

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

In the Matter

- of -

the Applications for Permits To Construct and Operate a Proposed Development to be Known as the Belleayre Resort at Catskill Park, Located in the Town of Shandaken in Ulster County, New York, and the Town of Middletown in Delaware County, New York, Pursuant to Environmental Conservation Law Article 15, Titles 5 and 15, and Article 17, Titles 7 and 8, and Parts 601, 608 and 750 through 758 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), and for a Water Quality Certification Pursuant to Section 401 of the Federal Water Pollution Control Act and 6 NYCRR Part 608

- by -

CROSSROADS VENTURES, LLC

Applicant.

DEC Project Numbers:

0-9999-00096/00001
0-9999-00096/00003
0-9999-00096/00005
0-9999-00096/00007
0-9999-00096/00009
0-9999-00096/00010

INTERIM DECISION OF THE DEPUTY COMMISSIONER

December 29, 2006

INTERIM DECISION OF THE DEPUTY COMMISSIONER¹

Crossroads Ventures, LLC ("applicant"), has submitted applications for a proposed development to be known as "The Belleayre Resort at Catskill Park" ("project") to be located in the Town of Shandaken, Ulster County, and the Town of Middletown, Delaware County, within the New York City Catskill and Delaware Watershed and within the boundaries of the New York State Catskill Park.

The project, which would be adjacent to the State-owned Belleayre Mountain Ski Center, would encompass 1,960 acres, of which 573 acres would be disturbed and the remaining 1,387 acres would be left undisturbed. The project includes two distinct developments:

- Wildacres Resort which would be developed on 242 acres of a 718 acre site west of the Belleayre Mountain Ski Center and which would include a golf course, hotel, additional hotel/detached lodging units, and a 21-lot subdivision of single-family homes and related infrastructure. The resort would be served by central water provided by the Village of Fleischmanns water system, and central wastewater treatment, with effluent discharged to an unnamed tributary of Emory Brook or used for golf course irrigation. This part of the project would lie within the New York City Pepacton Reservoir watershed; and

¹ By memorandum dated February 15, 2005, then acting Commissioner Denise M. Sheehan delegated decision making authority in this matter to Deputy Commissioner Carl Johnson. The memorandum was forwarded to the service list for this proceeding by letter dated February 17, 2005.

- Big Indian Plateau which would be developed on 331 acres of a 1,242 acre site east of Belleayre Mountain Ski Center and which would include a golf course, hotel and additional hotel/detached lodging units, and related infrastructure. The resort would be served by central water (provided by an on-site well) and central wastewater treatment, with effluent discharged to Birch Creek or used for golf course irrigation. This part of the project would lie within the New York City Ashokan Reservoir watershed.

Although the project's major components (Wildacres Resort and Big Indian Plateau) are physically separated to the west and east of Belleayre Mountain Ski Center, it is considered by applicant to be an integrated single development.

Applicant has applied to the New York State Department of Environmental Conservation ("Department" or "DEC") for individual water supply permits and State Pollutant Discharge Elimination System ("SPDES") permits for Wildacres Resort and for Big Indian Plateau under title 15 of the New York State Environmental Conservation Law ("ECL") and under titles 7 and 8 of ECL article 17. In addition, a use and protection of waters permit under title 5 of ECL article 15 is required for proposed road crossings of regulated streams at the site and for the treated wastewater outfall structures to Birch Creek and the unnamed tributary of Emory Brook. Applicant has also applied for a water quality certification in accordance with section 401 of the Federal Water Pollution Control Act.

Under the State Environmental Quality Review Act (ECL article 8, ["SEQRA"]), the proposed project is classified as a Type I action. The Department is serving as lead agency, and a draft environmental impact statement ("DEIS") has been prepared.

The matter was referred to the Department's Office of Hearings and Mediation Services ("OHMS") and assigned to Administrative Law Judge ("ALJ") Richard R. Wissler. In addition to applicant and Department staff, the following entities submitted petitions for party status: the Planning Board of the Town of Shandaken ("Planning Board"); the City of New York ("City"); the Coalition of Watershed Towns, Delaware County, the Town of Middletown and the Town of Shandaken (collectively, "Watershed Towns"); and the Catskill Preservation Coalition and the Sierra Club (collectively, "CPC"). In addition, a petition for amicus status was filed by the New York City Watershed Inspector General.

In his Ruling on Issues and Party Status dated September 7, 2005 ("Ruling"), ALJ Wissler granted full party status to the Planning Board, the City, the Watershed Towns and CPC, and amicus status to the New York City Watershed Inspector General (see Ruling, at 9-24 [addressing party status in rulings numbered one through five]). The ALJ identified twelve issues

for adjudication including water supply and groundwater and surface water impacts, aquatic habitat impacts, stormwater impacts, impacts to the Catskill Forest Preserve, impacts to wildlife, noise impacts, traffic impacts, visual impacts, impacts to community character, secondary and induced growth impacts, cumulative impacts, and alternatives (see Ruling, at 26-151 [addressing issues identified for adjudication in rulings numbered six, and eight through eighteen])).²

Appeals were taken from the Ruling by applicant, Department staff, CPC, and the Watershed Towns. Replies to the appeals were filed by applicant, Department staff, CPC and the City.

For the reasons discussed in this interim decision, the ALJ's Ruling is modified with respect to the issues identified for adjudication. The matter is remanded to the ALJ for further proceedings consistent with this interim decision.

² Rulings numbered seven, and nineteen through twenty-two addressed issues where a substantive and significant issue had not been raised (water supply permit application for Wildacres Resort, forestry impacts, wastewater SPDES impacts, applicability of mined land reclamation law, and applicability of the New York City Watershed Memorandum of Agreement of 1997), and, therefore, would not be adjudicated (see Ruling, at 47, 151-164).

DISCUSSION

My task on this interim appeal is to determine whether the ALJ adhered to the standard for adjudicable issues as set forth in 6 NYCRR 624.4(c). Where the contested issues are not the result of a dispute between applicant and Department staff (see 6 NYCRR 624.4[c][1][i] and [ii]), but are proposed by third parties, an issue must be "both substantive and significant" to be adjudicable (see 6 NYCRR 624.4[c][1][iii]).

Substantive and Significant Standard

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]). This adds a relevancy component to the first element of doubt as to the ability to meet an applicable standard.

Where Department staff has reviewed an application and finds that a component of an applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable

statutory and regulatory requirements, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both significant and substantive (6 NYCRR 624.4[c][4]). In this proceeding, no issues exist between applicant and Department staff with respect to these applications, except for certain components of the stormwater issue (see Ruling, at 63; Department Staff Appeal Brief, at 9, 10 and 16-17).

In determining whether a potential party has raised an adjudicable issue, 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]).

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 Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2). It is expected that, at the issues conference, Department staff will explain its review of the permit application and any permit conditions that have been proposed to address or otherwise mitigate identified environmental impacts.

The regulations governing Part 624 hearing procedures require that a petition for full party status, among other things:

"(i) identify 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 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]).

The submission of a petition for party status is not a pro forma exercise. Indication of the competency of the witnesses offered to testify on the proposed issue must be shown, although actual competency need not be determined until the adjudicatory hearing. Assertions by potential parties cannot simply be conclusory or speculative but must have a factual or scientific foundation (see Matter of Bonded Concrete, Interim Decision of the Commissioner, June 4, 1990, at 2). The petition for party status must provide specifics on those elements of the application or proposal that are being challenged or questioned. Mere speculation is

insufficient to establish that an issue is substantive and significant. 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]).

One purpose of the petition for party status is to inform other potential parties, Department staff and an applicant of the issues that a potential party is seeking to adjudicate, thereby allowing those other potential parties to effectively consider them. 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, an issue is not raised. Furthermore, it is not the purpose of post-issues conference briefing to allow a party to supplement, expand upon or otherwise remedy a deficient petition for party status.

My review of whether a substantive and significant issue has been raised includes, but is not limited to, an evaluation of each petition for party status to determine if it satisfies the regulatory requirements at 6 NYCRR 624.5(b)(2).

That a consultant or expert for a potential party takes a position opposite to that of the applicant or Department staff does not of itself raise an issue (see, e.g., Matter of Jay Giardina, Interim Decision of the Commissioner, September 21, 1990, at 2 ["Offers of expert testimony contrary to the application are not . . . necessarily adequate in and of themselves to raise an issue for adjudication"]). Otherwise, every issue on which differing views are expressed would be adjudicable and the issues conference would not fulfill its function of limiting and defining, as appropriate, the subject matter of the adjudicatory hearing (see 6 NYCRR 624.4[b][2]).

Offers of proof, however, 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.

The issues conference, by regulation, has certain identified purposes: (i) to hear argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to hear argument on whether disputed issues of fact that are not

resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute; and (v) to hear argument on the merits of those issues, and to decide any pending motions (6 NYCRR 624.4[b][2][i]-[v]).

The issues conference provides a mechanism to determine what, if any, issues will proceed to adjudication. It is intended to serve a "gatekeeper" function and to be of relatively short duration, with a format generally limited to presentations by Department staff and the attorneys or representatives for the applicant and any intervenors. The issues conference is not, however, intended to duplicate the functions of an adjudicatory hearing.

Where an issues ruling is appealed, substantial deference is given to the ALJ on factual issues. However, on such an appeal, the Commissioner will first review whether the ALJ has properly applied the substantive and significant standard. Where a Commissioner determines that the substantive and significant standard has not been properly applied, the Commissioner does not defer to the ALJ but rather conducts an independent review. With respect to legal and policy issues, the Commissioner's review is de novo, and provides the opportunity to

offer guidance "to optimize the permitting process and focus the hearing" (Matter of Saratoga County Landfill, Second Interim Decision of the Commissioner, October 3, 1995, at 3).

SEQRA and the Permit Hearing Process

In this proceeding, a number of issues raised by intervenors relate to matters pertaining the sufficiency of the draft environmental impact statement. These include the issues of alternatives, noise, visual impacts, community character, secondary and induced growth, and cumulative impacts, among others.

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.

The 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]). The focus of SEQRA review is whether an action may have a significant impact on the environment. If it is determined that the action may have a significant adverse impact, an environmental impact statement must be prepared (see ECL 8-0109[2], 6 NYCRR 617.1[c]; 6 NYCRR 617.7[a][1]).

An agency's compliance with its substantive SEQRA obligations is governed by a rule of reason. The extent to which particular environmental factors are to be considered, and the degree of detail required, vary in accordance with the circumstances and nature of particular proposals (see Jackson, 67 NY2d at 417, Matter of Akpan v Koch, 75 NY2d 561, 570 [1990]); see also Matter of American Marine Rail, LLC, Interim Decision, February 14, 2001, at 5). Not every conceivable environmental impact, mitigation measure or alternative must be identified and addressed before a final environmental impact statement will satisfy the substantive requirements of SEQRA (see Jackson, 67 NY2d at 417, Matter of Aldrich v Pattison, 107 AD2d 258, 266

[1985]).

As noted, speculative comments or mere expressions of differing opinions without substantiation are insufficient to establish that an issue is substantive and significant. Similarly, in the course of SEQRA review, speculative comments or mere conjecture need not be considered (see Matter of WEOK Broadcasting Corp v Planning Bd. of Town of Lloyd, 79 NY2d 373, 384-85 [1992]; see also Matter of Industrial Liaison Committee of Niagara Falls Area Chamber of Commerce v Williams, 72 NY2d 137, 143 [1988][“not arbitrary and capricious or a violation of existing law for [an] agency, when it takes its ‘hard look’ and makes its ‘reasoned determination’ under SEQRA, to ignore speculative environmental consequences”]). Similarly, generalized, non-specific comments about impacts will not advance a SEQRA issue to adjudication.

The SEQRA regulations direct that an environmental impact statement is to be analytical, not encyclopedic (see 6 NYCRR 617.9[b][1]). There is no requirement that every conceivable possibility be addressed. Where a participant in the Part 624 hearing process seeks simply to add to information on a topic for which the DEIS contains sufficient information, no adjudicable issue is raised. However, such SEQRA-related

information would be considered in the ongoing SEQRA process, including but not limited to the preparation of a responsiveness summary as part of the final environmental impact statement.

Following issuance of the Ruling, appeals were taken as to each issue that was identified for adjudication. Those issues are addressed in the subsections that follow.

Water Supply and Groundwater and Surface Water Impacts
(Ruling 6 and Ruling 7)

- Issues Ruling

The issue of potable water supply for the project was subdivided based upon the differing needs of, and respective water sources for, the two distinct project developments - Big Indian Plateau and Wildacres Resort. As originally proposed, applicant sought to withdraw approximately 190,000 gallons per day ("gpd") from Rosenthal Wells 1, 2 and 3 (in combination) for Big Indian Plateau, and 230,000 gpd from the Village of Fleischmanns water system for the Wildacres Resort. Department staff, with input from staff of the New York State Department of Health ("NYSDOH") and the Ulster County Department of Health, developed a draft water supply permit for the Big Indian Plateau proposal.³ Additionally, Department staff, with input from

³ See Department Staff Issues Conference Exhibit ("Exh") 9. As previously noted, Big Indian Plateau would be developed to the

NYSDOH staff, developed a draft water supply permit for the Wildacres Resort proposal.⁴

With respect to Big Indian Plateau's water supply, the ALJ ruled, based upon CPC's offer of proof, that "the lack of empirical data from a simultaneous pump test sufficient to establish the actual yield of the Rosenthal Wells at equilibrium" was a substantive and significant issue requiring further inquiry (Ruling [Issue 6], at 47). Citing to 6 NYCRR 621.15(b), the ALJ directed applicant to conduct such a test pursuant to a protocol developed by mutual agreement of the parties, or by adjudication if no such agreement could be reached. The ALJ concluded, however, that CPC's proposal that the nature of the stratigraphy and any cross-connections within the "hydrogeologic architecture of the indigenous aquifer" be investigated would be an academic inquiry and need not be adjudicated (Ruling, at 45).

With respect to Wildacres Resort's water supply, the ALJ ruled that no party to the proceeding had raised a substantive and significant issue, and directed DEC Staff to

east of Belleayre Mountain Ski Center within the New York City Ashokan Reservoir watershed.

⁴ See OHMS Exh 11. As previously noted, Wildacres Resort would be developed to the west of Belleayre Mountain Ski Center and within the New York City Pepacton Reservoir watershed.

process and issue the requested water supply permit (Ruling [Issue 7], at 47).

- Positions on Appeal

Applicant has appealed from the Ruling with respect to Big Indian Plateau, arguing that the ALJ's holding is contrary to the issues conference record and the information provided by applicant's experts, as well as information provided by both Department and NYSDOH staff. Applicant contends that it undertook various empirical tests and studies, developed in consultation with and at the request of the Department and NYSDOH, which demonstrated that a safe and sufficient quantity of water exists for Big Indian Plateau, and that no other public or private water supplies or surface waters would be adversely affected by the increased pumping from the Rosenthal Wells. Moreover, according to applicant, Department staff and NYSDOH developed special permit conditions in the draft water supply permit for Big Indian Plateau specifically designed to be protective of public and private wells, as well as neighboring surface waters (Applicant Appeal Brief, at 96-118).

Department staff also appeals from the Ruling with respect to Big Indian Plateau, arguing that the tests and studies performed in support of the application provided the information

necessary to meet all of the criteria for permit issuance under ECL 15-1503(2) and 6 NYCRR 601.6. Department staff maintains that a further pump test will not lead to any additional or useful information for Big Indian Plateau (Department Staff Appeal Brief, at 4-8).

CPC appeals from Ruling 7 with respect to Wildacres Resort. It argues that, for substantially the same reasons that advanced the Big Indian Plateau water supply issue to adjudication, a substantive and significant issue was raised with respect to the proposed water supply for Wildacres Resort. CPC contends, based upon cumulative impact concerns stemming from a future, but as yet unknown, demand from a potential but unplanned expansion of the State-owned Belleayre Mountain Ski Center, that the Wildacres Resort water supply permit cannot be finalized without considering the needs of such expansion. CPC also argues that it must be determined whether the proposed water supply permit is justified by public necessity (CPC Appeal Brief, at 4-10).

In its reply to applicant's appeal, CPC contends that the Ruling properly concluded that a substantive and significant issue was raised regarding the availability of potable water for Big Indian Plateau. CPC sets forth various points in support of

its position, including the assertion of a "stacked" bedrock aquifer system, deficiencies relating to the pump test conducted by applicant, surface water impacts, and deficiencies in the proposed permit conditions (CPC Reply Brief, at 30-54).

Applicant replied to CPC's appeal, arguing in support of the ALJ's ruling that no adjudicable issue exists with respect to Wildacres Resort's water supply (Applicant Reply Brief, at 23-30).

-Discussion: Big Indian Plateau Proposal (Ruling 6)

The threshold question with regard to the issuance of any proposed water supply permit is whether the determinations required by ECL 15-1503(2), which are restated in 6 NYCRR 601.6, can be made (see Ruling, at 40). Specifically, 6 NYCRR 601.6 reads, in pertinent part, as follows:

"(a) The department may grant or deny a [water supply] permit, or grant a permit with conditions.

(b) To issue a [water supply] permit, the department must determine:

(1) that the proposed project is justified by the public necessity;

(2) that the applicant properly considered other sources of water supply that are or may become available;

(3) that all work and construction connected with the project will be proper and safe;

(4) that the water supply will be adequate to meet the needs of the proposed service area;

(5) that there will be proper protection and treatment of the water supply and watershed;

(6) that the proposed project is just and equitable to all affected municipalities and their inhabitants, and in particular with regard to their present and future needs for sources of water supply. . . ."

Applicant provides in its appeal an extensive review of the data that supports the application, as well as a review of conditions in the draft water supply permits that would prevent impacts to surface water flows and protect private potable water supplies (see Applicant Appeal Brief, at 99-102; see also DEIS, Volume ["Vol."] 3, Appendix ["Append"] 7; id. Vol. 7, Append 19 & 19A).

However, based upon my review of the record, CPC's offers of proof regarding the performance of applicant's pump tests,⁵ the adequacy of the water resources for Big Indian Plateau, and impacts on potable water supplies for other users, would lead a reasonable person to inquire further. Accordingly, intervenors carried their burden of raising an adjudicable issue with respect to the requirements of 6 NYCRR 601.6(b)(4), (5) and (6) as they relate to the water supply permit for Big Indian

⁵ Applicant, Department staff and CPC debated the implications of data that was derived from pump test for the Rosenthal Wells that was conducted in April 2004 and earlier testing conducted in 2001-2002 and whether the procedures followed in conducting the tests (particularly as to the tests' duration) were appropriate (see App Exh 102 [providing a summary of pumping tests conducted]).

Plateau.

The ALJ formulated a series of questions related to the Rosenthal Wells which, in his opinion, required resolution before the Big Indian Plateau permit could be issued by the Department (Ruling, at 41). The ALJ's questions directly relate to the regulatory requirements for water supply permits contained in 6 NYCRR 601.6(b), including 6 NYCRR 601.6(b)(4)(adequacy of the water supply to meet the needs of the proposed service area)(ALJ question #1), 6 NYCRR 601.6(b)(5)(proper protection and treatment of the water supply and watershed)(ALJ question #2), and 6 NYCRR 601.6(b)(6)(proposed project being just and equitable to affected municipalities and their inhabitants, in particular with respect to their present and future needs for sources of water supply)(ALJ question #5).

I read ALJ question #3, which raises a concern regarding potential dewatering of the surficial unconsolidated and bedrock aquifers to the detriment of other persons using the same supply, as relating in part to 6 NYCRR 601.6(b)(5) and (6). Because I am also affirming the ALJ's ruling that impacts to aquatic habitat is an adjudicable issue (see discussion of Ruling 8, infra), ALJ question #4 ("at the rates proposed in the draft permit, is there a risk that both surficial unconsolidated and

bedrock aquifers could be dewatered to the detriment of the aquatic and terrestrial habitats") should be addressed as part of that issue.

Accordingly, the issue for adjudication shall be whether applicant's water supply permit application for Big Indian Plateau satisfies the three referenced regulatory requirements.⁶ Also, in the context of this issue, the parties should address whether duration of the Rosenthal Wells pump testing that applicant conducted was appropriate as well as any significant variations in the results of the tests conducted.⁷

⁶ The Ruling did not identify the standards in 6 NYCRR 601.6(b)(1), (2), or (3) as matters to be adjudicated with respect to Big Indian Plateau. I note that CPC states in its petition for party status that applicant has not satisfied 6 NYCRR 601.6(b)(1)(public necessity) and 601.6(b)(2)(consideration of other sources of water supply). Based upon my review of the record (see, e.g., Applicant Reply Brief, at 25-26 [public necessity]; DEIS, Vol. 1, at 5-14 to 5-26 [alternative water supply investigations]), adjudication of these two requirements is not warranted. In addition, based on this record, no adjudicable issue has been raised with respect to 6 NYCRR 601.6(b)(3)(safety of work and construction).

⁷ Department staff contends that the Ruling focuses on the 2004 pump test which was not required or relied on by Department staff. Rather, Department staff maintains that it relied on the earlier pump testing (see Department Staff Appeal Brief, at 5-7; see also Issues Conference Transcript ["Tr"], at 3761-3764). However, whether or not Department staff relied on the 2004 pump test data, which is not clear from the record, the 2004 data must be evaluated for suitability for its use in the adjudication of this issue, and if suitable, must be considered.

The ALJ, in framing the issue, held that the lack of empirical data from a simultaneous pump test sufficient to establish the actual yield of the Rosenthal Wells at equilibrium is an issue that is both substantive and significant. Accordingly, the ALJ directed, pursuant to 6 NYCRR 621.15(b), that a simultaneous pump test sufficient to establish the actual yield of the Rosenthal Wells at equilibrium be conducted by applicant in order to determine adequacy of the water supply (Ruling, at 47). Based upon my review of the record, I reject the ruling. Furthermore, the direction to applicant to conduct a further pump test at this time is overruled.

Department staff did not direct applicant to conduct another pump test to obtain the information that the ALJ has referenced in his ruling and considers the test that it accepted to be appropriate for purposes of the water supply application for Big Indian Plateau (see, e.g., Tr, at 3764, 3767-68). Nor has NYSDOH staff sought such additional data. For purposes of the adjudication of the issue as I have defined it, and based upon my review of the record, the data that has already been compiled may be sufficient and I decline to exercise my discretion to direct any such additional testing at this time.

This raises a broader issue of the use of 6 NYCRR 621.15(b) to order site investigations and testing at this stage of the hearing process. Section 621.15(b) reads as follows:

"At any time during the review of an application for a new permit, modification, or renewal, the department may request in writing any additional information which is reasonably necessary to make any findings or determinations required by law. Such a request shall be explicit, and shall indicate the reasonable date by which the department is to receive the information. Failure to provide such information by the date specified in the request may be grounds for denial of the application."

This regulation, contained in the Department's Uniform Procedures for processing permit applications, is utilized by the Department to obtain additional information beyond what has been submitted in support of a permit application, renewal or modification. Where appropriate, the Department may avail itself of the opportunity to gather further information from an applicant even after the subject application has already been determined to be "complete" (see Matter of Al Turi Landfill, Inc., Rulings of the ALJ, June 19, 1998, at 30). The discretion to require additional information is, however, more circumscribed in later stages of the process (see Matter of Oneida-Herkimer Solid Waste Management Authority, Decision of the Commissioner, March 19, 2004, at 6; see also Matter of Peckham Materials Corp., Interim Decision of the Commissioner, January 27, 1992, at 2).

In this proceeding, Department staff has neither called for nor supported the request for additional pump testing. Appropriate deference should be given to the position of Department staff in decisions of this nature which rely significantly on technical expertise.

Based upon this record, including but not limited to the data that has already been compiled and the circumstance that staff of the two agencies charged with the authority over the quality and quantity of public water in the State have not required that additional data be obtained, I do not see any basis to direct applicant to conduct the pump test referenced in the Ruling and decline to exercise my discretion to do so. Accordingly, applicant is not required to perform the test as directed by the Ruling.

During the adjudicatory phase of a permit hearing, applicant has the burden of demonstrating that its proposal will be in compliance with all applicable laws and regulations (see 6 NYCRR 624.9[b][1]). It may be demonstrated that the existing data from applicant's previously conducted pump tests is sufficient for purposes of this water supply permit application and no further testing is required. However, if applicant determines that additional pump test data would be useful in

defending its position, or otherwise demonstrating compliance with the requirements of 6 NYCRR 601.6 (b)(4),(5) and (6), this interim decision does not preclude applicant from performing additional pump testing. To the extent that applicant conducts any further pump testing, it will need to consider TOGS 3.2.1, Appendix 10 ("Recommended Pump Test Procedures for Water Supply Applications") and any other applicable Department or NYSDOH protocols or guidances. Furthermore, any additional testing must be upon notice to the other parties in accordance with any procedures established by the ALJ.

Based upon this record, including but not limited to my review of CPC's petition for party status, I concur with the ALJ that a review of the precise nature of the stratigraphy and cross-connections within the "hydrogeologic architecture" as presented by CPC's consultants would be no more than an academic exercise and accordingly adjudication is not warranted.

- Discussion of Wildacres Resort Proposal (Ruling 7)

CPC correctly asserts that the determinations required by ECL 15-1503(2) and 6 NYCRR 601.6 are equally applicable to the draft water supply permit for the Wildacres Resort. However, a review of CPC's petition for party status dated April 23, 2004 demonstrates that its offer of proof was inadequate to raise a

substantive and significant issue with respect to the water supply permit for the Wildacres Resort.

Unlike its proffer with respect to the Big Indian Plateau proposal, CPC's offer with respect to the Wildacres Resort is limited. In that regard, the concerns that CPC raises regarding the as-yet undetermined expansion of the Belleayre Mountain Ski Center and resulting potable water demands are merely speculative at this point and are not sufficient to raise an adjudicable issue.⁸ The application and the supporting documentation relating to the Wildacres Resort's water supply permit furnish ample support for the issuance of the permit (see, e.g., App Exh 51C ["Application for Public Water Supply Permit - Wildacres Resort"]; OHMS Exh 11 (draft water supply permit for Wildacres - special conditions 1, 2 and 3)).

In particular, the record demonstrates that the quantity of water to be used for the Wildacres Resort would not adversely affect the supply of water available to the Village of Fleischmanns and intervenors have not raised an adjudicable issue

⁸ Moreover, the amount of potable water available for any expansion of the Belleayre Mountain Ski Center would properly be addressed during the environmental review associated with that expansion.

concerning that demonstration (see, e.g., App Exh 51C).⁹

The ALJ, in his ruling, directed that Department staff process and issue the requested Wildacres Resort water supply permit. To the extent that the Ruling indicates that no adjudicable issues were raised with respect to this permit, it is affirmed. However, at this time, the SEQRA process for the proposed project (to which this permit relates) is not completed and no permit can be issued until the SEQRA process is completed and the requisite SEQRA findings are made.

Aquatic Habitat Impacts (Ruling 8)

- Issues Ruling

The ALJ ruled that, with respect to Big Indian Plateau only, an issue was raised regarding the impacts of the project on aquatic habitat (Ruling, at 56). Specifically, the ALJ noted potential impacts on the level of base flows for area streams that would result from pumping the Rosenthal Wells at the rate proposed in the draft water supply permit, and posed a series of questions to be addressed (id.). The ALJ noted however that the record does not raise a substantive and significant issue with respect to aquatic habitat in connection with the Wildacres

⁹ Furthermore, the technical arguments that CPC raises on its appeal from Ruling 7 are fully addressed by applicant in its reply (Applicant Reply Brief, at 23-30).

Resort (Ruling, at 55).

- Positions on Appeal

Department staff contends that the alleged adverse impact to aquatic habitat was premised on a diminished stream flow due to the use of the water supply wells but that no indication exists that the use of the wells would diminish stream flows. Accordingly, Department staff argues that adjudication is not warranted (Department Staff Appeal Brief, at 8).

Applicant maintains that no connection has been demonstrated between the Rosenthal Wells and Birch Creek, and that Birch Creek and the bedrock groundwater are separated by a substantial layer of impervious materials. According to applicant, no basis exists to conclude that the project would reduce the base flow in Birch Creek. Applicant further contends that all direct impacts to streams have been avoided to the greatest extent practicable. In support of its position, applicant points out that stream buffers will be preserved, the construction of impervious areas will be limited, and that most of the area will remain in its natural state (Applicant Appeal Brief, at 118-123).

CPC, in its reply, argues that the impacts on aquatic habitat were not evaluated in the DEIS. Furthermore, CPC argues that the DEIS failed to evaluate the cumulative impacts that the project would have in conjunction with the proposed expansion of the Belleayre Mountain Ski Center (CPC Reply Brief, at 54-59).

- Discussion

Based on my review of CPC's petition for party status, the submissions by its proposed witnesses and the submissions by Department staff and applicant, I conclude that a substantive and significant issue has been raised regarding the sufficiency of the DEIS. As indicated in my discussion of Ruling 6 with respect to the water supply permit for Big Indian Plateau, the aquatic habitat portion of the question that the ALJ posed as number #4 ("at the rates proposed in the draft permit, is there a risk that both the surficial unconsolidated and bedrock aquifers could be dewatered to the detriment of the aquatic and terrestrial habitats", see Ruling, at 41) should be addressed as part of this issue.

Applicant and Department staff contend that the arguments of CPC's proposed witnesses are based on speculation and a misreading of the data. Applicant, in particular, argues that no connection exists between the groundwater pumped from the

Rosenthal Wells and the surface water flowing in Birch Creek. Applicant may be correct. However, based on the record before me, I cannot determine whether CPC's arguments are well-founded or misplaced without further development of the factual record (see 6 NYCRR 624.4[b][2][iv]). Accordingly, this issue will advance to adjudication.

The ALJ has posed a number of further questions addressed with respect to this issue (see Ruling, at 56). To the extent that those questions relate to the pumping test that the ALJ proposed, and which I decline on this record to direct, those questions are modified accordingly. The issue to be adjudicated is whether, at the pumping rates proposed in the draft water supply permit for Big Indian Plateau, the risk exists that dewatering would occur to the detriment of aquatic habitats. Questions as to the extent of the reduction in base flow, if any, for Birch Creek and its tributaries and the effect of any such drop in base flow on aquatic habitats, including but not limited to trout spawning and species survival, should be addressed as part of the adjudication. In addition, how the base flow may vary, as a result of the proposed pumping, due to seasonal and

drought conditions, should also be addressed.¹⁰

Finally, I reject CPC's argument that this issue must also include consideration of the combined impacts of the proposed project and the potential expansion of Belleayre Mountain Ski Center. No plans for an expansion have been proposed and any consideration of such impacts would be speculative at best.

Stormwater Impacts (Ruling Number 9)

- Issues Ruling

The control and treatment of stormwater from the construction and operation of the project was of concern to several intervenors due to the proposed project size. Department staff determined that applicant must apply for an individual SPDES permit for both construction and operation discharges of stormwater from each of the project's components, and prepare appropriate Stormwater Pollution Prevention Plans ("SWPPPs").

¹⁰ The ALJ also raised questions regarding the effect of sediments transported by runoff during storm events to the streams on Big Indian Plateau, the nature and location of proposed forested buffers and if such buffers would be adequate to protect trout populations and their habitat. These questions should also be addressed in conjunction with the adjudication of the issue on stormwater impacts (see Ruling Number 9, infra).

Based upon applicant's submissions, Department staff prepared separate draft SPDES stormwater permits for Big Indian Plateau and for Wildacres Resort. The ALJ determined that at least nine sub-issues related to stormwater from the project, based primarily on applicant's use of the HydroCAD computer hydrology model, should be adjudicated (Ruling, at 73-74). The nine sub-issues include: (1) the adequacy of the HydroCAD model, its assumed inputs and design points; (2) stormwater flow paths on the project sites; (3) verification of and consistency of the HydroCAD model with actual field data; (4) the level of pre- and post-development stormwater flows; (5) the level of pre- and post-development pollutant loadings; (6) the adequacy of the Hydrological Simulation Program - FORTRAN modeling analysis provided; (7) with respect to wildlife and aquatic habitat, the acceptable level of chitosan acetate in waters and soils; (8) a permit condition delineating special conditions to be included in all waivers from the five-acre exposure limit during construction; and (9) the adequacy of the Big Indian SWPPP and the design of its various stormwater management controls.

During the issues conference, Department staff indicated that, based upon the City's submissions and despite the SPDES stormwater permit conditions that had been drafted, it now disputed applicant's ability to meet permitting standards. As a

result, Department staff agreed that at least two of the nine stormwater sub-issues identified by the ALJ should be adjudicated.

- Positions on Appeal

Applicant, in its appeal from the Ruling, notes that Department staff had already reviewed applicant's proposal and prepared draft stormwater SPDES permits. As such, applicant argues that those permits are prima facie evidence that the applicable regulations have been met and that therefore the permits should issue. Applicant also states that those SPDES permits were subsequently revised by Department staff during the issues conference in order to address additional questions and concerns raised by other parties (Applicant Appeal Brief, at 123-147).

Department staff asserts that only two of the nine sub-issues related to stormwater identified by the ALJ require adjudication. These topics were delineated by the ALJ as items "1" (the adequacy of the HydroCAD model, its assumed inputs and design points), and "9" (the adequacy of the Big Indian SWPPP and the design of its various stormwater management controls). As for six of the other items identified by the ALJ (items numbered "2," "3," and "5" through "8"), Department staff maintain that

applicant has either adequately addressed those concerns, or that the concerns do not warrant further inquiry because the related conditions of the draft SPDES permits fully comply with applicable regulatory requirements and standards. With respect to item "4" (the level of pre- and post-development stormwater flows), Department staff stated that, to the extent that item "4" is duplicative of item "1," it should be adjudicated but to the extent it is not duplicative, it should not be adjudicated (Department Staff Appeal, at 9-16).

CPC and the City, in their replies, contend that the ALJ was correct in advancing the topic of stormwater controls, and the identified sub-issues, for adjudication (CPC Reply Brief, at 59-66; City Reply Brief, at 20-45).

- Discussion

There is no question that the scope of the proposed project is extensive, consisting of 400 hotel rooms, 351 additional hotel and housing units, a 21-lot single-family subdivision and two 18-hole golf courses spread over 1,960 acres within the Catskill Mountains. It is expected that a total of 573 acres of land would be disturbed to accommodate the proposed facilities at Big Indian Plateau and Wildacres Resort, and the remaining acreage would be left undisturbed. Because of the

amount of land that is proposed to be disturbed, coupled with the sensitivity of the New York City watershed in the project area, numerous parties expressed concerns about the impacts of stormwater from both construction and operation of the project.¹¹

Based upon my review of the record, I agree with the ALJ that certain of the issues raised with respect to the proposed stormwater controls associated with the construction and operation of the project are both substantive and significant, and require adjudication. In addition, because of the dispute between applicant and Department staff regarding the adequacy of the HydroCAD model, its assumed inputs and design points (Ruling, at 73, item "1"), and the adequacy of the Big Indian SWPPP and the design of its various stormwater management controls (Ruling, at 74, item "9"), these items will be advanced to adjudication (see 6 NYCRR 624.4[c][1][ii]).

While it was generally recognized by the parties to this proceeding that the HydroCAD model has been used for many years throughout the State to estimate stormwater runoff and assist with the development of appropriate controls, intervenors

¹¹ In addition to CPC and the City, the New York City Watershed Inspector General and the Watershed Towns also expressed concern with respect to stormwater issues. The Watershed Towns and the New York City Watershed Inspector General did not file appeals or replies on this issue, however.

raised substantive and significant issues relating to the model in the context of this specific project. Accordingly, in addition to the two items in dispute between Department staff and applicant, the following sub-issues identified by the ALJ as relating to the HydroCAD model will be adjudicated: item "2," stormwater flow paths on the project site; and item "4," the level of pre- and post-development stormwater flows.

The remaining items identified by the ALJ are addressed, in turn, below.

With respect to the sub-issue identified by the ALJ as "verification of and consistency of the HydroCAD model with actual field data" (item "3"), I conclude that no substantive and significant issue has been raised. The HydroCAD model is a computer simulation which utilizes four synthetic 24-hour rainfall distributions established by the Soil Conservation Service and adjusted by the State in which the project is situated; it does not use actual input from stormwater runoff sampling conducted in the field at any given site. Thus, it is not reasonable to presume that the model, which predicts typical storm flow conditions over time, will accurately depict single-event conditions (such as Hurricane Ivan which was referenced in this proceeding). Here, applicant appropriately modeled the

particular synthetic storm type which was required by the Department's Stormwater Design Manual in the development of a SWPPP. Therefore, this sub-issue will not be adjudicated.

With respect to "the level of pre and post-development pollutant loadings" (item "5"), applicant and Department staff are also correct in asserting that no substantive and significant issue has been raised. This item initially arose in the context of applicant's analysis of pollutant loadings for total suspended solids, phosphorus, and chitosan acetate, a flocculant proposed for temporary use during construction. Department staff note that 6 NYCRR 750-1.7(b)(12), cited by the ALJ regarding individual SPDES permit outfall configurations, is not applicable to these pollutant loadings because outfall configurations do not relate to the treatment of those pollutants. Notwithstanding the foregoing, applicant did identify and provide the necessary stormwater retention pond outfall configuration information, as required by 6 NYCRR 750-1.7(b)(12), as part of its SPDES stormwater permit application. This information was assessed by Department staff in order to develop the monitoring conditions in the draft SPDES permits at issue. Moreover, contrary to the ALJ's statement, Department staff has, in fact, set monitoring requirements for total suspended solids and phosphorus in the draft SPDES permits for Big Indian Plateau (see draft permit #4

for Big Indian Plateau), as well as for Wildacres Resort.

With respect to the sub-issue "the adequacy of the HSPF [Hydrological Simulation Program - FORTRAN] modeling analysis provided" (item "6"), I conclude that this issue should not proceed to adjudication because Department staff did not use the results of the study to evaluate the permit applications or to formulate the draft SPDES stormwater conditions. Applicant submitted the HSPF model during the issues conference in furtherance of the discussion on pre- and post-development pollutant loadings from the site. Previously, applicant used another modeling program, known as WinSLAMM, to develop pollutant loading information.¹² The HSPF model was intended to replace WinSLAMM. Nevertheless, Department staff based its SPDES permit conditions upon a third method proposed by applicant known as the "direct calculation method" (see Department Appeal Brief, at 12-13). This method, which is not a computer model, provided staff (and the other parties) with a mechanism allowing for the entry of data which could generate reproducible results. None of the issues conference participants raised a substantive and significant issue with respect to applicant's use of, or staff's reliance upon, the "direct calculation method." Moreover, this

¹² Applicant subsequently withdrew its WinSLAMM analysis from consideration.

method conforms to the Department's Stormwater Management Design Manual standards.

The issue of "the acceptable level of chitosan acetate in waters and soils" (item "7") also will not proceed to adjudication. Applicant proposes to utilize a flocculent (Liqui-Floc) on a temporary basis to assist with erosion and sediment control on the project site during construction (not operation).¹³

It is expected that the use of Liqui-Floc would be intermittent, that the Liqui-Floc would be largely captured by stormwater detention ponds, and that potential discharges would be of short duration. Department staff requested that applicant conduct a site-specific acute (rather than chronic) toxicity test to determine whether the use of Liqui-Floc would have any adverse impact upon the area's fish population, primarily trout. In addition, at Department staff's request, applicant conducted site-specific tests of differing soils at the proposed project location to determine the extent to which Liqui-Floc could migrate from the project site and whether such migration could result in any adverse impacts. The results from these tests

¹³ Use of Liqui-Floc is not required by Department guidelines for stormwater.

indicated that Liqui-Floc would not be present in concentrations that would be acutely toxic to fish or any aquatic or terrestrial habitats.

Department staff used the results from these tests to develop empirically-based permit conditions which would limit the amounts of Liqui-Floc which could be applied during the construction phase of the project. In addition to those empirical limits, staff also formulated special conditions imposing further limits on the use of Liqui-Floc by applicant in recognition of the sensitive nature of the watershed in the project area. Both CPC and the City failed to show any deficiencies in applicant's testing methods or results derived therefrom, nor did they offer any proof that the site-specific permit conditions developed by Department staff for the use of Liqui-Floc would not be sufficiently protective of the environment or were in violation of regulatory standards. Therefore, the use of chitosan acetate (Liqui-Floc) by applicant to assist with stormwater control during construction will not be adjudicated.

With respect to the sub-issue identified by the ALJ as the "waiver from the five-acre exposure limit during construction" (item "8"), I concur with the ALJ that this issue

should proceed to adjudication. The parties agree that the Department has the discretion in an individual SPDES permit to waive the prohibition in the SPDES General Permit for Stormwater Discharges from Construction Activity (GP-02-01) against disturbing more than five acres of soil at one time during project construction. The basis for the Department to grant this waiver, however, depends upon whether an applicant has prepared an erosion control plan which adequately addresses potential erosion issues associated with a larger disturbance.

CPC, the City, and the Watershed Towns have all made sufficient offers of proof regarding whether applicant has prepared an adequate erosion control plan that would support a waiver from the five-acre limit. I note also that this was a concern raised by the New York City Watershed Inspector General.¹⁴

In sum, the stormwater designated sub-issues that the ALJ has numbered "1," "2," "4," "8" and "9" shall be adjudicated.

¹⁴ The proposed SWPPPs for the project and the corresponding draft SPDES stormwater permits prepared by Department staff, rely on applicant's use of, and the results from, the HydroCAD hydrology model. To the extent that the sufficiency of this model will be adjudicated (see supra), the proposed SWPPPs and draft SPDES stormwater permits are subject to further scrutiny. In light of the foregoing, it cannot be determined at this time whether the waiver of the five-acre disturbance limit can be permitted.

Impacts to the Catskill Forest Preserve (Ruling 10)

- Issues Ruling

The ALJ ruled that an adjudicable issue was raised with respect to the project's impacts on the Catskill Forest Preserve, noting in particular that the DEIS "lacks the discussion and evaluation of impacts to the Forest Preserve necessary for an appropriate SEQRA review of these impacts" (Ruling, at 85). The ALJ also proposed that "recreation behavior modeling of the type proposed by [a CPC consultant] should be undertaken in this matter" (see id.)

- Positions on Appeal

Department staff, in its appeal, contends that the Ruling is based on speculation and an unwarranted worst-case scenario. Department staff further notes that it proposed two permit conditions that would provide sufficient protection to the Forest Preserve (Department Staff Appeal, at 17-19). Applicant, in its appeal, argues that no basis exists to adjudicate this issue. It contends that the Ruling ignores Department staff's expertise on this issue, recommends a study that is based on mere speculation, and exaggerates the project's potential impact on wilderness areas (Applicant Appeal Brief, at 38-44).

CPC, in its reply, maintains that significant information was missing from the DEIS that would be necessary for any meaningful review of the impacts of the proposed project on the Forest Preserve. CPC further contends that the lack of user and resource information in the Department's unit management plans for Slide Mountain and Big Indian Wilderness areas further impedes review. CPC also rejects Department staff's position that the proposed permit conditions would allow for effective management of impacts relating to increased use of those lands as a result of the proposed project (CPC Reply Brief, at 66-72).

- Discussion

The Catskill Forest Preserve is one of the State's great natural resources. As noted in the Ruling, the various management plans developed by the Department recognize the need to protect this area.

A basic function of the Forest Preserve is to provide public recreation opportunities. Accordingly, the Department has undertaken efforts to promote greater public use of this area (see Tr, at 1308-09 [noting that the Catskills generally are underutilized for public recreation]). Furthermore, in this proceeding, Department staff outlined the mechanisms currently in place to address any problems associated with erosion in the

Forest Preserve, or overuse of its trails and camping areas.

Department staff proposed two special permit conditions (DEC Ex 2) that would further assist in managing this resource. The first would require applicant to develop a plan regarding the use of trails by its resort guests, an annual report on guest usage and trail conditions, and monthly reports of usage of Forest Preserve trails by resort guests. The second condition would require applicant to prepare a maintenance program plan for the trails on its property. Both of these conditions would reasonably assist the Department in managing the Forest Preserve due to any increased use arising from the proposed project (see, e.g., Tr, at 1361-64 [presentation by Department senior forester on the proposed conditions]).

Concerns raised regarding the impact of the project on the Forest Preserve fail to take into account the current setting. Applicant, in its papers, describes the physical separation of the project from Department-designated wilderness areas. It notes that the proposed project is physically adjacent to an already existing intensive use area, that is, the state-owned Belleayre Mountain Ski Center (see Applicant Appeal Brief, at 43-44). Applicant also notes that 1,387 acres of forested lands surrounding the developed areas of the project would be

preserved through conservation easements that would prohibit further development (see DEIS, Vol. 1, at 2-7).

Based upon my review of the record, I see no reason to require the recreation behavior simulator modeling that CPC proposes. The arguments presented in support of this modeling are based on speculative assumptions regarding trail usage and impacts on the Catskill Forest Preserve. A review of the presentations of CPC's expert and Department staff underscores the limited nature of the data concerning use of the Forest Preserve that would be available for such modeling (see, e.g., Tr at 1372 ([“no concrete data”])). The utility or reliability of such a modeling exercise using such limited data has not been shown.

In contrast, the Department-proposed permit conditions would generate data that would provide an accurate basis to evaluate trail usage and would allow Department staff to determine if any controls, beyond those presently considered, should be implemented. Such data would furnish an ongoing picture of trail-related activity, in contrast to modeling with inputs that would be speculative at best.

Based upon my review of the record, no substantive and significant issue has been raised with respect to potential impacts of the proposed project on the Forest Preserve. Speculation regarding the potential effects on the Forest Preserve does not satisfy the standard for adjudication (see, e.g., Matter of Bonded Concrete, Interim Decision of the Commissioner, June 4, 1990, at 2 ["[a]ssertions made by prospective intervenors cannot be conclusory nor speculative but must be supported by a sound factual and/or scientific foundation"). Accordingly, this issue shall not be adjudicated.¹⁵

Impacts to Wildlife (Ruling 11)

- Issues Ruling

The ALJ considered CPC's offer of proof with respect to wildlife impacts and concluded that the surveys and discussion provided in the DEIS demonstrate that potential impacts to wildlife and plant species "have been adequately evaluated and, where indicated, appropriate mitigation measures have been proposed" (Ruling, at 88). Based upon applicant's survey, the ALJ concluded that the project would not pose any threat to the timber rattlesnake (see id.).

¹⁵ Issues relating to noise are being addressed separately (see infra).

The ALJ concluded that the record did not suggest that development of the proposed project would pose any threat to other indigenous flora or fauna, except to four birds of special concern. More particularly, he ruled that an adjudicable issue had been raised with respect to the impacts on the presence and breeding habits of the Cooper's Hawk, Sharp-shinned Hawk, Common Nighthawk and the Cerulean Warbler on the Big Indian Plateau portion of the site. The ALJ noted that it is unknown whether these species of special concern are breeding on the proposed project site and, if so, where. As a result, he concluded that further inquiry was required (Ruling, at 88-90).¹⁶

- Positions on Appeal

CPC, in its appeal, contends that the issues ruling improperly limited the adjudication of wildlife impacts given the project's location, lack of credible wildlife surveys, and inadequate mitigation measures. CPC advocates that the scope of this adjudicable issue be expanded to require adjudication of the proposed mitigation measures and the adequacy of the survey work. It also contends that the botanical survey work was deficient. In addition, noting potential timber rattlesnake habitat on the

¹⁶ While the Cerulean Warbler and Cooper's Hawk have been observed on the site (see Tr, at 1522), the DEIS indicates that only the Sharp-shinned Hawk and the Common Nighthawk may have nested on the site (see DEIS, Vol. 7, Append. 20).

eastern portion of the project site, CPC requests that the Commissioner require additional survey work in that area (see CPC Appeal Brief, at 18-23).

Department staff also appeals from this ruling, arguing that no substantive and significant issue was raised, and that applicant's wildlife surveys were sufficient. Furthermore, Department staff maintains that it has not been shown that the four bird species that the ALJ referenced would be significantly impacted by the project (see Department Staff Appeal Brief, at 20-22).

Applicant argues that the ALJ failed to apply relevant legal standards to CPC's offer of proof (see Applicant's Brief, at 45-51). Applicant contends that the Ruling ignored the bird studies that applicant conducted and that those studies fully complied with Department guidance, and accordingly, no adjudicable issue was raised with respect to the four identified bird species. Both CPC and applicant also addressed wildlife impact issues in their replies.

- Discussion

The record demonstrates that applicant undertook an extensive review of wildlife at the site. Applicant's

consultants conducted multi-day field surveys focusing on birds, mammals, reptiles and amphibians. Database searches of the United States Fish and Wildlife Service and the Natural Heritage Program were conducted to identify any known records of rare, threatened or endangered species, or significant wildlife habitats on or near the project site. These searches and surveys are detailed in the DEIS, together with an evaluation of potential impacts and a description of proposed mitigation (see, e.g., DEIS, Vol. 1, 3.5.3, at 3-96 to 3-110; Vol. 7, Append. 20 [Bird, Reptile and Amphibian Studies]); Tr, at 1521-24 [addressing spring 2004 survey]).

Department staff reviewed the surveys conducted and found that these were sufficient for purposes of SEQRA and adequately characterized the wildlife species composition on the project site (Department Staff Supplemental ("Supp") Exh 2, at 1; see also Department Staff Appeal, at 22). Department staff concurred with applicant's proposed preventative mitigation measures to minimize impacts on wildlife species (Department Staff Supp Exh 2, at 2).

I have considered CPC's contentions that more survey time was required or that the surveys should have been conducted in a different manner. Many of CPC's arguments in support of

additional surveys are merely speculative. For example, CPC requests that further studies be undertaken to locate timber rattlesnakes at the site. Applicant conducted searches to determine the presence of that species and its habitat, including potential den sites. No evidence of timber rattlesnakes (such as live or dead snakes or shed skins) was found (see DEIS, Vol. 1, 3.5.3, at 3-98; see also Department Staff Supp Exh 2, at 2). In fact, the closest known active timber rattlesnake population is more than 13 miles away, with no known populations within 5 miles of the site (Ruling, at 88). CPC did not present anything in its offer of proof that would justify additional timber rattlesnake surveys (see Matter of Thalle Industries, Decision of the Deputy Commissioner, November 3, 2004, at 21-22 [concurring with determination of the administrative law judge that, in the absence of reliable information that timber rattlesnakes actually inhabit the area at the site or in close proximity to the proposed mine expansion, no adequate basis exists to require further survey work]).

Similarly, CPC maintains that additional plant surveys should be conducted. However, applicant examined the database of the New York Heritage Program and found no records of rare, threatened or endangered species or of rare or unusual ecological communities within the project area. Applicant conducted site

surveys to supplement the record searches (see, e.g., Tr, at 2776), contrary to CPC's suggestion that no surveys were conducted. Based on my review of the record, the work undertaken by applicant with respect to plant surveys was sufficient. CPC raises concerns about plants that might be at the site, but those concerns are merely speculative and do not support advancing this issue relating to plants to adjudication.

Based upon my review of applicant's surveys, the qualifications of the consultants that performed those surveys, and the material presented in the DEIS, I conclude that the information submitted by applicant is sufficient for the requirements of SEQRA. In light of the survey work that has been performed and Department staff's evaluation, I am not persuaded by CPC's arguments that more surveys are necessary. Furthermore, CPC has not shown that any basis exists for denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions with respect to this issue.

The four species of special concern identified by the ALJ are not afforded the special legal protections provided to endangered or threatened species including habitat. However, the State's regulations list these species of special concern for informational purposes and to encourage actions that would avoid

further risk to them (see 6 NYCRR 182.6[c]), and impacts on species of special concern must be considered for purposes of SEQRA.

In this case, the surveys conducted were sufficient to document use of the site by wildlife, including but not limited to the four species of special concern. The surveys were competently performed and no basis exists to require further studies in light of the work that was conducted.

Only a portion of the acreage on which Wildacres Resort and Big Indian Plateau would be located is proposed to be disturbed. In fact, approximately seventy percent of the acreage would be preserved in its natural state. To the extent that any individual members of the four bird species are at some point present on-site, substantial areas of the site remain available for use. Furthermore, applicant has proposed mitigation measures, such as limited clear-cutting, maintenance of understory vegetation, and wetlands avoidance that will benefit on-site species (see DEIS, Vol. 1, at 3-108-3-110 [describing wildlife mitigation measures]), in addition to planting over 4,000 indigenous trees on the project site.

If any impact occurred, the record indicates that it would be minimal (see also Department Staff Appeal Brief, at 21-22 [noting that loss of habitat for non-endangered/non-threatened species may impact individuals but is not likely to have a significant negative impact on long-term survival of species]). Accordingly, because intervenors have not raised a substantive and significant issue, the issue of wildlife impacts shall not be adjudicated in this proceeding.

Noise Impacts (Ruling 12)

- Issues Ruling

The ALJ ruled that, because applicant's noise impact study failed to address the operational phase of the proposed project, an adjudicable issue had been raised (Ruling, at 95). Pursuant to 6 NYCRR 621.15(b), the ALJ directed that a noise impact study be undertaken for the operational phase of the project and set forth a series of questions to be answered by the study (Ruling, at 93-94). The ALJ indicated that, given the project's proximity to designated wilderness and wild forest areas of the Catskill Forest Preserve, noise impacts to users of those areas occasioned by the operation of the proposed project must be considered (Ruling, at 95). However, with respect to noise generated during the construction of the project, the ALJ concluded that applicant's sound impact study provided an

evaluation and analysis of sufficient scope and detail, and that applicant had proposed appropriate mitigation measures (Ruling, at 92).

- Positions on Appeal

CPC, in its appeal, argues that the Ruling improperly limits the adjudication of noise impacts to the project's operational phase. CPC proposes that, "[a]t a minimum," the additional study that the ALJ is directing include a revised noise impact analysis for the construction phase for Big Indian Plateau. CPC further requests that adjudication of the construction phase noise analysis address the noise impacts associated with any blasting needed to level portions of the two resort sites in order to install the golf courses and other resort amenities (CPC Appeal Brief, at 14-17).

Applicant argues that, although the ALJ properly determined that applicant evaluated and analyzed the potential impacts of the construction phase of the project, the ALJ improperly created new issues requiring further study. Applicant contends that CPC, in raising the noise issue, did not conduct any studies at the site or use any factual information relating to the project. Applicant further argues that the operational noise issues that the ALJ identified either were fully addressed

in the DEIS or would not be relevant (Applicant Appeal Brief, at 52-55).

- Discussion

Although CPC's petition for party status states that the DEIS "failed to mitigate the noise generated from the Belleayre Project notwithstanding that the noise impacts will be intrusive" (CPC Petition for Party Status, at 25), the petition primarily addresses construction noise (see proposed testimony items #1-3). However, in one proposed area of testimony (testimony item #4) operational noise issues are raised.

The DEIS states that no operational phase impacts for noise have been identified and no mitigation measures are required (see DEIS, Vol. 1, at 3-176).

A review of the record demonstrates that operational issues relating to traffic were adequately addressed in the DEIS (see DEIS, Vol. 1, at 3-173 to 3-176 ["Operational Phase - Traffic Noise"]). The noise assessment was conducted based on information provided in the Environmental Procedures Manual of the New York State Department of Transportation ("NYSDOT"), the DEC's program policy for assessing and mitigating noise impacts, and the New York Code of Rules and Regulations (see DEIS, Vol. 1,

at 3-173). The study took into account peak seasonal traffic volumes during the winter months. The DEIS discusses the methodologies used to estimate the existing and future projected noise levels in the project area (see id., at 3-174). CPC's petition for party status did not identify any specific deficiencies in this study that would raise a substantive and significant issue.

However, the record is inadequate with respect to operational noise impacts on outdoor activities (that is, on the users of the nearby designated wilderness and forest areas) generated by onsite activities. According to the Ruling, without such an evaluation, the SEQRA review in this matter cannot be completed. The Ruling specifically cites noise from delivery, maintenance and service trucks and vehicles, noise from the project's guest vehicles and activities, equipment used in golf course and general landscape maintenance and operation, outdoor activities which could include use of personal recreational vehicles such as snowmobiles and all terrain vehicles, and other outdoor activities and gatherings (Ruling, at 93).

The ALJ concludes that a noise impact assessment should be prepared to address these impacts and sets forth the parameters for such an assessment (Ruling, at 93-94). I agree

that, given the project's proximity to wilderness and wild forest areas, noise impacts to users of these areas is a relevant consideration in the SEQRA review of this project.

However, based on my review of the record, certain of the noise-related impacts referenced in the Ruling will not occur or will be limited (see, e.g., DEIS, Vol. 1, at 2-46 ["ATV and snowmobile use by guests of the Resort will be prohibited. Limited use by Resort maintenance personnel is possible."]; existence of underground parking garage at Big Indian Plateau, DEIS Figure 2-14a).¹⁷

Notwithstanding the foregoing, I concur that additional information with respect to the impacts of operational noise on wilderness and wild forest areas in close proximity to the project is necessary for purposes of SEQRA review. Accordingly, applicant should undertake a noise study that would take into account the onsite noise-generating activities that would occur at Wildacres Resort and Big Indian Plateau, and present that

¹⁷ However, I concur with CPC, for the reasons stated in CPC's reply, that observations made during the site visit regarding noise-related impacts arising from the equipment in use at the adjacent Belleayre Mountain Ski Center cannot be considered here (CPC Reply Brief, at 85 [noting that no information on the type of equipment being used, the hours of that equipment's operation, or the equipment's location on Belleayre Mountain Ski Center is known]).

study during the adjudicatory phase of the proceeding.

This study, which should utilize as appropriate DEC Program Policy DEP-00-1 ("Assessing and Mitigating Noise Impacts"), would address the questions that the ALJ has posed (see Ruling, at 93-94). In that regard, the ALJ states that, with respect to logistics such as the appropriate locations for sound level receptors and the development of an appropriate protocol for the noise impact study, "these can be the subject of further adjudication or mediation by the Department" (Ruling, at 95). I do not see the necessity for further adjudication or mediation with respect to such logistics, and leave it to applicant to present a noise study sufficient to carry its burden of proof.

With respect to construction noise, I concur with the ALJ that applicant's Community Sound Survey and Construction Noise Impact Assessment (see DEIS, Vol. 8, Append 22) is of sufficient scope and detail with respect to construction noise issues. Applicant has addressed concerns regarding construction noise and has proposed mitigation measures (see, e.g., DEIS, Vol. 1, Table 3-36 & Table 3-37; App Exh 7; Tr., at 583-86; Applicant Reply Brief, at 14-18 [addressing blasting noise]).

Based upon my review of the record, except for operational noise impacts on users of wilderness and wild forest areas of the Catskill Forest Preserve arising from onsite activities at Wildacres Resort and Big Indian Plateau, noise issues have been adequately addressed for purposes of the "hard look" necessary to make SEQRA findings. Accordingly, only the issue of operational noise impacts on users of wilderness and wild forest areas of the Catskill Forest Preserve (in close proximity to the project) arising from onsite activities shall be adjudicated.¹⁸

Traffic Impacts (Ruling Number 13)

- Issues Ruling

The ALJ determined that CPC had raised a substantive and significant issue with respect to the effect the planned growth of the neighboring Belleayre Mountain Ski Center will have on increased traffic due to the proposed project (Ruling, at 100). The ruling was based, in large part, upon the current (1998) Unit Management Plan ("UMP") for the Belleayre Mountain Ski Center which discusses a future proposal to improve and update the facilities "to accomodate a projected peak attendance

¹⁸ The noise analysis should be provided to the parties prior to the adjudicatory hearing in accordance with a schedule established by the ALJ.

of 4,500 skiers/day" (Ruling, at 99).¹⁹ The ALJ concluded that applicant failed to consider this future growth in the traffic analysis in the DEIS.

- Positions on Appeal

Applicant asserts that it specifically addressed this issue in its traffic study and had, in fact, performed an analysis which examined the impacts of 5,150 skiers/day from Belleayre Mountain Ski Center. Moreover, applicant contends that NYSDOT reviewed and approved the traffic studies that applicant conducted and determined that the proposed project would not significantly impact state highways.

At the issues conference, Department staff deferred to NYSDOT's review and assessment of traffic impacts created by the proposed project.

CPC supports the adjudication of traffic impacts from the proposed project but seeks to expand upon the discrete issue identified by the ALJ. Assuming a future Belleayre Mountain Ski Center expansion, CPC contends that certain underlying flaws in

¹⁹ The status of the Department's draft UMP for Belleayre Mountain Ski Center is discussed later in this decision in conjunction with CPC's discovery motion seeking disclosure of that document.

applicant's traffic analysis must be addressed to avoid underestimating the project's traffic impacts. According to CPC, these alleged defects include applicant's failure to consider summer traffic conditions, and off-site resort/shuttle bus and other traffic impacts on Route 28 (the main highway impacted by the project) in its analysis. CPC contends that NYSDOT's review of applicant's traffic analysis was performed early in the process and without the benefit of this information and was, therefore, incomplete.

- Discussion

Applicant performed a traffic impact study which addressed traffic impacts for both Big Indian Plateau, which is located on the south side of Route 28, and Wildacres Resort, which is located on the west side of County Route 49A (see DEIS, Vol 8, Append 25). The ALJ framed the traffic issue with respect to the impacts of the planned growth of Belleayre Mountain Ski Center. However, based upon my review of the record, I conclude that applicant specifically took into account these growth patterns in its traffic analysis (see, e.g., Applicant Exh 18, at 1-4).

Furthermore, the concerns that CPC raised regarding traffic impacts arising from some yet-to-be finalized plans for a

future expansion at Belleayre Mountain Ski Center are entirely speculative and do not serve as a basis for finding a substantive and significant issue. If an expansion of Belleayre Mountain Ski Center is actually proposed, the sponsor of that project will be required to conduct an appropriate traffic analysis which evaluate existing conditions at that time together with any projected traffic increases.

Although the Department is the lead agency responsible for ensuring compliance with SEQRA, it appropriately defers to the expertise of other involved agencies to determine the adequacy of SEQRA review when aspects of that review fall within the expertise and jurisdiction of other agencies. The Department defers to NYSDOT when traffic matters within NYSDOT's jurisdiction arise (see, e.g., Matter of Wilmorite, Inc.: Rotterdam Square, Interim Decision of the Commissioner, October 7, 1981, at 4).

On this project, NYSDOT reviewed the traffic impact analysis undertaken by applicant, including revisions to the analysis, and concluded that the methodology used was acceptable (see, e.g., Applicant Exh 19 [letter dated March 6, 2002 from NYSDOT]). NYSDOT has also advised that it has reviewed the project as part of the SEQRA process and concludes that the

highway-related improvements proposed as part of the project are appropriate (see Applicant Exh 19 [letter dated May 4, 2004 from NYSDOT]). Further, by letter dated November 10, 2004, NYSDOT advised that "[t]he analyses performed for SEQRA purposes (earlier submittals and this build scenario of 2014) by [applicant], satisfactorily covers [sic] all the traffic related items [NYSDOT] requested as part of scoping document."

A review of the record also indicates that specific traffic-related concerns that CPC raised in this proceeding have been fully addressed by applicant (see, e.g., Applicant Reply Brief, at 19-20 [presenting a chart providing citations to record in response to CPC's concerns]; App Supp Exh 15 [addressing CPC exhibits and presentations]).

As previously noted, SEQRA does not require the Department to use the adjudicatory forum to resolve all comments related to the DEIS. Where, as here, the agency with traffic expertise and jurisdiction over impacts has provided its analysis in the SEQRA process and has concluded that all matters have been satisfactorily addressed, no adjudication is warranted. Furthermore, a review of intervenors' petitions for party status indicates that any material concerns raised have been addressed by applicant or by NYSDOT's evaluation and, accordingly, no

substantive and significant issue is raised.

Visual Impacts (Ruling 14)

- Issues Ruling

The ALJ ruled that an adjudicable issue was raised with respect to visual impacts. The ALJ identified several sub-issues to be addressed including: (1) the lack of certain information in the visual impact study including the failure to provide an inventory of aesthetic resources required by the Department's policy entitled "Assessing and Mitigating Visual Impacts" and an assessment of the significance of the visual impacts on those listed resources; (2) the failure of applicant's visual impact analysis to consider the seasonal effect on viewsheds particularly those including the Big Indian Plateau; and (3) applicant's failure to evaluate the impacts of light pollution (Ruling, at 115-116).

- Positions on Appeal

Applicant, in its appeal, maintains that it followed the Department's Program Policy, DEP-00-2, "Assessing and Mitigating Visual Impacts," dated July 31, 2000 ("VIIPP") in conducting its visual impact analysis and that the DEIS and related documents present a comprehensive and in-depth review. Applicant emphasizes that no showing has been made that the

visibility of the project from certain locations gives rise to any significant adverse environmental impacts. Applicant also references various mitigation measures incorporated into the project design (Applicant Appeal Brief, at 62-80).

CPC, in its reply, contends that the Ruling correctly identified three issues for adjudication with respect to visual impacts (CPC Reply Brief, at 85-94). CPC argues that the visual impacts have been omitted or downplayed by applicant and that significant adverse visual impacts would result from the project. It notes that a project's unmitigated visual impacts may provide a basis for permit denial, major modification to the project or imposition of significant permit conditions under SEQRA (see CPC Reply Brief, at 87 [citing Matter of Lane Construction Co., Decision of the Deputy Commissioner, June 26, 1998, at 3-4]).

- Discussion

Based on my review of the record, including but not limited to applicant's Visual Impact Study (see DEIS, Vol. 7, Append 21) and related materials in the record (see, e.g., DEIS, Vol. 1, at 2-49 to 2-50 [addressing lighting], 3-141 to 3-170 [addressing visual resources and lighting, and supplemental materials offered during the issues conference]), I determine that only sub-issues #2 (as modified in this interim decision)

and #3 with respect to visual impacts should be adjudicated.

Applicant's study was undertaken pursuant to a protocol reviewed and approved by Department staff. The study appropriately addressed areas of likely visual impact. The digital viewshed and photo simulations provided by applicant exceeded the minimum "line-of-sight" profile referenced in the VIPP (see VIPP, at 5 [noting that a digital viewshed may be used rather than the minimum "line-of-sight" profile]).

With respect to the inventory of aesthetic resources (Ruling sub-issue #1), the Ruling appears to be setting standards beyond what is suggested in Department guidance. The visual inventory prepared by applicant was derived from database file searches, a review of trail maps, local interviews and a windshield survey, among other things (see DEIS, Vol. 1, at 3-151 to 3-153 [summarizing the tasks undertaken]). The inventory of potential views included sites up to 19.5 miles from the proposed project (see DEIS, Vol. 1, at 3-142).²⁰

²⁰ Applicant's visual impact study included photographs from various locations outside the five-mile radius of the visual impact study area. As stated in the study:

"A five mile radius encompasses approximately 31 square miles. Five miles is the standard limit of visual concern as it represents the far, distant view. We have expanded the normal industry standard of five miles to address concern for potential visual effects from surrounding trails, viewpoints and mountain

Nothing in the VIPP requires that an exhaustive list of every potential view of a site be prepared, as the Ruling appears to suggest. The record indicates that applicant undertook a substantial effort to determine what significant views would be impacted in the various categories (such as State parks, urban cultural parks, State Forest Preserve, etc.) that are set forth in the VIPP (see Applicant Appeal Brief, at 69-74). Applicant's inventory of aesthetic resources is sufficient and this sub-issue (including the related items referenced on page 113 of the Ruling) shall not be adjudicated.

With respect to sub-issue #2, the Ruling notes the failure of the visual impact analysis to consider the effect of seasonal changes on viewsheds. In particular, the Ruling states that the visual impacts of the project in the wintertime have not been addressed (see Ruling, at 113). I agree with the ALJ that a substantive and significant issue has been raised.

Applicant contends that in the winter the Big Indian Resort, "with its leafless deciduous vegetation and snow covering the flat roof surfaces," will blend into its surroundings (Applicant Appeal Brief, at 74). That may be so. However, in

peaks" (DEIS, Vol. 7, Append 21; see also DEIS, Vol. 1, at 3-154 [noting sites outside the five mile radius]; VIPP, at 5 [discussing radius of impact area to be evaluated]).

the absence of such wintertime visual impacts being addressed in the visual impact analysis, it is reasonable to inquire further.

I note also that the DEIS discusses the design of the project and the mitigation measures that have been incorporated into that design (see, e.g., DEIS, Vol. 1, at 3-167 to 3-169 [addressing, among other things, building layout, the use of natural stone and natural wood for exterior treatment, and a landscaping screening plan]). With respect to Big Indian Plateau, the DEIS states that the design "tucks the entire facility into the very contours of the [area]" (id. at 3-168). However, whether the topographical setting and building materials to be used are sufficient mitigation cannot be determined until an assessment of visual impacts in such "leaf-off" conditions is presented.

Sub-issue #2, as set forth in the Ruling, considers "the failure of the visual impact analysis to consider the effect of seasonal changes on viewsheds, particularly those including the Big Indian [Plateau]" (Ruling, at 116). However, based on the discussion in the Ruling and the arguments advanced by the parties, the issue concerns Big Indian Plateau in "leaf-off" (that is, wintertime) conditions. Accordingly, the adjudication of this sub-issue shall be limited to visual impacts caused by

Big Indian Plateau in wintertime conditions.

With respect to sub-issue #3, the failure to evaluate the impacts of light pollution, the Ruling states that the "night sky" is one of the important assets of the Catskill Forest Preserve, and reasonable steps should be taken to guard against its degradation, specifically noting light pollution (Ruling, at 114). The extent to which the area in the vicinity of Big Indian Plateau would be impacted by visible lights and "night glow," particularly from higher elevations and during winter months, is uncertain. Based on my review of the record, I concur with the ALJ that the issue of light pollution is a substantive and significant issue that shall be adjudicated.

Impacts to Community Character (Ruling 15)

- Issues Ruling

The ALJ ruled that CPC raised an adjudicable issue with respect to the impact of the proposed project on the community character of the hamlets and villages in the area of the proposed project (Ruling, at 125). In the Ruling, the ALJ sets forth various questions including whether the project will overwhelm existing hamlets and villages to the significant detriment of their present quality of life, and whether, if so, the resort should be reduced in size or reconfigured. He also questions

whether an alternative configuration could be achieved to provide the critical economic mass necessary for the resort's success and drive the economic revitalization of the hamlets and villages (id. at 124).

- Positions on Appeal

The Watershed Towns, in their appeal from the Ruling, argue that community character should not be an issue for adjudication in light of long-standing precedent to defer to the local vision of the communities as evidenced by zoning and comprehensive plans (Watershed Towns Appeal Brief, at 3-6).

Similarly, applicant argues that no basis exists for adjudicating community character. Applicant contends that the Department should defer to adopted local land use plans and regulations and that no evidence exists of potential adverse impacts on hamlets and villages as a result of the proposed project. Applicant also maintains that the questions that the ALJ poses regarding quality of life and significant detriment are not appropriate or legally supported (Applicant Brief, at 80-87).

CPC, in its reply, supports the identification of community character as an issue for adjudication in light of the project's impacts on resources of regional and statewide concern.

(CPC Reply Brief, at 94-103).

- Discussion

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).

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 community character (see Matter of Lane Construction 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 ["[i]f 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 a 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"]).

Impacts on community character are often intertwined with other environmental issues and can be addressed in the context of those specific issues. In fact, community character is not readily susceptible to adjudication as a separate issue but rather is considered after the record is developed on particular environmental issues which are aspects of the overall community character (see, e.g., Matter of Lane Construction Co., Interim Issues Ruling of the ALJ, February 22, 1996, at 16 [most of intervenors' alleged impacts on community character, including impacts on clean air and health of residents, held to be issues for adjudication under specific rulings, including rulings regarding PM10 and fugitive dust emissions]).

The long-standing principle of deference to local plans, and the focusing of adjudication on discrete environmental issues rather than a general issue of "community character," were most recently affirmed by Commissioner Crotty (see Matter of St. Lawrence Cement Co., LLC, Second Interim Decision of the Commissioner, September 8, 2004, at 117-118). Furthermore, in

this matter, the existing record provides sufficient information to evaluate the project's consistency with community character for purposes of the Department's SEQRA review.²¹

Accordingly, the issue of community character will not be adjudicated.

Secondary and Induced Growth Impacts (Ruling 16)

- Issues Ruling

The ALJ ruled that the City raised an adjudicable issue with respect to secondary and induced growth impacts, including impacts from new residential development that would be induced by the proposed project (Ruling, at 132). The ALJ noted that the presence of this new residential construction presents a

²¹ This record includes but is not limited to the DEIS, the public comments received, the issues conference record which includes three days of testimony on community character issues (see transcripts dated June 9, 2004, July 12, 2004 and August 24, 2004), and local and regional plans and local zoning ordinances that have been submitted. In addition, further information will be provided through the adjudicatory hearing process. I note, in particular, the Resources Protection and Economic Development Strategy for the Route 28 Corridor which the Ruling references as "[p]erhaps the most important economic development study undertaken for the area" (Ruling, at 122). This study has been adopted by both the Towns of Shandaken and Middletown in which the proposed project would be located. Among the study's goals are that development opportunities outside the villages and hamlets should be limited to major tourist facilities which require large sites in scenic locations and that four-season, long-term tourist visitation must be encouraged (see Ruling, at 122-123; see also Applicant Exh 83).

significant potential threat to local water quality, "including increases in impervious surfaces, phosphorous loads, fertilizer and pesticide use, stormwater flows, wastewater flows and water usage" (Ruling, at 131-132).

- Positions on Appeal

The Watershed Towns on their appeal do not take a position with respect to the relative accuracy of the respective parties' projections on future growth. However, they contend that the City's projected impact of future growth on water quality, estimated to be an increased phosphorus loading of 15 kilograms/year, is minimal and insignificant, and cannot serve as the basis for denial or substantial modification of the project (Watershed Towns Appeal, at 6-8).

Applicant, in its appeal, maintains that the DEIS contains a comprehensive analysis of secondary growth and induced impacts and that any changes in land use along the New York State Route 28 corridor for commercial purposes would be very limited if all demand were met by new construction. Applicant also disputes the City's estimates regarding the increase in residential housing that might be induced, but notes, even assuming the City's estimates, that the impact of runoff would not be environmentally significant (Applicant Appeal Brief, at

87-92).

The City, in its reply, contends that the absence of any environmental analysis in the DEIS of new residences that the project will induce fails to satisfy the requirements of SEQRA and, accordingly, an adjudicable issue has been raised (New York City Reply, at 46-48). CPC, in its reply, argues that the DEIS was deficient in its analysis of this issue from both a commercial and residential growth context (CPC Reply Brief, at 104-115). CPC references a number of deficiencies, including but not limited to: the failure to recognize the demand for additional housing for workers needed for the resort facilities as well as new commercial development to service those workers; the underestimation of daily off-site spending by resort visitors; the failure to differentiate between categories of induced growth retail businesses; the erroneous conclusion that secondary commercial development would be concentrated in hamlets and villages; and a failure to address the impact of pollution runoff and other environmental effects from the induced growth.

- Discussion

Applicant, in its DEIS, has extensively addressed the issue of secondary growth and induced impacts, taking into account both new commercial and residential development (see

DEIS, Vol. 1, at § 7; DEIS, Vol. 9, Append 26 ["Economic Benefits and Growth Inducing Effects" prepared by Allee King Rosen & Fleming, Inc.]). Further supplementation occurred during the issues conference (see, e.g., Applicant Supp Exhs 6 & 24 [letters dated October 24, 2004]). The studies that applicant undertook relied on various sources including an economic computer model (RIMS II), interviews with local officials and businesses and a review of development potential and constraints (see, e.g., Vol. 1, at 7-4; Vol. 9, Append 26, Chapters 4 & 7). Applicant addresses new construction (both residential and commercial) and the potential influx of individuals employed at Wildacres Resort and Big Indian Plateau.

The City used a different computer model (REMI) to estimate growth patterns, and I have reviewed the results that the City has obtained. I note that the City's model "does not provide information regarding where within the region or local area . . . growth will occur, only the relative scale of development" (see Appendix B2 to the City's Petition for Party Status, at 14). The City's projected build-out predicts 158 housing units over a period of ten years in the 395 square mile primary study area. It does not, however, suggest that housing would be concentrated in close proximity to the proposed project or in one municipality, nor does this ten year build-out estimate

itself (15-16 new units per year) suggest any significant impact such that a reasonable person would inquire further (see also DEIS, Vol. 1, at 7-9 to 7-14).

In reviewing the City's submissions, the extent and location of any growth is speculative at best. Applicant has furnished sufficient information, as well as provided an adequate rebuttal to points raised by the City.

Furthermore, the environmental impacts arising from any induced growth have not been shown to be significant. For example, the non-point source runoff of phosphorus from the City's projection of 158 new homes would be 15 kilograms per year which both the Watershed Towns and applicant show to be insignificant in the context of the total area involved (see, e.g., Watershed Towns Appeal Brief, at 7; Applicant Appeal Brief, at 91). With respect to impervious surfaces, the City indicates that such areas "could increase" by up to 11.73 acres for all new induced development (including residential, commercial and parking area development) (Appendix C5 to the City's petition for party status, at 3 & Table 1), out of an area estimated at 252,800 acres (see Applicant Appeal Brief, at 91). To the extent that water quality concerns might be raised due to the construction of a housing unit, such concerns (such as water

usage and wastewater disposal) would be considered by the local and any other authority with jurisdiction over the permitting of such construction.

CPC has also presented opinions or estimates regarding new commercial development that differed from those of applicant. However, nothing raised by the intervenors suggests that the analysis of commercial development provided in the DEIS is insufficient and, therefore, requires adjudication.

Accordingly, the submissions on this issue do not meet the threshold required for a substantive and significant issue and, accordingly, the issue of secondary and induced growth impacts shall not be adjudicated.²²

Cumulative Impacts (Ruling 17)

- Issues Ruling

The ALJ ruled that CPC raised an adjudicable issue with respect to significant adverse cumulative impacts occasioned by the project, as well as by the projected usage of the Belleayre Mountain Ski Center (Ruling, at 137). Specifically, the ALJ

²² The information that the City has provided will be considered for purposes of the SEQRA process, including its consideration during the preparation of a responsiveness summary.

stated that the cumulative effect of impacts from traffic, impacts to community character, induced secondary growth impacts, impacts to the Forest Preserve, impacts to the water supply and impacts to aquatic habitat "occasioned by the proposed project alone warrant further inquiry" (Ruling, at 137).

- Positions on Appeal

Applicant, in its appeal from Ruling 17, contends that the Ruling errs in concluding that applicant failed to analyze the cumulative impact of the proposed project and the future growth of the Belleayre Mountain Ski Center (Applicant Appeal Brief, at 92-95). In particular, applicant contests the number of skiers that the ALJ calculated in his review of the cumulative impact issue.

CPC, in its reply to applicant's appeal, contends that the ALJ was justified in concluding that applicant failed to fully address cumulative impacts of the proposed project and the Belleayre Mountain Ski Center. CPC argues, in part, that the DEIS for the project grossly underestimated the potential number of skiers likely to visit the Belleayre Mountain Ski Center in the near future and thereby failed to adequately evaluate cumulative impacts with respect to traffic. CPC further indicates that the failure of the Department to disclose the

plans for the expansion of the Belleayre Mountain Ski Center compounds the deficiency in applicant's environmental review (CPC Reply Brief, at 115-120).

- Discussion

Cumulative impacts are those environmental impacts that:

"result from the incremental or increased impact of an action(s) when the impacts of that action are added to other past, present and reasonably foreseeable actions. Cumulative impacts can result from a single action or a number of individually minor but collectively significant actions taking place over a period of time. Either the impacts or the actions themselves must be related (The SEQR Handbook, New York State Department of Environmental Conservation, 1992, at 41 [emphasis added]).

When analyzing cumulative impacts under SEQRA, some nexus should exist between the matters to be considered together, and the combined impact must have the potential for a significant environmental impact. "The SEQR Handbook" states that:

"[c]umulative impacts must be assessed when actions are proposed to or will foreseeably take place simultaneously or sequentially in a way that their combined impacts may be significant. Assessment of cumulative impacts is limited to consideration of probable impacts, not speculative ones" (The SEQR Handbook, New York State Department of Environmental Conservation, 1992, at 41).

An agency's substantive obligations under SEQRA, including any evaluation of cumulative impacts, must be viewed in light of a rule of reason (see Matter of Jackson v New York State Urban Dev.

Corp., 67 NY2d 400, 417 [1986]).²³

In this regard, CPC contends that the plans for the expansion of Belleayre Mountain Ski Center should be disclosed and considered in the evaluation of impacts for the proposed project. However, although the Department is in the process of updating a Unit Management Plan ("UMP") for Belleayre Mountain Ski Center, it is still a draft and may be subject to significant revision. Accordingly, I concur with the ALJ's determination that the draft UMP does not constitute a specifically defined project "and remains speculative, precluding its utility in this proposed project's environmental review" (Ruling, at 136). Furthermore, cumulative impacts with respect to this project and any proposed expansion of Belleayre Mountain Ski Center would be properly considered as part of the environmental review on the Belleayre Mountain Ski Center UMP.

²³ The SEQRA regulations require that a DEIS must include: "(iii) a statement and evaluation of the potential significant adverse environmental impacts at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence. The draft EIS should identify and discuss the following only where applicable and significant:

(a) reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts."

The Ruling, however, states that, based on the currently adopted UMP (Final Unit Management Plan, Belleayre Mountain Ski Center dated May 1998, Applicant Exh 82), the possibility exists that more than 550,000 skiers could visit the Belleayre Mountain Ski Center annually, "far exceeding" the potential skier visits cited in the DEIS for the proposed project (Ruling, at 136). It appears, from the Ruling, that this number was calculated based on a projected peak day use (4,500) of the Belleayre Mountain Ski Center times the number of days (125) that skiing is possible at the ski center.

Applicant contends that this number of 550,000 is not found in the record. It further maintains that no support exists for making a calculation in that manner either in the current UMP or in the skier visitation summaries (Applicant Appeal Brief, at 93). I agree. A review of the current UMP indicates an average midweek day-use of 500 persons and average weekend day-use of 1,400 persons (Applicant Exh 82, at 23). Moreover, the current UMP provides that under the present UMP "[m]odernization and upkeep of facilities, expanded marketing, and promotion systems are aimed to increase average attendance of skiers by 20 percent" (Applicant Exh 82, at 36). The Ruling's assumption of a 4,500 per day attendance throughout the skiing season is not realistic and not supported by the UMP (see Applicant Exh 82, at 23-24

[noting current limitations in accommodating larger number of skiers at the Belleayre Mountain Ski Center]). The skier season visit numbers that applicant used in the DEIS are more realistic (see DEIS, Vol. 1, at 1-7).

My review of the record, including but not limited to the currently adopted Unit Management Plan, indicates that the projected number of 550,000 is not supportable and is not a basis for identifying cumulative impacts as an issue. Further, an potential increase identified in the Unit Management Plan is not predicated in any way on applicant's proposed project; therefore, the burden does not fall to the applicant to account for or mitigate the potential increase.

The Ruling makes a general statement that the cumulative effects of impacts from traffic, impacts to community character, induced secondary growth impacts, impacts to the Forest Preserve, impacts to the water supply and impacts to aquatic habitat "occasioned by the proposed project alone" warrant further inquiry (Ruling, at 137). No analysis or references to the record are provided in support of this statement. Applicant contends that the Ruling fails to identify what new or different cumulative impacts would arise by virtue of the consideration of these subject areas collectively or what

cumulative impact would arise that has not already been the subject of discussion and comment (Applicant Appeal Brief, at 94).

CPC maintains that its offers of proof demonstrate that many proposed and foreseeable projects would combine in ways that could significantly impact the environment. Furthermore, CPC contends that, as steward of the environment and Forest Preserve, the Department has a "heightened duty" to consider and mitigate potential cumulative impacts relating to its permitting activities (CPC Reply Brief, at 120).

The concept of cumulative impacts relates to consideration of projects or proposals other than the project or proposal under review. Based upon my review of the record, no other planned or contemporaneous projects have been identified that have a nexus to the proposed project or that otherwise would need to be considered in a cumulative impact assessment of applicant's project. Furthermore, any future expansion of Belleayre Mountain Ski Center has not been proposed and any expansion issues are therefore mere conjecture.

Regarding cumulative impacts of the "proposed project alone," the Ruling does not identify what the adjudication of

cumulative impacts in that context is meant to entail. Based on my review of the record, the environmentally related components that the Ruling references (traffic, community character, secondary growth impacts, Forest Preserve, water supply and aquatic habitat) have either been sufficiently addressed by applicant or, to the extent that further consideration is necessary, will be addressed through adjudication.

Accordingly, cumulative impacts shall not be an issue for adjudication in this proceeding.

Alternatives (Ruling 18)

- Issues Ruling

The ALJ ruled that an adjudicable issue was raised with respect to the adequacy of the alternatives analysis in the DEIS, noting specifically "the lack of sufficient environmental and economic detail" (Ruling, at 151). The ALJ sets forth a series of questions to be addressed with respect to the comparative environmental analysis of alternatives and applicant's Internal Rate of Return ("IRR") economic analysis (Ruling, at 150-51).

- Positions on Appeal

Applicant, in its appeal, maintains that the discussion of alternatives in the DEIS fully complies with the mandates of

SEQRA. Applicant argues that the Ruling misconstrues the alternatives analysis required under SEQRA for a project that "confers a public benefit that is integral to the 'objectives' of the project sponsor" (Applicant Appeal Brief, at 21). Applicant also argues that the Ruling wrongly relies on the presentations of witnesses with no resort industry expertise to rebut the presentation on viable alternatives. Finally, applicant contends that no further consideration of alternatives is required for the project because no unmitigated significant adverse environmental impacts are left to balance against the economic benefits the project would provide to the region (Applicant Appeal Brief, at 21-38).

The City, in its reply, maintains that the DEIS failed to analyze alternatives in sufficient detail, improperly relies on a financial feasibility analysis to dismiss alternatives, and relies on an inappropriate "public need for a regional resort" standard. The City rejects applicant's claim that no unmitigatable environmental impacts exist, and submits that the Commissioner may direct applicant to prepare "an appropriate alternatives analysis" (City Reply Brief, at 7-19).

CPC, in its reply, argues that the alternatives ruling was fully supported by the issues conference record, rejects any

notion that the "public benefit" of the project lessens the requirement to address alternatives, further rejects various other arguments raised by applicant to support the alternatives analysis (including but not limited to the contention that the DEIS is consistent with the project's scoping document), and maintains that its and the City's experts are competent to testify as to the adequacy of the alternatives analysis (CPC Reply Brief, at 121-138).

- Discussion

An environmental impact statement must address alternatives to the proposed action (see ECL 8-0109[2][d]). The SEQRA regulations elaborate on this requirement, stating that the environmental impact statement must describe and evaluate "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 description and evaluation of each alternative "should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed" (id.). A "no action" alternative must be included in the range of alternatives considered.

For private project sponsors, the SEQRA regulations state that "any alternative for which no discretionary approvals

are needed may be described. Site alternatives may be limited to parcels owned by, or under option to, a private project sponsor" (id.).

The purpose of requiring inclusion of reasonable alternatives to a proposed project is to aid the public and governmental bodies in assessing the relative costs and benefits of the proposal (see Webster Assoc. v Town of Webster, 59 NY2d 220, 228 [1983]). To be meaningful, any choice among alternatives must be based on an awareness of all reasonable options, but the degree of detail required in assessing those alternatives will vary with the circumstances and nature of each proposal. A rule of reason applies to the alternatives analysis (Matter of Town of Dryden v Tompkins County Bd. of Representatives, 78 NY2d 331, 333-334 [1991]; see also Matter of Halperin v City of New Rochelle, 24 AD3d 768 [2d Dept 2005])[alternatives section of a final environmental impact statement "need not identify or discuss every conceivable alternative"], appeal dismissed, 6 NY3d 890, lv denied 7 NY3d 708 [2006]).

The objectives of a private project sponsor are important in determining what alternatives should be considered in an environmental impact statement. A description and

evaluation of alternatives that manifestly would not achieve the objectives of the proposed project are not required by SEQRA (Shellabarger v Onondaga County Water Auth., 105 AD2d 1134, 1135 [4th Dept 1984]). However, an applicant who proposes a project but offers no further alternatives risks the possibility that denial may be the only option for the agency, upon consideration of the environmental impacts.

A review of the DEIS demonstrates that the descriptions of alternatives were, at least in part, reasonable and sufficiently detailed to permit comparative assessment.²⁴

Applicant, as indicated in project documents, seeks to develop a "world class four season destination resort." The alternatives analysis first reviews the alternative locations that were considered and provides a satisfactory explanation regarding their unsuitability or unavailability, including environmental impediments, in light of the applicant's objective. Alternative uses for the site are considered. A review of alternative layouts, including alternative layouts for the proposed golf courses, buildings, and the east resort/west resort alternative (including market evaluation and financial analyses

²⁴ The alternatives analysis (which is briefly summarized in the introductory section of the DEIS [Vol 1, at xx-xxi]) is presented in Section 5 of the DEIS (see Vol. 1, at 5-1 to 5-59).

of the project's viability for such smaller scale alternatives [see DEIS, Vol. 9, Append 27]) is presented. Alternative water supplies, wastewater disposal, site access, golf course management practices, stormwater management practices, and construction phasing, in addition to an evaluation of a no-action alternative, are also presented.²⁵

CPC and the City contend that reasonable smaller scale alternatives to the proposed project were available and should have been assessed in the SEQRA alternatives analysis. My review of the record indicates that their contention has merit. For example, the analysis of the east resort/west resort alternative in the DEIS, which considers proceeding with only one component (either Wildacres Resort or Big Indian Plateau), offers an extensive economic analysis but fails to provide a sufficient evaluation of environmental impacts and the extent to which those impacts would be reduced by eliminating either component. A review of DEIS Table 5-2 which provides information on the two

²⁵ In the context of this type of project (that is, a resort complex), the economic information presented was appropriately detailed. At the bottom of page 150 of the Ruling, the ALJ lists four economic-related questions as being unanswered by the DEIS. My review of the record, including but not limited to a review of those portions of the record where applicant contends that these questions have been answered (see Applicant Appeal Brief, at 36-37), persuades me that these questions have been adequately addressed.

components separately provides some useful comparative environmental information. However, I agree with the ALJ that the level of detail is not sufficient to allow for a fully comparative analysis. Furthermore the DEIS lacks discussion of various parameters that cannot be numerically quantified (such as visual impacts and noise impacts). Although a smaller-scaled alternative of "a one golf course and one hotel complex" is presented, this alternative is discussed primarily in an economic, rather than an environmental, context.

Applicant argues that the project will not cause any unmitigatable significant environmental impacts and therefore consideration of an alternative need not be explored further (Applicant Appeal Brief, at 36). That argument is rejected. At this stage in the proceeding, with various environmental issues identified for adjudication, it is premature to conclude that the project will not have unmitigatable impacts. The final environmental impact statement has not been completed. No findings have yet been made pursuant to 6 NYCRR 617.11 at which time the relevant environmental impacts, facts and conclusions disclosed in the final environmental impact statement will be considered.

Similarly, I do not accept applicant's public need argument (see Applicant Appeal Brief, at 24 [discussing the need to provide year-round recreational opportunities to attract tourists and revive the region's economy]) to the extent that it is meant to limit applicant's obligation under SEQRA to provide an evaluation of a reasonable range of project alternatives.

Applicant contends that it should be recognized that the present design of the proposed project results from the consideration of larger-sized resort facilities (such as a facility with another golf course and a greater number of lodging units and hotels). I agree that such information is relevant to an alternatives analysis to the extent that the reduction from a larger design was done to minimize environmental impacts.

Although the scoping document for the proposed project indicates that the draft environmental impact statement should include "a discussion of a different mix of resort components and various layouts of the selected components" (see City Exh 7), the DEIS fails to provide a sufficient environmental analysis of alternative layouts. Given the magnitude of the proposed project, its location, and the environmental impacts already noted in this record, the alternatives analysis in the DEIS must include further environmental detail on the alternatives

presented as well as one or more additional alternatives to ensure a meaningful basis to compare and evaluate the environmental impacts of the proposed project.

Accordingly, applicant is directed to prepare a supplement to its alternatives analysis that addresses the environmental impacts of alternative layouts which will be considered during the adjudicatory phase of the proceeding. This analysis should be provided to the parties prior to the adjudicatory hearing in accordance with a schedule established by the ALJ. Although I am not designating a specific number of alternatives that would be included in this supplement, I would direct applicant to include an environmental evaluation of impacts with respect to the two alternatives already referenced in the DEIS (the one golf course and one hotel complex alternative and the east resort/west resort alternative) and such additional smaller scale alternatives that would ensure that a reasonable range is considered. In that regard, applicant may wish to include, but is not obligated to do so, one or more of the alternatives that have been referenced by other parties in this proceeding (see, e.g., CPC Petition for Party Status, April 23, 2004, at 46). Applicant should also review the comments made during the issues conference in evaluating the extent of any revisions to the "no action" alternative discussion in the DEIS.

With respect to the questions posed by the ALJ on alternatives (see Ruling, at 150 [environmental questions #1-6]), applicant should address the initial two questions in its supplemental analysis of the east resort/west resort alternative. I do not see any need for applicant to address the remaining four questions that were posed unless they relate specifically to an alternative layout that applicant presents in the supplemental alternatives analysis.

Applicant may, in its supplemental alternatives analysis, include an economic evaluation with respect to each alternative presented, in addition to what is already presented in the DEIS. However, the primary focus of the supplemental alternatives analysis should be directed to provide the information necessary to allow for a comparative environmental assessment of the alternative layouts.

I concur with the ALJ that the alternatives analysis is a matter for adjudication, but modify the ruling to limit the adjudication to alternative layouts on Wildacres Resort and Big Indian Plateau. Furthermore, the primary focus of the adjudicatory hearing on this issue should be the environmental impacts associated with the alternative layouts rather than the economic feasibility of the alternatives.

Other Issues

To the extent that other issues have been raised in the appeals and the replies, they have been considered and rejected.

Party Status

The ALJ's rulings on party status are not disturbed and the parties granted such status are entitled to participate in the adjudicatory hearing.

CPC Discovery Motion

CPC, in its appeal, requests that I direct that the Department's records regarding the proposed expansion of Belleayre Mountain Ski Center be disclosed for evaluation of the cumulative impacts of the proposed project.

CPC previously sought access to these records pursuant to a Freedom of Information Law ("FOIL") request that it submitted to the Department. Although certain records were released in response to that request and CPC's subsequent appeal ("FOIL appeal"), other records were withheld.

During the pendency of the FOIL appeal, CPC moved by papers dated June 2, 2004, for an order before ALJ Wissler for production of records related to "Unit Management Plans or

Amendments for the Belleayre Mountain Ski Center" (Notice of Motion for Discovery, June 2, 2004, at 1). On June 21, 2004, ALJ Wissler denied CPC's motion, and CPC subsequently sought leave to file an expedited appeal. The motion for leave to file an expedited appeal was denied by letter dated July 20, 2004.

CPC contends that the hearing record must be expanded to include records relating to the current draft unit management plan for Belleayre Mountain Ski Center. It maintains that the records contain information, such as the placement of new ski trails, anticipated level of trail use, increased parking accommodations, and expanded year round recreational opportunities "such as an expanded summer concert series" that are relevant to issues identified for adjudication (CPC Appeal Brief, at 24).

Both applicant and Department staff oppose CPC's discovery motion (see Applicant Reply Brief, at 30-34, and Department Staff Reply Brief, at 3-4).

To the extent that CPC appeals from ALJ Wissler's June 21, 2004 Ruling on Motion for Discovery denying CPC's motion for pre-issues conference discovery pursuant to 6 NYCRR 624.7(a), the ALJ's ruling is affirmed. I agree with the ALJ that CPC failed

to demonstrate "extraordinary circumstances" warranting the grant of pre-issues conference discovery beyond that afforded under FOIL (see Ruling on Motion for Discovery, June 21, 2004, at 2-4).

To the extent CPC is seeking post-issues conference discovery pursuant to 6 NYCRR 624.7(c), I deny the motion without prejudice to renew before the ALJ at the appropriate time. At this time, the matter is being remanded to the ALJ for further proceedings subject to his direction. Pursuant to the regulations, CPC has the right to serve a discovery demand upon the Department (see 6 NYCRR 624.7[b][1]). Procedures before the ALJ are available to the parties to resolve any discovery disputes that may arise, and the parties should avail themselves of those procedures if necessary.

CONCLUSION

The ALJ's Ruling is hereby modified and the matter is remanded to ALJ Wissler for further proceedings consistent with this Interim Decision.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Carl Johnson,
Deputy Commissioner

Albany, New York
December 29, 2006
TO: Service List