue" (6 NYCRR 624.5[b][2][i] & [ii]).

In situations where, as here, Department staff has reviewed the

application and finds that the applicant's project conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the potential party proposing an issue (in this instance, TA, CCC or the Town) to demonstrate that the issue is both substantive and significant (6 NYCRR 624.4[c][4]). An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit" (6 NYCRR 624.4[c][3]).

A potential party's burden of persuasion at the issues conference is met by an appropriate offer of proof that supports its proposed issues (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). Offers of proof may take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application (see id.). Although a potential party is not required to present proof of its allegations sufficient to prevail on the merits, conclusory or speculative statements without a factual foundation are not sufficient to raise an adjudicable issue (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2). Conducting an adjudicatory hearing "where 'offers of proof, at best, raise [potential] uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process" (Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 [citing Matter of AZKO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12]).

The ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments [that the ALJ authorizes]" (6 NYCRR 624.4[c][2]).⁴ Offers of proof made by

⁴ In areas of Department staff's expertise, its evaluation of the application and supporting documentation is an important consideration in determining whether an issue is adjudicable (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2; Matter of Mirant Bowline, LLC, Interim Decision of the Commissioner, June 20, 2001, at 3 [judgments about the strength of an offer of proof by a potential party must be made in the context, among other things, of Department staff's analysis]; Matter of Bonded

potential parties may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff including staff's pre-issues conference review of an application, the SEQRA documents, the record of the issues conference, and authorized briefs, among other relevant materials and arguments.

If a potential party cannot adequately explain the nature of the evidence that it expects to present and the grounds upon which its assertions are made, no issue is raised. Furthermore, the issues conference is not the point where a potential party should be deciding what experts or qualified witnesses it will need to substantiate the allegations that it has made in its petition (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). The potential parties' offer of proof should be based upon the opinions of experts or other qualified witnesses already identified (see id.).

Air Quality Issues

The ALJ concluded that TA failed to identify any issues for adjudication (see Ruling, at 21).

With respect to air quality issues, the ALJ determined that no adequate offer of proof was presented (see Ruling, at 9, 13). A review of TA's petition for party status reveals that TA simply listed various issues that it believed to be substantive and significant, with no further elaboration. Although the petition references "Air Pollution" and "Health Effects (new reports)," among other matters, it failed to identify any statutory or regulatory criteria that would not be met, or how these issues would lead to the denial or modification of the proposed permit or the imposition of significant additional permit conditions. TA's arguments at the issues conference on air quality issues were conclusory or speculative and as such insufficient (see Matter of Bonded Concrete, Interim Decision of the Commissioner, June 4, 1990, at 2).

Furthermore, TA's petition does not identify any witnesses that it intends to call, nor were any witnesses identified at the issues conference that would be called upon at any adjudicatory hearing. TA's appeal papers include a letter from Professor Gardella who criticized various aspects of the DEIS, including

Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2).

aspects of the air quality analysis, but TA did not propose to offer him as a witness in any adjudicatory proceeding.⁵

Traffic Impacts

In this proceeding, certain issues raised by TA, including the issue of traffic impacts, relate to the sufficiency of the

⁵As noted, TA submitted, in addition to the letter from Professor Gardella, other documentation on its appeal in support of its argument that air quality and hydrogen sulfide odors should be an adjudicable issue. The proper forum for an offer of proof, and any supporting documentation, is the issues conference. An offer of proof that is presented for the first time at the interim appeal stage is untimely (see Matter of the Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5).

Accordingly, the information submitted is not timely presented. Even, however, if the information had been timely, no adjudicable issue would have been raised. The copied section of 6 NYCRR 211.2 is presented without any explanation as to how it relates to a specific issue. Even presuming that the regulatory section is offered to demonstrate that odors from the facility are injurious or unreasonably interfere with the enjoyment of life or property, TA has not offered any qualified witnesses or experts to testify in that regard. Department staff asserts that the number of odor complaints is minimal and that no complaints have been received to date in 2008 (see Department Staff Reply, at 1-2), although CCC in its reply refers to an odor event on June 21, 2008. Even if the complaints attached to the Town's reply and the odor event referenced in CCC's reply were timely presented and taken into account together with those offered by TA, the complaints here, without more (such as the offering of qualified witnesses or experts), are insufficient to raise an issue.

The draft permit, however, includes a permit condition with respect to hydrogen sulfide mitigation (see Draft Permit, Condition 9, at 3). To ensure that the Department is advised of any odor complaints received by the facility, I direct that Department staff ensure that if a permit is issued, it contain language requiring the facility to forward information on any odor complaints received to the Department's Region 9 office.

TA's appeal also refers to the air sampling that CCC conducted (the "bucket brigade" sampling) to indicate that hydrogen sulfide emissions exceeded applicable standards. I have reviewed the ALJ's determination that no violation was demonstrated, and see no basis to disturb that conclusion (see Ruling, at 11-13; see also Department Staff Reply, at 2 [sampling protocol did not properly document a violation]; Applicant Reply, at 5-6 [setting forth deficiencies in CCC sampling event]).

draft environmental impact statement ("DEIS") for this proposal. Where, as here, the Department as lead agency has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the Department to make findings required pursuant to SEQRA will be made in accordance with the same standards that apply to the identification of issues generally (see 6 NYCRR 624.4[c] [6][i][b]; Matter of Jointa-Galusha, LLC, Interim Decision of the Commissioner, May 7, 2002, at 3). SEQRA, however, does not require the Department to use the adjudicatory forum to resolve all comments on the DEIS.⁶

At the issues conference, TA contended that applicant should relocate the entrance/exit to its facility to reduce environmental impacts. The ALJ, however, noted that TA had not made any offer of proof relating to this matter (see Ruling, at 14). Further, the ALJ stated that TA and the other petitioners:

"provided no traffic counts or studies, . . . did not identify any witnesses they would call to challenge the route used by the truck traffic from the facility and the impact they contend it has on pedestrian and vehicular traffic [and] did not question the specifics of the traffic study done in 1997 [and referenced in the draft environmental impact statement for this project] or object to the methods used in the 1997 study" (Ruling, at 14).

Speculative comments or mere expressions of differing opinions without substantiation are insufficient to establish that an issue is substantive and significant. In the context of a SEQRA review, speculative comments or mere conjecture need not be considered (see, e.g., Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 384-85 [1992]). Generalized, non-specific comments about impacts will not advance a SEQRA issue to adjudication pursuant to Part 624.

With respect to the issue of traffic impacts, TA submitted various materials on its appeal. As previously noted, the appeal process is not the appropriate venue to supplement a petition for party status or offer further documentation in support of the

⁶The crux of review under SEQRA is identifying the relevant areas of environmental concern, taking a "hard look" at those areas and making a "reasoned elaboration" of the basis for a determination (Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 417 [1986]; see also Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 688 [1996]).

arguments that a potential party has advanced at the issues conference. Furthermore, TA provided no explanation as to why this traffic information, which predates the issues conference, was not included with its petition for party status or provided at the issues conference. Submission of the documentation at this stage is untimely.

Even if the traffic information that TA presents in its appeal papers were now considered, it is insufficient to raise an adjudicable issue. With respect to the traffic counts from 2001 and years earlier, no information was offered to demonstrate that the increase in traffic was related to the facility's operations. In fact, the proposed modification is not intended to increase the rate of production from the quarry, and no increase in traffic from the facility or change in traffic patterns is anticipated (see DEIS, at 5.2.2; see also Applicant Reply, at 7).

With respect to the traffic accident data that was contained in the e-mail attachment to TA's appeal, no information is provided on the location of the accidents, the types of vehicles involved, or any relationship between the accidents and the traffic generated by the quarry. The Town, in support of TA's appeal, contends that a "dramatic increase" in traffic accidents has occurred over the last twelve to fourteen years on Como Park Boulevard (Town Reply, at 2), but similarly provides no information on the location of the accidents and to what extent any are related to the operation of applicant's facility.

Furthermore, TA has not presented any traffic studies or other analyses of the data.⁷ With respect to relocating the access point to the facility, the information TA offers is general and speculative. The Town, in its reply, argues that the Department should explore alternative configurations to the main access point for the facility but it failed to make an adequate

⁷ The Town, in its reply, argues that the Ruling improperly shifted the burden onto the Town to prove that applicant's traffic study was inadequate (see Town Reply, at 2). The Town's argument is in error. As previously noted, in situations where Department staff has reviewed an application and finds that, as proposed or as conditioned by the draft permit, it conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the potential party proposing an issue to demonstrate that it is both substantive and significant (see 6 NYCRR 624.4[c][4]). In this proceeding, Department staff determined that applicant's proposed modification did so conform, and the burden of persuasion rested with the Town and the other intervenors (see id.; 6 NYCRR 624.4[c][6][i][b]).

offer of proof at the issues conference that would support this being identified as an adjudicable issue.⁸ Again, the appeals process is not the appropriate forum to first present information in support of an offer of proof (see Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5 [attempt to raise new offer of proof on appeal rejected as untimely]).

Based on my review of TA's appeal, and arguments that are raised in support of that appeal by the Town, no adjudicable issues relating to traffic impacts have been raised.

Other Appealed Issues

Similarly, TA's offers of proof relating to asphalt processing equipment, OSHA documentation, and potential impacts to partially capped landfills in the vicinity and Cayuga Creek, are insufficient to raise adjudicable issues.

TA states that nothing has been mentioned regarding the type of "Asphalt Processing Equipment" that the facility will use (TA Appeal, at 2). TA fails to provide any explanation as to how the type of equipment would be the basis for an adjudicable issue. I note that the DEIS indicates that the existing stone-crushing plant, as well as two of the three existing asphalt plants, will be relocated into the east quarry basin, and that one asphalt plant will be decommissioned (see DEIS, at 3.2).

TA also contends that the possible contamination at the base of the plant has not been addressed, and offers an exhibit that references toxic pollutants that arise from asphalt plant operations (TA Appeal, at 2 & Appeal Exh 8). TA does not, however, show how the concerns set forth in the exhibit relate or are otherwise relevant to applicant's facility operations. With respect to possible contamination, the DEIS addresses issues relating to groundwater and surface water quality arising from the facility's operations and describes the protective measures to be undertaken (see DEIS, at 5.1.2.1 & 5.1.2.2). The DEIS also presents various analyses relating to facility emissions that show that applicable standards would not be exceeded (see DEIS, at 4.1.3.2.2.1, 4.1.3.2.2.2, & 4.1.3.2.2.3). TA provides no credible information to the contrary.

TA states that "there is no documentation from [the federal

⁸ CCC expressed its opposition to the relocation of the mine's entrance (see CCC Reply, at 1).

Occupational Safety and Health Administration] as to the health and safety of [facility] employees" (TA Appeal, at 2), but provides no further discussion in this regard. TA does not assert that specific worker health and safety standards would not be met, or which of those standards may properly be within the scope of this hearing. It should be noted that the DEIS provides information on employee exposure monitoring showing that the exposures to respirable dust and other contaminants are below the regulatory limits (see DEIS, at 4.1.3.3.6 & Appendix S [monitoring by U.S. Mining Safety and Health Administration]; see also DEIS, at 4.1.3.2.2.4 [hydrogen sulfide limits within permissible exposure limits promulgated by the Occupational Safety and Health Administration]).

Finally, TA contends that documentation is needed from the U.S. Army Corps of Engineers that the facility's operations will not affect either the partially capped landfills in the vicinity or Cayuga Creek. TA does not provide any explanation why the U.S. Army Corps of Engineers must provide such documentation, or that this proceeding must await receipt of any such documentation. Moreover, the DEIS addresses the potential impacts of the facility on the Schultz Landfill, and includes a study showing that the blasting and other operations at the facility would not adversely impact the landfill (see DEIS Appendix HH, "Blasting Effects on Adjacent Schultz Landfill and Local Aquifers," at 6).⁹ TA has not submitted any information contrary to the analysis in the DEIS. Similarly, the DEIS addresses potential impacts to Cayuga Creek and concludes that no impacts to the flow or quality of this waterbody would result from the proposed modification (see DEIS, at 5.1.2.2). Again, TA has not submitted any information about potential impacts to Cayuga Creek that is contrary to this evaluation.¹⁰

⁹ Applicant contends that TA previously failed to raise this issue relating to impacts to partially capped landfills and, accordingly, the issue should not be considered upon appeal. My review of the record indicates that the issue was raised in a very limited fashion. However, neither TA (nor any other potential party) has made an adequate offer of proof on this issue.

¹⁰ TA also appended a letter from Joseph A. Gardella, Jr., Professor of Chemistry at the University of Buffalo, State University of New York, to its appeal. Professor Gardella addresses various aspects of the Ruling (including air sampling techniques, air quality issues, and traffic) as they relate to the DEIS (see TA Appeal, Exhibit A-3). Professor Gardella concludes that the DEIS "can be improved by including, analyzing and addressing" the issues presented in his letter (see id. at 5). Where a consultant for a potential

Appeal/Replies and the SEQRA Review

Although I concur with ALJ's determination that no adjudicatory hearing is warranted, the information presented on the appeal may be relevant to the SEQRA review on this proposed permit modification. Both Department staff and applicant have acknowledged the relevance of at least some of the material to the SEQRA review. Department staff stated that various concerns that TA raised were "proper matters" for inclusion in the final environmental impact statement ("FEIS") on this application (see Department Staff Reply, at 3). Department staff also stated that it would "endeavor to assure that all such questions are addressed by the [a]pplicant" in the response to comments that would become part of the final environmental impact statement (see id.; see also Applicant Reply, at 11 [relevant comments on the appeal should be deemed comments on the DEIS and included in the FEIS]).

Accordingly, TA's appeal papers and CCC and the Town's replies, shall be considered as comments on the DEIS and addressed to the extent appropriate in the FEIS on the proposed permit modification.¹¹ Furthermore, upon completion of the FEIS,

party takes a position opposite to that of an applicant or Department staff, that does not in and of itself raise an adjudicable issue (see Matter of Jay Giardina, Interim Decision of the Commissioner, September 21, 1990, at 2). At the outset, I note that TA does not indicate that it is offering Professor Gardella as a witness in any adjudication. At the issues conference, the ALJ questioned whether Professor Gardella was being offered as a witness, but no definite answer was provided (see Issues Conference Transcript, at 116, 133). TA has not set forth Professor Gardella's qualifications or expertise on various of the issues that he addresses in his letter (for example, traffic issues and air quality and health impacts). I direct however that Professor Gardella's comments, as requested in his letter, are to be considered in the SEQRA review on this proposal.

The Town, in its reply, attempts to introduce issues that were not raised by, or are beyond the scope of, TA's appeal (see, e.g., Town Reply, at 4 [compliance of stormwater pollution prevention plan with State design manual]). A reply is not to be used as an appeal, or to introduce new matters, and any attempt to so employ it is rejected. Although the Town had the right to appeal the Ruling, it failed to do so. Furthermore, as noted, its request for an extension of the appeal period was untimely made and denied.

¹¹ Two earlier submissions relating to extending the appeal period are also to be considered in the SEQRA process. Those include CCC's faxed submission received by the Office of Hearings and Mediation

I direct that Department staff promptly notify TA, CCC and the Town of its completion.

CONCLUSION

Based on my review of the record, I find that there are no issues requiring adjudication in this matter and affirm the ALJ's Ruling. I hereby remand this matter to Department staff to complete the SEQRA process and the review of the permit application in accordance with this Decision.

For the New York State Department
of Environmental Conservation

By: _____ /s/
Alexander B. Grannis
Commissioner

Albany, New York
November 17, 2008

Services on June 4, 2008 [CCC's submission was incorrectly dated May 21, 2005] and the Town of Cheektowaga's letter dated June 6, 2008 which was received on June 9, 2008 (see Memorandum dated June 12, 2008 from Assistant Commissioner Louis A. Alexander to the service list, at 2 [accepting both submissions as comments on the SEQRA record]). Furthermore, Ms. Kelly A. Robinson's letter dated July 1, 2008 is also to be considered in the SEQRA review to the extent applicable.

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