

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

In the Matter of the Application for a Protection of Water Permit Pursuant to Article 15, Title 5 of the Environmental Conservation Law and Part 608 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York by

**Ruling on Issues
and Party Status**

DEC Application No.
4-1936-00001/00001

SHANTY HOLLOW CORPORATION,

Applicant.

Background

Shanty Hollow Corporation ("Shanty Hollow" or "applicant") owns and operates Hunter Mountain ski resort located in the Town and Village of Hunter, Greene County, New York. The applicant has been withdrawing water from Schoharie Creek for its snowmaking needs for nearly fifty years. Since 1992, the applicant's use of water from the creek has been governed by the terms of an administrative order on consent ("ACO") with the Department of Environmental Conservation ("DEC" or "Department"). By application dated August 25, 2006, Shanty Hollow applied for a stream disturbance permit under article 15 of the Environmental Conservation Law ("ECL") and part 608 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

The applicant proposes to (i) continue withdrawing water from Schoharie Creek for snowmaking purposes; (ii) make improvements to and continue upkeep of an existing diversion weir in Schoharie Creek and an inlet channel to Dolan's Lake; (iii) expand the existing water storage reservoir by 5.5 million gallons; (iv) construct a second water intake structure on Schoharie Creek at Deming Road; and (v) construct a new water storage reservoir south of Deming Road with a capacity of 20 to 25 million gallons.

Proceedings

On July 6, 2007, Department staff referred the captioned matter to the Office of Hearings and Mediation Services

("OHMS") to schedule a legislative hearing and issues conference. The matter was assigned to Administrative Law Judges ("ALJs") Richard A. Sherman and Maria E. Villa. A Combined Notice of Complete Application, Legislative Hearing and Issues Conference ("Combined Notice") was published in the Department's *Environmental Notice Bulletin* ("ENB") on July 25, 2007. The applicant also published the Combined Notice in the *Catskill Daily Mail* on August 1, 2007 and in the *Windham Journal* on August 2, 2007.

The Department is the lead agency with respect to the environmental review required by ECL article 8, the State Environmental Quality Review Act ("SEQRA"), and its implementing regulations at 6 NYCRR part 617. The applicant submitted a Draft Environmental Impact Statement ("DEIS") in accordance with the terms of the ACO. As noted in the Combined Notice, Department staff accepted the DEIS as adequate for public review on July 6, 2007.

The Combined Notice advised that the Legislative Hearing and Issues Conference were to be held on August 22 and 23, 2007, respectively, at the base lodge of the Hunter Mountain ski resort. The Combined Notice further advised that written comments would be accepted if received by OHMS on or before September 4, 2007. The comment period was extended to September 25, 2007 after the Department received several requests for additional time to comment on the application and DEIS. The extension of the comment period was announced at the Legislative Hearing on August 23, 2007 and was also noticed in the ENB on August 29, 2007.

After reviewing the application materials, staff prepared a draft permit and water quality certification. The application materials and draft permit were made available for public review and comment upon publication of the Combined Notice.

Legislative Hearing

As provided in the July 25, 2007 Combined Notice, ALJs Sherman and Villa convened the legislative hearing on August 22, 2007 at 6 p.m. at the base lodge of the Hunter Mountain ski resort, on the south side of Route 23A in Hunter, New York. There were approximately 70 people in attendance, including representatives of the applicant and the Department. The applicant and Department staff made presentations and five elected officials offered comments. These presentations and comments are briefly summarized below.

Ronald Alveras, of HDR-LMS, the applicant's consultant, provided an overview of the proposed project. Mr. Alveras provided a brief description of each component of the proposal beginning with improvements to the existing diversion weir. He stated that these improvements will divert creek bed material away from the intake channel and stabilize the weir, thereby reducing the frequency with which maintenance activities will occur in the creek. According to Mr. Alveras, the proposed expansion of the existing reservoir and the creation of a new reservoir with its associated intake are necessary to ensure sufficient water is available for snowmaking under the more restrictive withdrawal rates that are provided for under the draft permit. Mr. Alveras stated that under the provisions of the ACO, which currently govern withdrawals from the creek, water may be withdrawn from the creek as long as the flow remains at or above 11 cubic feet per second ("cfs"). Under the draft permit, withdrawals will be allowed only when the flow rate is at or above 15 cfs or, if the air temperature falls to zero degrees Fahrenheit or below, 20 cfs. Mr. Alveras concluded by stating that by increasing the minimum flow rate to 15 cfs, the draft permit would be more protective of aquatic life in the creek than the current rate of 11 cfs.

Ann Lapinski, Assistant Regional Attorney, DEC Region 4, spoke on behalf of Department staff. Ms. Lapinski stated that the draft permit was the result of extended review by staff and staff is now satisfied that the draft permit will be protective of the creek. Ms. Lapinski advised that certain provisions of the draft permit had been refined since it was made available for public review and that she would provide copies of the revised draft upon request. Ms. Lapinski stated that the ACO allows for withdrawals even below 11 cfs under certain conditions and that the increase of the minimum cfs rate to 15 will provide greater protection to the creek. Ms. Lapinski also stated that the additional reservoir capacity will be protective of the creek because it will allow the applicant to be less dependent on withdrawals from the creek during periods of low flow. Ms. Lapinski concluded by stating the draft permit provides the Department with the tools necessary to ensure Schoharie Creek is protected.

Mayor Bill Maley, Village of Hunter, spoke in support of the proposed project and issuance of the permit. The Mayor stated that this solution both provides for the snowmaking needs of Hunter Mountain ski resort and protects the environment. The Mayor also stated that the success of the ski resort is integral to the success of the Village of Hunter.

Mr. Tom Hitchcock, Board Member, Town of Jewett, spoke in support of the proposed project and issuance of the permit. Mr. Hitchcock stated he thought the proposal was excellent and noted the Town of Jewett may seek to be more involved with the project going forward. Mr. Hitchcock also submitted written comments (see infra, at 7).

Mr. Dennis M. Lucas, Sr., Supervisor, Town of Hunter, spoke in support of the proposed project and issuance of the permit. Mr. Lucas stated that the Town of Hunter Board had discussed the proposal and is "four-square behind" it. He also expressed appreciation for the cooperation between the Department and the applicant in reaching the solution detailed in the draft permit. Mr. Lucas also submitted written comments (see infra, at 7).

Mr. Larry F. Gardner, County Legislator, Greene County, spoke in support of the proposed project and issuance of the permit. Mr. Gardner stated that the ability of the applicant to continue its snowmaking operations is critical to the economy of the area and, in light of Department staff's determination that the proposal will not harm the creek, he expressed his full support for the proposal.

Mr. Michael Tancredi, Trustee, Village of Hunter, spoke in support of the proposed project and issuance of the permit. Mr. Tancredi stated that the proposal is not only critical to the ski resort but also to all the watershed communities. He noted that many people came to the area because of the local environment and that he does not believe anyone in the Village or Town of Hunter wants to degrade the environment. He stated that the applicant has been a good steward of the environment for many years and has worked with the Department to address the issues raised by various parties.

Written Comments

As noted at the Legislative Hearing on August 23, 2007 and in the ENB on August 29, 2007, the comment period was extended from September 4 to September 25, 2007. Timely written comments on the application and DEIS were received, in order of their receipt, from:

Kirt Mayland, Esq., Director of the Eastern Water Project, Trout Unlimited. Mr. Mayland requested that the hearing be postponed until October to allow Trout Unlimited "ample time" to review and comment on the DEIS and to decide whether to intervene in the proceeding. Mr. Mayland also stated that

protecting the Schoharie Creek is one of the highest priorities for Trout Unlimited's New York Council.

Amanda Goad, Esq., Assistant Corporation Counsel, New York City. On behalf of the City of New York, Ms. Goad requested an adjournment of the proceedings to allow the City more time to review the application and DEIS. Ms. Goad further requested an extension of the August 15, 2007 deadline for filing for party status. According to Ms. Goad, the City believes the project falls within its jurisdiction under the New York City Watershed regulations (codified at 10 NYCRR part 128). Accordingly, the City argues that it is an "involved agency" as defined at 6 NYCRR 617.2(s) and that it has not been afforded an opportunity to participate in the development of the DEIS as mandated by SEQRA. Ms. Goad subsequently filed additional comments elaborating on the City's position.¹ Therein Ms. Goad again requested an extension of the deadline for the City to file for party status.² In addition to the failure of the application to properly identify the City as an "involved agency," Ms. Goad raised two other concerns: (i) the application completely fails to address the potential stormwater impacts of the project, and (ii) the lack of detailed project plans frustrates a full review of the project's environmental effects. Ms. Marilyn Shanahan also submitted written comments on behalf of the City (see infra, at 7-8).

Mr. Ronald D. Urban, Chairman, New York Council, Trout Unlimited. Mr. Urban submitted two letters. The first is substantively identical to Mr. Mayland's letter discussed above (supra, at 4-5). In the second comment letter Mr. Urban stated that there are several deficiencies in the DEIS, including: lack of a needs analysis to demonstrate the actual amount of water necessary for snowmaking; insufficient analysis of best management practices to protect the creek during low flow periods; and the age of the studies on invertebrates, which are now over ten years old. Mr. Urban stated that he is appalled that the Department deemed the DEIS complete and that it would be

¹ Where the same author has submitted written comments on more than one occasion, that author's comments are discussed together herein.

² The applicant subsequently consented to an extension of the deadline for filing for party status, but only as to DEP. As discussed later in this ruling, Department staff, DEP and the applicant entered a stipulation on the record of the issues conference addressing DEP's concerns (see infra, at 11).

inappropriate to issue a permit given the misinformation contained in the DEIS and its lack of completeness.

Mr. Terrence E. McCartney, Vice-President for Conservation, Theodore Gordon Flyfishers Inc. ("TGF"). Mr. McCartney stated that TGF is a not-for-profit environmental conservation organization with several hundred members. On behalf of TGF, Mr. McCartney requested full party status, but noted that TGF had not yet determined whether it will formally oppose the application. TGF is concerned that the proposal will result in increased withdrawals from Schoharie Creek and may have permanent adverse effects on the trout fishery "which, historically, is one of the premier trout streams in the northeast region of the United States." Mr. McCartney also noted the length of the DEIS and requested a postponement of the hearing until October to allow for a more comprehensive review of the application. Mr. Mark Thompson also submitted comments on behalf of TGF (see infra, at 9)

Mr. Walter T. Keller. Mr. Keller submitted two comment letters. In the first, he identified himself as a member of Trout Unlimited and stated that he is "working with that organization on this matter." His comments, however, appear to be his own as they are not presented as being made on behalf of Trout Unlimited. Mr. Keller requested that the hearing be postponed until at least October to provide more time for review of the DEIS. Mr. Keller stated that he has, thus far, found the DEIS to be incomplete in two significant areas: (i) the lack of an analysis of the amount of water the ski resort must withdraw to operate efficiently and profitably, and (ii) alternative operation plans premised on varying the allowable water withdrawal amounts. Mr. Keller also noted that, in letters to the Commissioner and to the DEC Region 4 Director, he had requested the hearing be cancelled until the DEIS is completed.

In his second comment letter, Mr. Keller stated that he finds the DEIS to be deficient because (i) it does not include analysis of the specific amount of water from Schoharie Creek that is required to meet the applicant's snowmaking needs, and (ii) the DEIS lacks a discussion of best management practices for snowmaking to minimize the need for water withdrawals from the creek. Mr. Keller also stated that section 2.2.2.3 of the DEIS contains a misrepresentation of the invertebrate studies cited therein. Specifically, he stated that the studies evaluated the effect of changes in water quality on invertebrate populations, and not changes in water quantity as indicated in the DEIS. Mr. Keller concluded by stating that he is "flabbergasted" that the Department would consider the DEIS complete.

Mr. Frank Alguire, Greene County Economic Developer. Mr. Alguire expressed strong support for the proposal and permit issuance. He noted that the ski industry creates substantial employment and economic activity in Greene County and that the proposal will ensure Hunter Mountain ski resort has dependable snowmaking operations. Mr. Alguire stated that the environmental and fisheries benefits of this proposal are particularly gratifying and that the higher flows required under the draft permit will provide a clear benefit to the aquatic environment.

Mr. Tom Hitchcock, Board Member, Town of Jewett. Mr. Hitchcock, who also spoke at the legislative hearing, reiterated his support for the proposed project and for issuance of the permit. He noted that he is a life-long resident of Jewett and a ten-year member of the town board. Mr. Hitchcock stated that the economic contribution of the ski resort is likely huge and that he is proud to have such a world class ski resort nearby.

Mr. Dennis M. Lucas, Sr., Supervisor, Town of Hunter. Mr. Lucas, who also spoke at the legislative hearing, reiterated his support, and that of the entire town board, for the proposed project and for issuance of the permit. Mr. Lucas summarized the proposed project and stated that the town board has no objection to the issuance of any and all permits related to the applicant's proposal.

Ms. Marilyn Shanahan, Chief, SEQRA Coordination Section, City of New York, Department of Environmental Protection ("DEP"). Ms. Shanahan stated that Schoharie Creek drains into the Schoharie Reservoir, which supplies 16% of New York City's water supply. Ms. Shanahan further stated that, due to erosion and sedimentation, the reservoir is listed on the State's Total Maximum Daily Load Priority List pursuant to section 303(d) of the Federal Clean Water Act. Therefore, DEP is particularly concerned with stormwater, both during and after construction of the applicant's proposed project. She also proposes several features for inclusion in the project's stormwater pollution prevention plan. Additionally, Ms. Shanahan stated that the applicant must obtain approval from DEP for stormwater discharges associated with the project and these discharges must also be covered by the DEC General Stormwater Permit or an individual stormwater permit.

Other issues raised by Ms. Shanahan include:

Streambed Disturbances. Streambed disturbances should be minimized and both DEP and the Greene County Soil and Water Conservation District should be afforded the opportunity to

review and comment on design plans for in-stream activities. Further, the project should be reviewed to ensure compatibility with the local stream management plan.

Wetlands. Wetlands were identified by DEP staff within the project area. A field assessment should be done to determine whether these wetlands fall within the jurisdiction of the Army Corps of Engineers ("ACOE"). If so, an ACOE permit would be required.

Natural Resources. The need for increased water storage capacity should be fully explained and other options fully evaluated. Provisions for greater protection of the creek during extended periods of low flow should be included in the permit and the applicant should determine the minimum flow at which no detriment to stream ecology is observed. Several deficiencies are noted in the analysis of the anticipated effect of the project on fish populations, especially on wild trout. These deficiencies include the lack of data on winter distribution of fish and the failure to take fish stocking into account in the population studies used in the DEIS. The DEIS also fails to address mitigation measures relative to the loss of vegetation that will be caused by the expansion of the resort's water storage capacity. Ms. Shanahan also stated that areas disturbed by the applicant's activities along the creek should be vegetated with appropriate native species.

Mr. Roy Silver. Mr. Silver noted that he has worked with Friends of the Schoharie with regard to water quality issues, but stated that Friends has not reviewed or taken a formal position on the merits of the application. The comments submitted are his own. Mr. Silver noted that the Stream Management Plan ("SMP") for the Schoharie Creek was recently completed by the Greene County Soil and Water Conservation District. He notes that the DEIS fails to acknowledge the existence of the SMP and does not address many of the environmental issues raised in the plan. Mr. Silver stated that DEC's review of the project will be deficient if it fails to consider the SMP. Finally, Mr. Silver stated that recent studies indicate that global warming may eventually eliminate alpine skiing in the Northeast.

Mr. Mark Thompson, V.P., Co-Chair Conservation Committee, Theodore Gordon Flyfishers Inc. ("TGF"). Mr. Thompson cites four issues of concern: (i) the lack of a needs analysis for the project; (ii) the potential for segmentation/cumulative impacts if the applicant plans to expand the ski area or undertake other development activities in association with the

proposed project; (iii) the lack of best management practices to minimize water withdrawals during periods of low flow and to protect aquatic life during both cold and warm weather; and (iv) the effects of the increased use of ice nucleating agents on riparian vegetation. Mr. Thompson does not request party status, but concludes by stating that TGF preserves its right to submit expert reports and opinions in support of its concerns.

Mr. Neil F. Woodworth, Executive Director, and Ms. Marisa Tedesco, Conservation and Legislative Director, Adirondack Mountain Club, Inc. Mr. Woodworth and Ms. Tedesco state that the DEIS should quantify the estimated total amount of additional water the proposed project will withdraw from the creek. They also state that the applicant should be required to specify whether any expansion of the ski area is contemplated and, if so, the DEIS must include an analysis of the effect of such expansion to avoid segmentation.

Messrs. Jay Simpson and William Wegner, Clean Drinking Water Coalition ("Coalition"). The Coalition is comprised of environmental organizations having an interest in maintaining and enhancing water quality in the New York City watershed. The Coalition raises four areas of concern under the following headings: (i) potential environmental impacts; (ii) economic viability; (iii) segmentation; and (iv) climate change.

Environmental Impacts. The principal environmental issues of concern for the Coalition are water quality and aquatic ecology. With regard to water quality, the Coalition stated that the Final Environmental Impact Study ("FEIS") should include a detailed sedimentation and erosion plan for all in-stream and stream bank activities. The plan should provide detail on construction methods and sequencing to enable an informed review. The Coalition also notes that the DEIS does not address the fact that the Schoharie Reservoir is listed as an impaired water body pursuant to section 303(d) of the Federal Clean Water Act for "Silt/Sediment," nor does it address the consistency of the project with the Schoharie Creek Management Plan. The Coalition also stated that there is a discrepancy in the DEIS because in one instance the DEIS asserts that certain in-stream work will be done during periods of high flow to reduce the effects of sediment resuspension and in another instance the DEIS asserts in-stream work will be done during periods of low flow. The Coalition stated that the applicant should be required to reconcile this discrepancy and, if the applicant cannot demonstrate conclusively that its activities will not cause sediment resuspension, the applicant should propose best management practices to limit resuspension.

The Coalition notes that it is reasonable to conclude that increasing the minimum flow rate from 11 cfs to the proposed 15/20 cfs minimum rate will not have an adverse effect on creek ecology. However, existing conditions in the creek and the fish sampling surveys cited in the DEIS from the early 1990s through 2003 reflect the effects of the applicant's long-term withdrawals from the creek. The Coalition also notes that the DEIS contains no information regarding the applicant's compliance with the existing limits on water withdrawal from the creek and that this information would be useful in evaluating the applicant's willingness and ability to comply with the new limit. Finally, the DEIS lacks discussion of the effects of the project on native brown and rainbow trout populations and habitat.

Economic Viability. With regard to economic viability, the Coalition stated that the applicant should be required to demonstrate that its declining economic activity is the result of insufficient water storage capacity for snowmaking. The Coalition also notes that the DEIS states that the Hunter Mountain resort currently generates \$37.49 million and questions whether this level of economic activity truly threatens the resort's economic viability.

Segmentation. The Coalition next raises the issue of possible segmentation. The Coalition stated that the applicant's plans are unclear and, if the applicant intends any expansion of its activities as a result of the project, the environmental effects of such activities must be evaluated as part of the project. Therefore, the applicant should be required to clearly state whether it contemplates any new or expanded activities as a result of the proposed project.

Climate Change. Finally, the Coalition cites to a United States Geological Survey ("USGS") report entitled "Recent Climate Trends and Implications for Water Resources in the Catskill Mountain Region, New York, USA." The Coalition stated that the FEIS should include a discussion of the findings from the USGS report and their implications in relation to the proposed project.

Issues Conference

ALJs Sherman and Villa convened the issues conference on August 23, 2007 at 10 a.m. at the Kaatskill Mountain Club,³

³ Due to a scheduling conflict, the issues conference was relocated from the Hunter Mountain base lodge, the location

located at the base of Hunter Mountain ski resort, on the south side of Route 23A in Hunter, New York. The issues conference participants were: the applicant, represented by Thomas S. West, Esq., the West Firm; Department staff, represented by Ann Lapinski, Esq., Assistant Regional Attorney, Region 4; and DEP represented by Amanda Goad, Esq., Assistant Corporation Counsel (collectively, the "issues conference participants"). Theodore Gordon Flyfishers, Inc., which had requested full party status, did not attend the issues conference and its petition is discussed later in this ruling (see infra, at 13).

Prior to the commencement of the issues conference, the ALJs were advised that the applicant had met with Department staff and DEP to discuss the issues and concerns raised by DEP and that substantive agreements had been reached. Accordingly, at the outset of the issues conference, we asked whether the issues conference participants would discuss the outcome of those discussions on the record. Mr. West obliged.

Mr. West noted that DEP had earlier requested an extension to the deadline for it to file a petition for party status and that the applicant had consented to same. Mr. West further stated that the agreements reached obviated the need for DEP to file for party status at this time and that the issues conference participants were willing to set forth the substance of the agreement as a stipulation on the record (see issues conference transcript, at 6-13). The principal provisions of the stipulation are:

- applicant will stipulate that DEP is an "involved agency" in the context of this proceeding (see 6 NYCRR 617.2[s]) and that DEP is a proper party to these proceedings with regard to stormwater issues.
- the issues conference participants will work together to identify all planned construction activities over which DEP plans to assert jurisdiction ("jurisdictional activities").
- for all jurisdictional activities, the applicant will prepare the following documents: (i) design drawings; (ii) a stormwater pollution prevention plan ("SWPP"), in conformance with the requirements of the DEC general

designated in the public notices, to the nearby Kaatskill Mountain Club. The change in location was announced the night before at the legislative hearing and notices were placed at the entrance to the base lodge directing interested persons to the new location.

permit and DEP stormwater program; and (iii) a supplement to the DEIS to address SEQRA matters related to stormwater issues associated with the jurisdictional activities (collectively, the "supplemental documents").

- once the supplemental documents are completed by the applicant and reviewed by Department staff and DEP, they will be publicly noticed and subject to a 30 day comment period.
- in the event that DEP determines that an issue relating to stormwater has not been addressed to its satisfaction, DEP may request that the issues conference be reconvened and DEP would have the opportunity to demonstrate that their proposed issue is substantive and significant (see 6 NYCRR 624.4[c]).
- at the close of the comment period, the applicant will prepare a draft responsiveness summary for all comments received on the DEIS and the supplement and the ALJ will determine whether a hearing will be required with regard to stormwater.
- the supplemental documents and the responsiveness summary will become part of the FEIS.

Mr. West concluded by stating that, other than as provided by the agreement, the issues conference participants did not desire extensions of the deadlines as established under the public notices for these proceedings.

Ms. Goad offered DEP's concurrence with the stipulation as outlined by Mr. West and stated that DEP appreciated the applicant's cooperation in addressing the City's concerns. Ms. Lapinski stated that she had nothing further to add to Mr. West's description of the stipulation.

At the conclusion of these discussions, the ALJs again asked whether a representative from TGF was present. There was no response.

We concluded the issues conference with a brief discussion of the impending site visit. There being no other matters to be addressed at this point in the proceeding, the issues conference was adjourned and the site visit followed.

Ruling on Petition for Party Status

Both the applicant and Department staff are mandatory parties to this proceeding (see 6 NYCRR 624.5[a]). Pursuant to 6

NYCRR 624.5(b), and as set forth in the July 25, 2007 Combined Notice, any other party seeking full party or amicus status was required to file a written petition with OHMS. Section 624.5 of 6 NYCRR also allows for the supplementation of a petition and for late filing of petitions, under limited circumstances.

The Combined Notice advised that petitions for full party or amicus status must be received by OHMS on or before August 15, 2007. We received only one timely request for party status and no late-filed petitions were received.⁴ By letter dated August 13, 2007, Theodore Gordon Flyfishers, Inc. ("TGF"), requested full party status. That request, however, did not conform to the requirements of 6 NYCRR 624.5(b) because, inter alia, it did not identify the precise grounds for TGF's opposition to or support of the proposed project (see 6 NYCRR 624.5[b][1][v])⁵ nor did it present an offer of proof specifying the witnesses and nature of evidence TGF expected to present (see 6 NYCRR 624.5[b][2][ii]). TGF advised OHMS by e-mail on August 22, 2007 that it would not be able to attend the issues conference. Although TGF subsequently filed additional written comments, it did not renew or attempt to supplement, nor expressly withdraw, its earlier petition for full party status. The submissions from TGF do not meet the criteria set forth in 6 NYCRR 624.5(b) and, accordingly, its petition for full party status is denied.

No other petitions for full party or amicus status are before us.

⁴ As noted earlier (supra at 5 n 2), the applicant consented to an extension of the deadline for DEP to file a petition for party status. In the event that DEP does petition for party status, the applicant has stated that it will not oppose the petition on the basis of timeliness but that DEP would still need to demonstrate that any issue it proposes for adjudication is substantive and significant (see 6 NYCRR 624.4[c]).

⁵ In its petition, TGF stated that it was still studying the DEIS and had "not yet determined whether to formally oppose the application." In a subsequent submission, TGF elaborated on its concerns with regard to deficiencies in the DEIS, but did not state that it was opposed to the project.

Issues Ruling

To meet the standards for adjudication, an issue must (i) relate to a dispute between the Department and the applicant over a substantial term of the draft permit, (ii) relate to a matter cited by staff as a basis to deny the permit, or (iii) be proposed by a potential party and be both "substantive and significant" (see 6 NYCRR 624.4[c][1]). This same standard applies to the determination regarding whether to adjudicate issues raised regarding the sufficiency of the DEIS or the Department's ability to make the requisite SEQRA findings (see 6 NYCRR 624.4[c][6][i]). Here, there is no dispute between Department staff and the applicant in relation to the terms of the draft permit and staff has advised that it is in favor of issuing the permit. Further, no issue has been proposed for adjudication by a potential party. Accordingly, there are no issues for adjudication at this time.

Nevertheless, the stipulation agreed to by the issues conference participants engenders a process that may result in further proceedings in relation to the supplemental documents being prepared by the applicant. This process may also result in the identification of an issue or issues for adjudication. The applicant has stipulated that DEP is an "involved agency" for the purposes of SEQRA and, as to stormwater issues, a "party" for the purposes of this permit proceeding. The stipulation further provides that, in the event that DEP is not satisfied with the supplemental documents, the applicant will not object to reconvening the issues conference to afford DEP the opportunity to demonstrate that an issue related to stormwater meets the standards for adjudication. Additionally, until these proceedings have concluded, there remains the possibility that a potential party may seek to intervene under the limited circumstances set forth at 6 NYCRR 624.5(c).

In light of the foregoing, the record of the issues conference will remain open to allow the issues conference participants to complete the process set forth in the stipulation.

Appeals

Department regulations provide that this ruling may be appealed to the Commissioner on an expedited basis (see 6 NYCRR 624.8[d][2]). However, because the stipulation of the issues conference participants may result in further proceedings,

possibly to include a full adjudicatory hearing, appeals of this ruling, if any, should be held in abeyance at this time. Appeals of matters addressed herein that could otherwise be made on an expedited basis may instead be made at a time established by subsequent ruling of the ALJs.

_____/s/_____
Richard A. Sherman
Administrative Law Judge

_____/s/_____
Maria E. Villa
Administrative Law Judge

Dated: Albany, New York
November 19, 2007

To: Service List