

**In the Matter of the Application of  
SOUTHERN DUTCHESS SAND & GRAVEL, INC.,  
for Modifications to its Mined Land  
Reclamation Permit Authorizing the  
Operation of a Sand and Gravel Mine in  
the Town of Fishkill, County of Fishkill,  
pursuant to Article 23, Title 27 of the  
Environmental Conservation Law.**

**RULING ON ISSUES  
AND  
PARTY STATUS**

**April 20, 2005**

**DEC Application No. 3-1330-00047/00006**

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**SUMMARY OF RULINGS**

This ruling identifies the parties and the issues for adjudication in the hearing on Southern Dutchess Sand & Gravel, Inc.'s (Applicant's) application for modifications to its current mined land reclamation permit which authorizes the operation of a sand and gravel mine in the Town of Fishkill, Dutchess County, New York. The parties which will participate in the hearing are the Applicant, Department Staff of the New York State Department of Environmental Conservation (DEC or Department), the Village of Fishkill, the Town of Fishkill and the organization known as the Fishkill Ridge Caretakers. The organization known as the Concerned Residents of East Fishkill will not participate as a party in the hearing. The issues identified for adjudication in the hearing are (1) potential impacts to the Clove Creek aquifer as a result of mining below the water table and (2) potential impacts to unnamed tributaries of Clove Creek as a result of the proposed stormwater diversion plan, as well as the adequacy the plan's design. Issues which will not be adjudicated are the Department's negative declaration of January 9, 2002, pursuant to the State Environmental Quality Review Act (SEQRA), and the variance sought by the Applicant from the Mined Land Reclamation Law and regulations allowing the Applicant to maintain and utilize a roadway within the otherwise required 25 foot buffer area around the mine limits. A motion by the Applicant to dismiss the petition for party status filed by Fishkill Ridge Caretakers as untimely is denied.

## **BACKGROUND**

### **Project Description and Location**

The Applicant currently has a Mined Land Reclamation Permit, issued by the Department, authorizing the mining of sand and gravel from approximately 50 acres of a 76 acre parcel it owns on US Route 9, in the Town of Fishkill, Dutchess County, New York. The Applicant has made two applications to modify this existing Mined Land Reclamation Permit. One of the permit modification applications seeks to expand the previously approved mining limits downward to include excavation of a 22 acre lake within the footprint of the existing permitted mine. Mining of this expansion area will involve the removal of approximately 2,000,000 cubic yards of sand and gravel during an estimated operational period of 10 to 20 years. The other permit modification application seeks a variance from the buffer requirements of part 422 of the Mined Land Reclamation regulatory provisions of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) to maintain and utilize approximately 185 linear feet of existing roadway located within the required 25 foot buffer along the easterly property boundary, and to plant trees within 7,100 square feet of undisturbed land within the 25 foot buffer area to provide visual screening of the mine site from US Route 9. As part of these applications, the Applicant proposed a drainage diversion plan, dated October 17, 2003, and revised August 11, 2004, to divert stormwater flows from a neighboring parcel located on the east side of US Route 9, owned by Cranesville Block Company, to an unnamed tributary of Clove Creek which flows into Putnam County. These stormwater discharges presently flow in a westerly direction across and beneath US Route 9, over the property of a contiguous landowner and onto the Applicant's property. As a result of the diversion plan, stormwater flows from Cranesville Block Company will be captured after flowing in a westerly direction under US Route 9 and then directed south along the westerly side of US Route 9 through a series of high density polyethylene (HDPE) pipes and ditches and thence to an unnamed tributary of Clove Creek which flows into Putnam County.

### **Permit Required**

The Applicant has applied for the aforementioned modifications to its current Mined Land Reclamation permit issued pursuant to the provisions of Environmental Conservation Law (ECL) article 23, title 27 and 6 NYCRR parts 420 through 425.

### **SEQRA Status and Determination of Completeness**

Pursuant to 6 NYCRR part 617 of the implementing regulations for ECL article 8 (State Environmental Quality Review Act - SEQRA), DEC, as lead agency, determined that neither of the proposals will have significant impact on the environment. Accordingly, DEC issued a SEQR Negative Declaration on January 9, 2002, as to the mine expansion application, and a SEQR Negative Declaration on October 11, 2002, as to the variance application. With regard to the mine expansion application, a Notice of Complete Application was issued by DEC on January 10, 2002, and published in the *Environmental Notice Bulletin (ENB)* on January 23, 2002, and in the *Poughkeepsie Journal* on January 21, 2002. With regard to the variance application, a Notice of Complete Application was issued by DEC on October 15, 2002, and published in the *ENB* on October 23, 2002, and in the *Poughkeepsie Journal* on October 24, 2002.

### **LEGISLATIVE PUBLIC HEARING OF APRIL 3, 2003**

A Notice of Legislative Hearing, dated February 26, 2003, was published in the *ENB* and, subsequently, on March 7, 2003, as a legal notice in the *Poughkeepsie Journal*, a newspaper of general circulation in the area of the Town of Fishkill. The notice provided that a legislative public hearing, pursuant to 6 NYCRR parts 617, 621 and 624, would be held before Administrative Law Judge Richard R. Wissler to receive unsworn statements from the public on the applications on Thursday, April 3, 2003, at 7:00 P.M., at the Town Hall of the Town of Fishkill, 807 Route 52, Fishkill, NY 12524-3110.

The hearing went forward as announced on April 3, 2003, with more than 150 people in attendance. A total of 40 persons spoke. While several people voiced support for the project, the majority of the speakers expressed concern for the impact the proposed mine expansion might have on the aquifer which is the source of drinking water for the Village and Towns of Fishkill and their environs. Other concerns raised included the adequacy of the environmental review undertaken in the matter pursuant to SEQRA, the adequacy of the historic and archaeological evaluations conducted, and potential impacts on tourism. As provided in the notice of February 26, 2003, the public was invited to file written comments. A total of 15 letters were received expressing the same concerns raised during the hearing on April 3, 2003.

**ISSUES CONFERENCE OF APRIL 4, 2003**

**Conference Participants**

Pursuant to the February 26, 2003 notice, a pre-adjudicatory hearing issues conference was held at 10:00 A.M. on April 4, 2003, at the Fishkill Town Hall to determine what issues, if any, within the scope of the Department's regulatory purview required adjudication, and to consider all applications for party status to participate in any adjudicatory hearing which might be convened in this matter. The issues conference was completed that same day. The participants at the issues conference were the Applicant, the Department Staff, the Village of Fishkill, the Town of Fishkill, the Fishkill Ridge Caretakers, and the Concerned Residents of East Fishkill.

The Applicant was represented by Laura Zeisel, Esq., of the law firm of Drake, Sommers, Loeb, Tarshis & Catania, PLLC, One Corwin Court, Newburgh, New York 12550. Also attending on behalf of the Applicant was Roy T. Budnik, Ph.D., a geologist and consultant and principal of Roy T. Budnik & Associates, Poughkeepsie, New York.

The Department Staff was represented by Steven Goverman, Esq., Assistant Regional Attorney, in the Department's Region 3 Office, 21 South Putt Corners Road, New Paltz, New York 12561. Other members of Department Staff attending the issues conference were Margaret Duke, Regional Permit Administrator for Region 3; Mark T. Davin, Mined Land Reclamation Specialist 1; William Cooper, Mined Land Reclamation Specialist 2; and Scott E. Sheeley, Environmental Analyst.

The Village of Fishkill was represented by Gregory D. Supple, Esq., of the law firm of Lyons & Supple, 92 East Main Street, Wappingers Falls, New York 12590. Also attending on behalf of the Village of Fishkill was Michael F. Wolfert, a hydrogeologist with the consulting firm of Arcadis G&M, Inc., Melville, New York.

The Town of Fishkill was represented by Ron Blass, Esq., of the law firm of VanDeWater & VanDeWater, Esqs., Mill & Garden Streets, Poughkeepsie, New York 12561.

The Fishkill Ridge Caretakers was represented by Thomas P. Halley, Esq., 21 Alden Road, Poughkeepsie, New York 12603. Also attending on behalf of the Fishkill Ridge Caretakers was Peter O. Rostenberg, M.D.

The Concerned Residents of East Fishkill was represented by one of its members, Denis R. Callinan, of 1 Seymour Lane, Hopewell Junction, New York 12533.

### **Conference Proceedings**

The issues conference began with the identification of the various documents constituting the permit modification and variance applications. In accordance with the notice of February 26, 2003, petitions requesting full party or amicus status pursuant to 6 NYCRR 624.5(b) were to be filed with the Department's Office of Hearings by 4:00 P.M., March 26, 2003. Three petitions for full party status were timely received: the Village of Fishkill, the Town of Fishkill, and the Concerned Residents of East Fishkill. A petition from the Fishkill Ridge Caretakers was received by the Office of Hearings at 9:00 A.M. on March 27, 2003. No other petitions were received.

As potential intervenors, the Village of Fishkill, the Town of Fishkill, the Concerned Residents of East Fishkill, and the Fishkill Ridge Caretakers articulated their respective environmental interests in the proceeding, as required by 6 NYCRR 624.5(b)(1), and the Applicant and the Department Staff, as mandatory parties, were given the opportunity to respond thereto.

Thereafter, the conference focused on the various issues asserted by the intervenors to be both substantive and significant and therefore appropriate for adjudication pursuant to 6 NYCRR 624.4(c).

### **RECONVENED ISSUES CONFERENCE OF SEPTEMBER 17, 2004**

As noted and more fully described above, and as part of these applications, the Applicant proposed a drainage diversion plan, dated October 17, 2003, and revised August 11, 2004, to divert stormwater flows from a neighboring parcel located on the easterly side of US Route 9, owned by Cranesville Block Company, to an unnamed tributary of Clove Creek which flows into Putnam County. This drainage diversion plan was proposed in response to a concern raised by the Department Staff after an inspection revealed the presence of the aforementioned stormwater discharge onto the Applicant's site. Inasmuch as this drainage diversion plan was submitted some months after the close of the record of the issues conference of April 4, 2003, it was necessary to reconvene the issues conference pursuant to 6 NYCRR 624.4(b)(1). A notice of the reconvened issues conference was published in the *ENB* on August 25, 2004, and in the *Poughkeepsie Journal* as a legal notice on August 27, 2004. The notice provided that the

issues conference would be reconvened on Friday, September 17, 2004, at 10:00 A.M., at the Town of Fishkill Town Hall, 807 Route 52, Fishkill, NY 12524-3110. The notice also solicited written comments from the public to be submitted by that same day, and invited additional parties interested in intervening as full parties or with amicus status to file petitions to do so with the DEC Office of Hearings and Mediation Services by 4:00 P.M. on Friday, September 10, 2004. No additional petitions were received.

The reconvened issues conference went forward and was concluded on August 27, 2004, with the same parties present as participated in the original issues conference of April 4, 2003. The proposed drainage diversion plan was discussed as well as potential impacts to Clove Creek and its tributaries and the Clove Creek aquifer. The parties were directed to submit closing arguments by mail by October 29, 2004. As of November 5, 2004, the Office of Hearings received closing briefs from all parties.

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

The Applicant and the Department Staff are automatically full parties to the proceeding pursuant to 6 NYCRR 624.5(a).

With respect to the petitioners the Fishkill Ridge Caretakers, the Concerned Residents of East Fishkill, the Village of Fishkill, and the Town of Fishkill, as provided in 6 NYCRR 624.5(d) and as applicable to this matter, to be entitled to full party status a determination must be made that they each have

1. Filed an acceptable petition pursuant to 6 NYCRR 624.5(b)(1) and (2);
2. Raised a substantive and significant issue; and
3. Demonstrated an adequate environmental interest.

#### **Fishkill Ridge Caretakers, Inc.**

Fishkill Ridge Caretakers, Inc., (FRC) is a not for profit corporation organized under the laws of the State of New York. Formed in 1999, it is a citizens' group which encourages the responsible use of the Fishkill Ridge portion of the Hudson Highlands. While interested in water quality in general throughout the region, the group actively advocates the protection of Clove Creek and the Clove Creek aquifer, primarily through public information and educational efforts. Some of its

members, including residents of the Town of Fishkill and the City of Beacon, drink water drawn from the Clove Creek aquifer.

As will be discussed herein, FRC has raised two substantive and significant issues for adjudication and provided adequate offers of proof with respect thereto as to potential impacts associated with mining in the Clove Creek aquifer and the adequacy of the proposed stormwater diversion plan.

The Office of Hearings received FRC's petition at approximately 2:00P.M. on March 27, 2003, nearly 24 hours after the deadline of 4:00 P.M., March 26, 2003, as provided in the public notice of February 26, 2003. Thomas P. Halley, Esq., counsel for FRC, indicated that the reason for the delay was an error on the part of his office in believing that service of the petition on the Department's Region 3 office in New Paltz on March 26, 2003, was adequate. When his office learned otherwise, it was too late to get the petition to the Office of Hearings in Albany by 4:00 P.M. The FRC petition was then immediately sent UPS Next Day Air to Albany. It is to be noted that the UPS Next Day Air Shipping Document is dated March 26, 2003, as is Mr. Halley's cover letter to the FRC petition which is addressed to the Department's Region 3 Headquarters in New Paltz, and not the Office of Hearings in Albany. On the unique facts presented here, I find that sufficient good cause has been shown for the late filing of the FRC petition. Moreover, while the petition is 15 pages in length, it consists entirely of three letters, one from a principal of FRC comprising 7 pages, one from FRC's expert in hydrogeology comprising 6 pages, and Mr. Halley's cover letter comprising 2 pages. There are no scientific studies or other data contained in the petition. The FRC petition was received by all parties by March 27, 2003, some eight days before the issues conference of April 4, 2003. There has been no showing that the rights of the Applicant or any other party have been prejudiced by the FRC's delay in filing its petition. In addition, as will be apparent from the discussion herein, FRC's participation will materially assist in the determination of issues raised in this proceeding.

#### **Ruling One**

The FRC petition is deemed to be timely and will be considered. Moreover, upon the record, I find that FRC has met the requirements of 6 NYCRR 624.5(d) in that it has filed a petition that comports with the requirements of 6 NYCRR 624.5(b)(1) and (2), raised issues that are both substantive and significant, and demonstrated an adequate environmental interest. Accordingly, FRC is granted full party status in this proceeding.

### Concerned Residents of East Fishkill

Concerned Residents of East Fishkill (CREF) is an organization of residents residing in an area of the Town of East Fishkill, New York, which has been designated by the United States Environmental Protection Agency (USEPA) as the Shenandoah Road Groundwater Contamination Superfund Site, USEPA Identification No. NYSFN0204269. Annexed to the CREF petition for party status is a list of some of the residents of the Shenandoah Road, East Fishkill, Superfund site, comprising some 170 individual street addresses. As part of its cleanup approach at the site, USEPA has proposed providing a permanent alternative water supply to Shenandoah Road residents and, in particular, has identified the Town of Fishkill Municipal Water Supply as the preferred source of this alternative supply. The Department has concurred in the USEPA's proposal. To provide this permanent alternative water supply, the development of a new well field along Snook Road in the Town of Fishkill has been proposed. This proposed well field is located approximately one and one half miles north of the Applicant's site. The Town of Fishkill Municipal Water Supply draws its water from the Clove Creek aquifer. The proposed Snook Road well field is also located above the Clove Creek aquifer. The Applicant's mine is situated above this aquifer as well, and the proposed expansion of the mine downward below the water table would enter and expose the aquifer. CREF's concern is that the proposed expansion of the Applicant's project could impact its potential future water supply.

The petition for party status filed by CREF (Exhibit 13), consists of one page, exclusive of the aforementioned list of residents. The document identifies CREF; provides a brief history of the Shenandoah Road superfund site; lists six possible alternatives considered by the USEPA as alternative sources of water for affected East Fishkill residents, including the Town of Fishkill; and urges that the permit modification be denied or, in the alternative, held in abeyance for six months or until final approval by the USEPA of an alternative water source.

The required contents of a petition for party status are delineated in 6 NYCRR 624.5(b). The petition for party status filed by CREF does not comport with these regulatory requirements in several respects. With regard to section 624.5(b)(1), while the petition does, arguably, articulate CREF's environmental interest in this proceeding, in accordance with subparagraph (ii), it does not identify whether the petition is for full party or amicus status, nor does it identify the precise grounds for



opposition or support, as required by subparagraphs (iv) and (v), respectively.

Of greater significance, however, is the petition's failure to meet the requirements of paragraph (2) of section 624.5(b), assuming the petition is for full party status. In particular, the petition fails to identify an issue for adjudication that is both substantive and significant, contrary to the direction of subparagraph (i), and does not present an offer of proof with respect to any issue, as required pursuant to subparagraph (ii). Furthermore, the petition does not identify a legal or policy issue to be briefed which meets the criteria of 6 NYCRR 624.4(c) and, accordingly, cannot be viewed as a petition for amicus status pursuant to 6 NYCRR 624.5(b)(3).

At the issues conference, CREF proffered several exhibits including documentation of the USEPA action; photographs of the site and surrounding area, including Clove Creek and its tributaries, under various conditions of precipitation; and maps showing the location of the Clove Creek aquifer with respect to the Applicant's site. The parties agree that the proposed Snook Road well field is located above the Clove Creek aquifer. However, CREF failed to explain, based upon its proffer, how the aquifer at the location of the proposed Snook Road well field might be impacted by the Applicant's proposed action and, thus, failed to raise sufficient doubt as to the Applicant's ability to meet statutory or regulatory criteria applicable to the proposed mine expansion such that a reasonable person would inquire further. Accordingly, CREF's proffer failed to raise a substantive issue.

In addition, CREF's proffer did not raise an issue with the potential to result in denial of the proposed permit modification, a major modification of the proposed action, or the imposition of significant permit conditions. Thus, CREF failed to present a significant issue. While the information provided by CREF may be of relevance during any subsequent adjudicatory hearing in this matter, should any party wish to call any of its members as witnesses, it does not raise an issue that is either substantive or significant. Moreover, even allowing CREF's proffer at the issues conference to be received as additional information to amend an otherwise inadequate petition pursuant to 6 NYCRR 624.5(b)(4), its request for either full party or amicus status in this proceeding must be denied. Finally, as the discussion herein will indicate, surveys conducted by the USGS show that any hydrogeologic connection between the Applicant's site and any well field to be developed along Snook Road is unlikely.

## Ruling Two

Upon the record, I find that CREF has not met the requirements of 6 NYCRR 624.5(d) in that it has failed to file a petition that comports with the requirements of 6 NYCRR 624.5(b)(1), (2) or (3). Accordingly, CREF is denied either full party or amicus status in this proceeding.

## The Village of Fishkill

The Village of Fishkill is an incorporated municipality located in the Town of Fishkill, Dutchess County, New York. The Village maintains a well field approximately one mile north of the Applicant's site from which residents of both the Village and Town of Fishkill are supplied drinking water. This well field is located along the eastern side of Clove Creek and is within the Clove Creek aquifer. The Applicant's site is also located along the eastern side of Clove Creek and, as noted, within the Clove Creek aquifer. As the Village's petition for full party status suggests, the paramount issue in this proceeding, and indeed, the Village's primary reason for participating herein, concerns potential hydrogeological impacts to the Clove Creek aquifer and its water supply that may be occasioned by the Applicant's proposed mining activity, as well as the proposed drainage diversion plan.

As its petition states, the Village seeks "to protect [its] well fields, water supply and water aquifer from any form of pollution." (Exhibit 10, paragraph 4) The Village has proposed certain permit conditions addressing the prevention and containment of potential pollution spills and contamination. Moreover, the Village has entered into an agreement with the Applicant providing for the installation of groundwater monitoring wells at the Applicant's site. The agreement includes testing and inspection protocols for the monitoring wells. These measures, the Village asserts, will address its concerns and protect its drinking water. The Village does not believe a substantive and significant issue has thus been raised with respect to its hydrogeological or other water quality concerns requiring adjudication, but has requested that if an issue is raised, that it be permitted to fully participate in any subsequent adjudicatory hearing. In this regard, it has retained the services of a hydrogeological engineer, Michael F. Wolfert, a Certified Professional Geologist (CPG), of the consulting firm Arcadis G&M, Inc., Melville, New York, to testify at any subsequent adjudicatory hearing as to the nature and extent of the safeguards provided by the aforementioned permit conditions and agreement.

The Village is entitled to full party status in this proceeding inasmuch as its petition for full party status comports with the requirements of section 624.5(d)(1). First, as the owner and operator of a municipal well field located a mile north of the Applicant's site which draws its drinking water from the same aquifer the Applicant proposes to enter and expose as a result of its mine expansion, it is clear that the Village has demonstrated an adequate environmental interest in this matter as required by section 624.5(d)(1)(iii).

Second, the Village's petition satisfies the requirements of section 624.5(b)(1) and (2), and thus complies with the mandates of section 624.5(d)(1)(i). In meeting the requirements of subsections (1) and (2) of section 624.5(b), the petitioner can, in fact, support the Applicant's project, provided it articulates its grounds for such support, as directed by section 624.5(b)(1)(v). Moreover, in accordance with section 624.5(b)(2)(i), a petitioner must identify an issue that is substantive and significant, as those criteria are defined in subdivision 624.4(c). This does not mean, however, that in identifying an issue as substantive and significant that the petitioner is thereby a proponent of the doubt about the applicant's ability to meet permitting standards such that a reasonable person would inquire further, or a proponent of any scenario that could effect a change in permit issuance. The requirement of section 624.5(b)(2)(i) is only that a petitioner *identify* an issue for adjudication that meets the criteria of subdivision 624.4(c), not that it be a party *raising* that issue. The issue identified for purposes of the requirements of section 624.5(b)(2)(i) can be an issue raised by another party. Once identified, however, and in accordance with section 624.5(b)(2)(ii), a petitioner must present an appropriate offer of proof as to the evidence it intends to offer, as well as the grounds upon which it makes its assertion with respect to the issue it has so identified.

The substantive and significant issue *identified* by the Village is a substantive and significant issue that has been *raised* by FRC in its petition for party status regarding the hydrogeology of the Clove Creek aquifer and impacts to that aquifer that could be occasioned by the Applicant's proposed mining activity. The Village does not believe this issue is substantive and significant and, in this regard, has made an offer of proof through its expert, Michael F. Wolpert, and asserted its grounds for this belief, the same being the safeguards afforded by the aforementioned proposed permit conditions and its agreement with the Applicant with respect to monitoring wells. Thus, the Village's petition satisfies both

conditions imposed by subparagraphs (i) and (ii) of section 624.5(b)(2), and, accordingly, meets the requirements of section 624.5(d)(1)(ii).

Finally, although the Village has not raised the issue of the hydrogeology of the area as a substantive and significant issue, it is clear that the Village can make a meaningful contribution through its expert, Michael F. Wolpert, to the record regarding this issue. Thus, the Village's petition further satisfies the requirements of section 624.5(d)(1)(ii).

### **Ruling Three**

Upon the record, I find that the Village has met the requirements of 6 NYCRR 624.5(d) in that it has filed a petition that comports with the requirements of 6 NYCRR 624.5(b)(1) and (2), can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party, and has demonstrated an adequate environmental interest. Accordingly, the Village is granted full party status in this proceeding.

### **The Town of Fishkill**

The Town of Fishkill is an incorporated municipality located in Dutchess County, New York. As its petition for full party status indicates, the Town seeks to participate in this proceeding "in order to promote the balanced protection and enhancement of its environment, as well as to protect and promote the health, safety and welfare of [its] residents." (Exhibit 11, at 1.) Citing 6 NYCRR 617.2, the Town points out that the term "environment" includes not only physical conditions such as water and minerals, but also socioeconomic factors such as existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character. In this regard, the Town favors the Applicant's proposal "as a means for (a) maintaining sound commercial/industrial growth and balance; (b) assuring a continued source of real property tax revenue; (c) providing for preservation of local employment opportunities; and (d) fulfilling the Town's legislated desire to attract or maintain industrial uses in a district zoned for industry." (*Id.*, at 4.)

With respect to the Town's drinking water supply, inasmuch as that water is also drawn from the Clove Creek aquifer, the Town's concerns are similar to those of the Village. In addition, however, the Town acknowledges that the Snook Road well field may be the site of a future source of drinking water for

both the Town of Fishkill as well as the Town of East Fishkill. The Snook Road well field is also within the Clove Creek aquifer. The Town asserts, however, that there is no hydrogeological connection between the proposed Snook Road well field and the Applicant's site and that the Applicant's proposed mine expansion, as well as the proposed drainage diversion plan, will not have any impact on the Snook Road well field. In support of this position the Town provided the opinion of its consultant, Thomas P. Cusack, CPG, of Leggette, Brashears & Graham, Inc., Trumbull, Connecticut. As does the Village, the Town asserts that no substantive and significant issue has been raised which requires adjudication, but requests the right to fully participate in any subsequent hearing should an issue for adjudication be determined. Should an adjudicatory hearing be convened with respect to this issue, the Town would also offer expert evidence through its Town Engineer, John V. Andrews, Jr., P.E., of Rhode, Soyka & Andrews, P.C.; its Town Planner, John A. Morabito; and the Town Assessor, Paula Sarvis.

As did the Village, though not its proponent, the Town has, in effect, identified hydrogeological impacts to the aquifer occasioned by the Applicant's proposed mining activity as an issue that is substantive and significant. Moreover, from the record, it is clear that the Town can make a meaningful contribution through its experts to the record regarding this issue.

#### **Ruling Four**

Upon the record, I find that the Town has met the requirements of 6 NYCRR 624.5(d) in that it has filed a petition that comports with the requirements of 6 NYCRR 624.5(b)(1) and (2), can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party, and has demonstrated an adequate environmental interest. Accordingly, the Town is granted full party status in this proceeding.

#### **STANDARDS FOR ADJUDICABLE ISSUES**

In accordance with the standards articulated in 6 NYCRR 624.4(c), an issue is adjudicable only if it relates to a dispute between the Department Staff and the Applicant over a substantial term or condition of a proposed draft permit, relates to a matter cited by the Department Staff as a basis to deny the proposed permit and such matter is contested by the Applicant, or is proposed by a potential party and is both substantive and significant.

An issue is substantive if there is sufficient doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the proposed project, such that a reasonable person would inquire further. In determining whether such sufficient doubt exists, the ALJ will consider the issue in light of the permit application and related documents, such as the DEIS and exhibits annexed thereto, the proposed draft permit, the content of any petitions filed for party status, the record of the issues conference, and any subsequent written arguments authorized by the ALJ.

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.

Pursuant to 6 NYCRR 624.4(c)(4), where the Department Staff has reviewed a permit application and finds that the 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 the project to demonstrate that that issue is both substantive and significant. This burden of persuasion is met by an appropriate offer of proof. As stated by the Commissioner, "the offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues" (*Matter of Halfmoon Water Improvement Area*, Decision of the Commissioner, April 2, 1982, at 2).

#### **ISSUES REQUIRING ADJUDICATION**

Issues for adjudication have been raised with respect to (1) potential impacts to the Clove Creek aquifer as a result of mining below the water table and (2) potential impacts to unnamed tributaries of Clove Creek as a result of the proposed stormwater diversion plan, as well as the adequacy the plan's design.

## Impacts to the Clove Creek Aquifer

### Positions of the Parties

#### **FRC**

In its petition (Exhibit 12, pp. 3-5), FRC argues, through its hydrogeologist, Donald W. Groff, Ph.D., that potential impacts to local groundwater resources as a result of the proposed mining activity cannot be fully evaluated without first understanding the nature and architecture of the underlying Clove Creek aquifer. Such an inquiry would require an examination of the stratigraphy of the aquifer, including strata permeabilities, as well as groundwater quality, temperature, and flow directions. From this data a model of the Clove Creek aquifer could be developed, utilizing a computer program such as Modflow, and potential impacts to groundwater resources effectively evaluated.

With respect to an examination of the stratigraphy of the aquifer, Groff argues, in his letter of September 13, 2004, (Exhibit 51, pp. 3-4) that such a study would identify the location of aquifer flow and filtration zones, essential to ensuring adequate potable water supplies, both now and in the future. Amplifying this position in his letter April 28, 2003, (Exhibit 50, pp. 2-4) Groff asserts that such a study would reveal those zones in the aquifer where groundwater flows most freely and, thus, provide the basis for a mining extraction plan which avoids these zones, minimizing environmental impacts. While the available published literature and maps provide some indication of the stratigraphy of the aquifer, Groff believes these have been largely ignored by the Applicant. (Exhibit 12, p. 4; Exhibit 51, p. 3; Exhibit 50, p. 2) In particular, Groff contends that the mapping done by Moore, LeFleur and others and published in US Geological Survey (USGS) Open File Report 82-81 supports his claim that a more comprehensive understanding of the stratigraphy of the aquifer is required if environmental impacts to the water supply are to be minimized. Moreover, Groff argues that the bore holes drilled on the site were undertaken merely to verify the presence of commercially viable sand and gravel. As such, the location of the bore holes, whose precise locations are inadequately verified in his view, and the bore hole logs, cannot be said to provide an adequate understanding of the aquifer's architecture.

#### **CREF**

The Concerned Residents of East Fishkill (CREF) pointed out that the proposed Snook Road well field would be the most likely

source of drinking water for the residents of Shenandoah Road in East Fishkill impacted by the USEPA remediation of the IBM site in that community. CREF does not dispute the Applicant's right to mine its site, rather, its concern is that the proposed mining activity could negatively impact the quality of the water taken from the Snook Road well field and, thus, the future drinking water supply of its constituents. (T, 4/4/03, pp. 180-192) While CREF proffered no expert opinion with respect to any hydrogeologic connection between the aquifer beneath the Applicant's site and the aquifer beneath the proposed Snook Road well field site, it did offer a copy of Figure HA-8 from the Applicant's Hydrogeologic Assessment (part of Exhibit 6) which generally depicts the boundary of the entire Clove Creek aquifer, and which, asserts CREF, "specifically identifies the association of Clove Creek to the Snook Road aquifer." (Exhibit 55; T, 9/17/04, p. 218)

### **Applicant**

In support of its modification application (Exhibit 6), the Applicant provided a report, dated September 25, 2001, describing the proposed action and addressing various pollution control issues, including water pollution control. Annexed to this report is an Appendix 7.2 entitled, "Hydrogeologic Assessment for the Southern Dutchess Sand & Gravel Mine, Town of Fishkill, Dutchess County, New York," (Assessment) also dated September 25, 2001, hereinafter abbreviated "HA". This hydrogeologic assessment addresses the existing mining operation, the proposed pond, regional hydrology, the Village well field located on Clove Road, and potential impacts and mitigation measures. The Assessment concludes, at page 8:

"The current mining and processing of sand and gravel at the Southern Dutchess site do not represent a threat to the quality of the water supply at the Clove Road Well Field. Furthermore, the creation of a pond within the limits of the mine does not pose an increased threat to Clove Creek, the aquifer, or the water supply of the community."

In reaching this conclusion, Section 6.0 of the Assessment, in its consideration of potential impacts to water resources and mitigation measures, examines surface waters, groundwater and the Village well field. Surface waters will not be impacted from the mining operations, the report asserts, inasmuch as berms and surface grading will preclude stormwater runoff from the site. (HA, p. 5)



With respect to groundwater, the report notes that creation of the 22 acre pond raises concerns as to potential impacts to the groundwater budget and the possible chemical contamination of the Clove Creek aquifer. (*Id.*)

As to the groundwater budget, the report states that recharge to the aquifer occurs primarily through the unconsolidated glacial material underlying the valley floor, the sources of this recharge being adjacent uplands and direct participation. However, since the proposed pond is largely isolated from overland flow, direct participation is the primary source of aquifer recharge at the mine site. (HA, pp. 5-6)

Assuming an average annual precipitation rate of 43 inches and an average annual evapotranspiration rate of 21 inches, the Assessment asserts that the average recharge rate for the entire Clove Creek aquifer is 2.2 million gallons per day (mgd), although this could decrease by nearly 50% to 1.4 mgd during a one-year-in-thirty drought. Of this daily volume of recharge, 34,000 gallons per day presently passes through the sand and gravel comprising the 22-acre site of the proposed pond. (HA, p.6)

Given that mean annual lake evaporation for the area is about 29 inches per year, the Assessment concludes that there will be increased losses due to evaporation of about 8 inches per year, or approximately 40%. However, noting the trend of the increased conversion of the Clove Creek watershed to residential and light industrial uses, and the corresponding decrease in precipitation infiltration thereby occasioned, perhaps by even a factor of 10, the report argues that the creation of the 22-acre pond could, in fact, help to preserve recharge capacity. (HA, p.6)

Addressing the issue of groundwater contamination, the report notes that the only chemicals used in sand and gravel mining operations are the fuels and lubricants associated with the equipment used. (*Id.*) The Assessment quotes a 1992 report by the Dutchess County Water and Wastewater Authority document, entitled "Dutchess County Water Protection Program," which observes that "mining activities may present sources of groundwater contamination" including, (1) possible fuel spills associated with the refueling of equipment, (2) washing of stone, sand, and gravel, (3) disposal of wash water in the area, and (4) illegal dumping once operations cease. (*Id.*) To address these concerns, the Assessment points out that the Applicant is currently employing the following operational measures:

- 1) Fuel is stored in an above-ground steel tank, with positive overflow- and leak-containment.
- 2) Equipment is kept in good repair and is checked regularly for leakage of hydrocarbon products.
- 3) Waste oil lubricants and related petroleum products are collected in appropriate containers and periodically removed by a contractor qualified to handle and properly dispose of such materials.
- 4) The staff has been trained to report any spillage of fuels, waste oil, other petroleum or hazardous materials to the DEC Spill Hotline.
- 5) No solid- or liquid-chemical wastes are disposed of on the property. Refuse generated by the office and plant is placed into dumpsters located on the site and removed by a qualified contractor.
- 6) Natural, untreated water is used to wash the sand and gravel.
- 7) Silt contained in the wash water is removed through natural settling in the sedimentation ponds. (HA, pp. 6-7)

Referring again to the above document entitled "Dutchess County Water Protection Program," the Assessment concludes its Section 6.2 on groundwater with the following paragraph:

The *Program* also states that maintaining a greater distance from the ground to the water table is important since pollutants are attenuated as they travel through topsoil; although the effect is not quantified in the *Program*. However, this factor is significantly lessened in high-permeability sand and gravel because of rapid infiltration rates. Also, there is little opportunity for pollutant- and nutrient-generating activities to take place within the pond, so the lack of attenuating soil in the area of the pond does not increase the potential for contamination of the aquifer. (HA, p. 7)

Section 6.3 of the Assessment addresses potential impacts to the quality of the water pumped at the Village's Clove Creek Well Field. The report notes that contamination of groundwater anywhere within the more than fifteen square miles comprising the drainage basin surrounding the vicinity of the well field could affect water quality at the wells, such sources of contamination being septic systems, road salt, automobile wrecking yards and repair facilities as well as other industrial and commercial activities, chemical spills occasioned by vehicle accidents, and excessive use of residential pesticides. (HA, p. 7) The report

then asserts that the mining activities proposed by the Applicant do not propose a significant threat to water quality at the well field, especially in light of the seven operational measures which will be implemented, as noted above.

The Assessment points out that the Town of Fishkill has proposed, but has not officially adopted, a Well Head Protection Area (WHPA) program which would include the area surrounding the Clove Creek Well Field and be comprised of three zones, Zone I-G, the area within a 200 foot radius of the well head; Zone II-G, covering the entire Clove Creek aquifer; and Zone III-G, being that portion of the Clove Creek watershed that contributes runoff to the Clove Creek aquifer. The Applicant's mine is located within Zone II-G, as well as other uses including residential septic systems, automobile wrecking and repair facilities, and a NYSDOT maintenance and salt storage facility. (HA, pp. 4-5)

The Assessment notes that the Town Board of the Town of Fishkill, in 1992, designated eight Critical Environmental Areas (CEA's) within the Town's Water Improvement Area No. 1 and that the Clove Creek Well Field, in proposed well head Zone I-G, and that portion of proposed Zone II-G in Dutchess County northward of the Putnam County line are both in CEA No. 6. The Applicant's mine is entirely within CEA No. 6. (HA, p. 5) According to the Applicant, the sole purpose for the CEA designation is to require that all actions within a CEA that would otherwise be "Unlisted Actions" for the purposes of SEQRA are treated as "Type I Actions" necessitating the preparation of a full environmental assessment form. (*Id.*)

Asserting that the mine will meet the requirements of all regulations proposed as part of the WHPA initiative, the Assessment states that "the *Dutchess County Water Protection Program* proposes that mining be an allowed use (with a Special Permit) everywhere in the County, except in the immediate wellhead protection area (Zone I)." (HA, p. 7)

The Assessment concludes by asserting that short of significant urbanization, land use changes in the area will have little effect on the Clove Creek Well Field and that the proposed mining activity will not have any effect on water quality, recharge to the Clove Creek aquifer, or the available water supply. (HA, p. 8)

### **Village of Fishkill**

In light of certain language in the proposed permit and its agreement as to monitoring wells with the Applicant, the Village

supports modifying the permit. Special Condition 8 of the proposed permit (Exhibit 9) provides that the Applicant shall take all necessary precautions "to prevent contamination of Clove Creek and its aquifer by silt, sediment, fuels, solvents, lubricants, debris or any other pollutant associated with mining and mining procedures." Moreover, as noted earlier, the Village has entered into an agreement with the Applicant providing for the installation of groundwater monitoring wells at the Applicant's site. The agreement includes testing and inspection protocols for the monitoring wells. An executed copy of the agreement is annexed to the Village's petition for party status, Exhibit 10. The Village asserts that these wells will provide an "early warning" so that if contamination does occur there will be adequate time to address the problem before it can affect the water supply. (Transcript of issues conference of April 4, 2003, pp. 252-253; hereinafter abbreviated T, date and page number) The Village believes that the proposed permit special condition as well as implementation of the monitoring well agreement will address its concerns regarding potential impacts to the quality of its drinking water.

#### **Town of Fishkill**

The Town also favors the permit modification believing that the measures proposed will adequately protect the water supply at the Clove Creek well field. With respect to the proposed development of a well field along Snook Road to supply water to East Fishkill and the concerns raised by CREF, the Town asserts that there is no hydrogeologic connection between the aquifer underlying the Applicant's mine and the aquifer lying beneath the Snook Road site. (T, 9/17/04, p. 217) In support of this position, the Town proffered the opinion of its expert, Thomas P. Cusack, CPG, of the firm of Leggette, Brashears & Graham, Inc., Trumbull, Connecticut. In a letter to the Town dated November 18, 2003, and received at the issues conference as Exhibit 49, Mr. Cusack stated:

The Snook Road well field is located over 1.5 miles from [the Applicant's site]. Data from extensive pumping tests of proposed supply wells at the Snook Road well field indicates the zone of influence (recharge area) to the wells does not include the sand and gravel aquifer underlying Clove Creek in the vicinity of [the Applicant's site].

## Department Staff

Department Staff maintained that sand and gravel mining below the water is a common practice. Indeed, at present, more than 300 sand and gravel mines operating in the State mine aggregate below the water table. In its experience, no such mining activity has ever resulted in the contamination of a drinking water supply. (T, 4/4/03, p. 152) Moreover, Department Staff observed that mining below the water table often occurs within primary and principal aquifers where public water supplies are also located. (*Id.*, p. 158) Noting the lack of scientific data to support a conclusion to the contrary, Department Staff concurred with the conclusion reached by BCI Geonetics, Inc., of Laconia, New Hampshire, in its 1988 study entitled "The Impact of Sand and Gravel Mining on Groundwater Resources." (Exhibit 19) This study which entailed a comprehensive review of the scientific literature, field interviews with water supply managers, and an examination of case studies from New Hampshire, Ohio and New York, concluded that they had "found no scientific documentation containing evidence that excavating gravel above or below the water table was detrimental to an underlying aquifer." (Exhibit 19, p. 13) In further support of its position, Department Staff also cited the Department's own study entitled, "Upstate New York Groundwater Management Program Summary" (Exhibit 18) In a section dealing with mineral extraction, this report, at page 30, states:

Sand and gravel are good aquifer materials and the mining of them often occurs in productive aquifer areas. This mining often raises concerns in the public's mind about possible environmental impacts such as alteration of local groundwater flow patterns, use and possible spillage of petroleum products at the site, direct exposure of groundwater in mines near major transportation routes where spills are likely to occur, and possible illicit dumping of solid or hazardous wastes at the site.

DEC knows of no instance when significant groundwater quality or quantity problems have occurred at mines in New York State. In issuing Mined Land Reclamation Permits, DEC evaluates possible impacts on groundwater in the vicinity of mining sites.

With regard to the Applicant's mining operation, Department Staff notes that it has never been cited for any water quality violation. In addition, Department Staff points out that the mining operation at the site will not significantly change. The

footprint of the mine will remain the same, only its depth will be increased. (T, 4/4/03, pp. 130-131) Also, Department Staff observes that a 200 foot separation will be maintained between the pond excavation and Clove Creek, thus ensuring the water quality of the creek and its protected status as a trout stream. (T, 4/4/03, p. 132)

In view of the foregoing, and in light of the proposed permit conditions, the spill prevention measures to be implemented by the Applicant, and the system of monitoring wells to be put in place, Department Staff does not believe a substantive and significant issue has been raised with respect to mining in the Clove Creek aquifer which warrants an adjudicatory hearing.

### Discussion

The record in this matter raises substantive and significant issues regarding potential significant impacts to the Clove Creek aquifer occasioned by the Applicant's proposed mining activity requiring further inquiry.

The Applicant proposes to extract aggregate at the site from depths below the water table, in the process forming a 22 acre pond. The size and depth of this pond are significant. According to the reclamation plan submitted by the Applicant as part of Exhibit 6, dated February 15, 1978, and revised as of July 29, 2002, at its widest point from north to south, the pond will extend over 1600 feet, more than three tenths of a mile. At its widest point from east to west, it will extend over 1200 feet, or about a quarter of a mile. Moreover, the surface elevation of this pond will also be the surface elevation of the water table in the area, which is at approximately 245 feet above sea level (asl). The surface of the water table defines the upper limit of an aquifer, hence, the creation of this 22 acre pond will permanently expose 22 acres of the Clove Creek aquifer. According to the cross sections diagram, dated June 25, 1973, and revised as of September 25, 2001, also part of Exhibit 6, aggregate will be removed until the floor of the mine reaches 170 feet asl. Thus, the resulting 22 acre pond will be 75 feet deep.

A report prepared by the Applicant, dated September 25, 2001, entitled "1999-2004 Mining Permit Modification Application," and part of Exhibit 6, notes at Section 3.1, page 2, that an estimated 2,000,000 cubic yards of material are proposed to be removed from the site at a rate of approximately 100,000 to 200,000 cubic yards per year. This same section of the report states:

Initial site development will begin by excavating the sand and gravel down to the water table within the pond area. Excavation will begin at the west end of the pond and proceed eastward. Mining below the water table will be initiated by hydraulic excavator; it will continue by excavator, dragline, or dredge.

The record does not indicate the type of excavator, dragline or dredge to be used. Nor does it indicate the location of this equipment during mining operations below the water table, whether it will be operated exclusively from the shore line, or on floats, or from platforms. Moreover, because the Applicant does not plan to dewater the site during the extraction of aggregate, it is apparent that, during some phases of the mining operation, extraction equipment will be operating in the water at depths up to 75 feet. Beyond fuel requirements, this equipment will require lubrication in the form of oils and greases as well as hydraulic fluid and protective surface coatings. Whether and to what extent some lubricated, hydraulic or protectively coated surfaces of the extraction equipment used when mining below the water table will be exposed to the waters of the Clove Creek aquifer, risking its contamination, is unknown, requiring further inquiry. In addition, the impact of potential fuel spills upon the open waters of the pond is not addressed. Indeed, the Spill Prevention and Response Plan, included in Exhibit 6, addresses spill prevention and responses on land only, raising questions as to its adequacy for the type of mining operation proposed here.

Both the Applicant and FRC cite to the authority of a USGS report by Lafleur and others published in 1982. Known as USGS Open-File Report 82-81 and authored by R.B. Moore, R.G. LaFleur, and others, it is entitled "Geohydrology of the Valley-Fill Aquifer in the Sprout and Fishkill Creeks Area, Dutchess County, New York." The report is comprised of six sheets, for the most part consisting of maps of the area depicting various geologic and hydrogeologic data. The Sheets are numbered 1 through 6 and are respectively entitled "Surficial Geology," "Geologic Sections," "Water-Infiltration Potential of Soil Zone," "Estimated Aquifer Thickness," "Water-Table," and "Land Use." The aquifer studied in this report includes the land area wherein the Applicant's mine, the Village's Clove Creek well field, and the site of Town's Snook Road well field are all located.

As explained therein, Sheet 3, as noted, entitled, "Water-Infiltration Potential of Soil Zone," depicts and classifies the water-infiltration potential "for those soils which overlie and directly recharge the aquifer." Continuing, the note on Sheet 3 states, "Soils with high infiltration potential provide greater

recharge to the aquifer than soils with low potential," and observes "the infiltration rate is a general estimator [sic.] of how readily water can penetrate the soil zone." The water-infiltration classifications are numbered 1 through 4, 1 being classified "very low to low" and 4 being "high to very high." The exact location of the Village's Clove Creek well field is specifically noted and its NYS Department of Health number indicated, No. 00446000.

As is apparent from Sheet 3, the soils overlying the Applicant's site and running continuously northward and overlying the Village's Clove creek well field are classified as number "4," indicating soils with a high to very high water-infiltration potential. As Sheet 3 explains, a classification "4" implies an infiltration rate greater than six inches per hour. Soils in the area overlying the Snook Road well field, however, are classified "3" indicating a moderate to high water-infiltration potential, implying an infiltration rate of two to six inches per hour. As will be discussed, although the general flow of groundwater in the area is northward, the actual velocity of groundwater flow is, at this point, unknown. To the extent that such a swift infiltration rate in the overlying soils is an indicator, the potential for contamination from the mine pond to move rapidly northward to the aquifer beneath the Village's Clove Creek well field is a clear concern. Even though the Applicant proposes to maintain a 200 foot separation between the pond and Clove Creek, if infiltration rates through the aquifer material are greater than six inches per hour as in the soil, then this 200 foot buffer would be breached in only 400 hours, or about sixteen days. Moreover, at this rate, contamination would reach the Village's Clove Creek well field in about fourteen months, a relatively short period of time during which the detection, assessment, containment and correction of the problem must occur.

As to petroleum based discharges of any kind, some of these concerns might be lessened or even obviated by the installation of a floating boom around any mining equipment used in the waters of the pond to contain any potential spills. Such a requirement has been rejected by the Applicant, arguing that it is unnecessary inasmuch as the pond is self contained. (T, 4/4/03, pp. 235-238) However, given the size of the pond and the exact nature of the mining equipment to be used, but as yet unknown, this requirement may need to be revisited. Indeed, in this regard, Department Staff as part of its closing brief has proposed an additional special permit condition which would provide as follows:



The permittee shall retain a spill response and control contractor, who will be notified immediately and deployed to the site within one hour of any spillage of fuels, waste oils, other petroleum products or hazardous materials on any area of the mine site. Adequate spill containment materials will be kept on-site for ready use in the event of such a spill. A full containment berm shall be provided in the immediate work area in the excavation of the 22 acre lake at all times.

Whether this condition is adequate as written or whether it should be included in the spill prevention and response plan are matters for further inquiry and discussion.

Figure HA-7 in the Applicant's Hydrogeologic Assessment (Exhibit 6) is an aquifer delineation and cross section of the Clove Creek well field. The figure indicates that the land surface elevation of the well field is approximately 220 feet above sea level (asl). While two of the seven wells depicted in the figure appear to reach depths of less than 100 feet asl, five of the wells appear to reach depths of about 120 feet asl.

Sheet 4, of USGS Open-File Report 82-81, entitled "Estimated Aquifer Thickness," depicts, by degrees of shading, various ranges of the saturated thickness of the underlying aquifer. As Sheet 4 indicates, the "categories of saturated thickness represent estimates of thickness of relatively highly permeable sediments extending from the water table down to the top of the first unit of low permeability (down to till, bedrock, or layer of silt and clay)." On Sheet 4, light stippling depicts a range of the saturated thickness of the unconsolidated aquifer material of 0 to 40 feet, darker stippling indicates a range of thickness of 40 to 100 feet, and the heaviest stippling indicates a range of 100 to 180 feet. Diagonal lines indicate areas where insufficient data exists to make an estimate of the aquifer thickness at that location. Sheet 4 indicates that the aquifer running southward from the Clove Creek well field to the northern border of the Applicant's property forms a corridor approximately two tenths of a mile wide. The center of this corridor, comprising about half its width, indicates an aquifer thickness of 100 to 180 feet, flanked on either side by a band indicating an aquifer thickness of 40 to 100, and a narrow outermost band on either side indicating a thickness of 0 to 40 feet. The Applicant's property immediately to the south is covered with diagonal lines, indicating insufficient data to estimate the thickness of the aquifer at the mine site. However, if the stratigraphy of the aquifer is the same beneath the Applicant's

site as it is immediately to the north at the Clove Creek well field, it is clear that mining aggregate to a depth of 170 feet asl will pierce, and in some instances completely traverse, the thicknesses of the saturated unconfined aquifer material common to both the Clove Creek well field and the mine. Should the use of mining equipment expose the aquifer to contaminants that would remain in solution and not float to the surface, as would most petroleum based substances, the potential exists for those contaminants to move northward through the aquifer at depths from which they could be drawn into the Village wells along Clove Creek. Whether this is a fair assumption is unknown inasmuch as the actual stratigraphy of the Applicant's site is unknown, requiring further inquiry.

Sheet 5 of USGS Open-File Report 82-81, entitled "Water-Table," depicts water table contours for the area at 10 foot intervals. By way of explanation, Sheet 5 notes that "the contours show the estimated average altitude of the water table under nonstressed conditions (no pumping) based on water levels in shallow wells and on surface-water elevations." This average altitude is measured in feet above National Geodetic Vertical Datum (NGVD) of 1929. In further explanation, Sheet 5 states that arrows drawn perpendicular to the contour lines indicate "the general direction of water flow within the upper unconfined aquifer material."

As is apparent from Sheet 5, groundwater flows generally northward from the Applicant's site to the Clove Creek well field, from a level of about 240 feet above NGVD of 1929 at the mine, to a level of about 220 feet above NGVD of 1929 at the well field. By comparison, however, groundwater flows from the area of Snook Road are generally to the south and west, from a level of about 240 feet above NGVD of 1929 to a level of 210 feet above NGVD of 1929. Moreover, Sheet 5 indicates that groundwater flows from the vicinity of the Snook Road area remain north of the Clove Creek well field, suggesting that there is no hydrogeologic connection between the Applicant's site and any proposed well field along Snook Road, as maintained by the Town. Without the necessary pathway of travel provided by such a hydrogeologic connection, any contamination of the aquifer occasioned by the Applicant's mining activity could not, in any event, reach and corrupt the aquifer beneath the Snook Road well field. Accordingly, to the extent that CREF has raised concerns that the Applicant's mining activity could, through some hydrogeologic connection, contaminate the aquifer beneath the proposed Snook Road well field, those concerns are not supported by the record.

While the USGS Open-File report raises concerns with respect to the structure of the aquifer beneath the Applicant's site, including aquifer thickness and groundwater flow directions and velocities, additional questions are raised with respect to the Clove Creek well field which can only be resolved by further inquiry. In particular, if contaminants were released to the aquifer from the Applicant's site, and assuming they would be transported northward, at what point, if at all, would they pose an immediate threat to the drinking water supplied by the Clove Creek wells? To answer this question requires a clearer understanding of the Clove Creek wells themselves. For example, the record does indicate the dimensions of the zone of influence surrounding the wells, and how that zone of influence and the cone of depression around each well may vary as wells in the field are brought on and off line at various pumping rates. If the zone of influence were more accurately defined, would its boundaries intersect with the water bearing strata beneath the Applicant's property? Moreover, the record does not define the zone of contribution supplying the Clove Creek wells. Hence, the two-part question: What is that zone of contribution and is the Applicant's site located within it?

Pursuant to an agreement between the Applicant and the Village, executed March 24, 2003, the Applicant agreed to install three wells on its property to monitor the waters of the Clove Creek aquifer. As noted, a copy of the agreement was annexed to the Village's petition for party status, Exhibit 10. In accordance with section II of the agreement, the wells will be sampled and analyzed on a quarterly basis for volatile and semi-volatile organic compounds. The Village will provide the Applicant with the results of such analysis within one month of its receipt of the results. Only employees of the Village's water department and the Applicant may be present during the quarterly sampling of the wells. The first four quarterly sampling and analysis events will be paid for by the Applicant, and thereafter this expense will be borne entirely by the Village.

According to section III of the agreement, the Applicant's premises where the monitoring wells are located may be visually inspected on a monthly basis, the third Wednesday of the month at 10:00 a.m., but only by an employee of the Village's water department. As the agreement states at section III(1)(c), "The scope of the inspection shall be the lake, the wells, the excavation area of the mine, the diesel fuel storage tank, the waste oil tank, and any additional exterior oil, fuel or chemical storage areas as may be established upon the premises." The Village, at its option, may sample the wells during these monthly

inspections. Pursuant to Section III(5), if during such an inspection the Village's water department employee observes any condition which could give rise to an enforcement proceeding, "the Village's sole remedy shall be to give notice to [the Applicant] of the observed condition and to report the same to either the Town of Fishkill or the NYSDEC, whichever the case may require." Finally, section III(7) provides:

In the event of an unsatisfactory water test, or in the event of a physical calamity or a natural disaster which shall have the potential to damage the integrity of the wells, the Village shall have the right to inspect the premises on 24 hours written faxed and telephone notice to [the Applicant]. Such notice shall describe the condition upon which the right to inspect is asserted, and shall be given, as reasonably possible under the circumstance, during normal business hours.

While the proposed location of the three monitoring wells was not provided as part of Exhibit 10, this information is not crucial at this point given the questions that must first be answered with respect to the architecture of the Clove Creek aquifer beneath the Applicant's site. Without this latter understanding, the appropriate location, depth or number of wells actually needed cannot be determined. In addition, there is a concern whether the proposed analysis of the water for volatile and semi-volatile organic compounds is sufficient. For example, with the exposure to the environment of 22 acres of the aquifer by the pond, and notwithstanding that it is self-contained, are there inorganic compounds that should be included in the analysis, such as heavy metals, salts and pesticides? Are there other compounds or chemicals that could be introduced to the waters of the aquifer as a result of the type of equipment that will be used during various stages of the mining? If mining equipment will be used from floats or platforms upon the waters of the pond, as could be the case with a dredge, are the inspection parameters set by section III(1)(c) sufficient?

Other questions with respect to the monitoring well agreement are also unanswered by this record, requiring further inquiry. For instance, if the potential rate of travel of contaminants through the aquifer is swift, is a quarterly or even monthly analysis of the wells adequate to provide sufficient "early warning" to assess and correct any breach of water quality? What are the maximum limits of the tested parameters? If there is an exceedance of a parameter, is the mere communication of this fact to the Applicant and the Town or the

Department sufficient to initiate immediate corrective action, or should a more stringent protocol be put in place?

The Village's desire to ensure the water quality of the Clove Creek aquifer in this case is not unique to this application alone, but rather reflects the general concern of the residents of this area of the Hudson Valley about the integrity of their drinking water supply. At the local level, this concern is reflected in the designation by the Town, in 1992, of eight CEAs, intended to protect its aquifer. In accordance with New York State's SEQR regulations, such a designation requires that environmental impacts associated with the environmental characteristics of the particular CEA be specifically evaluated in making any determination of significance pursuant to 6 NYCRR 617.7. Town designated Critical Environmental Area 6 includes the Applicant's site, the Village's Clove Creek well field, and a portion of Snook Road. A map of CEA 6 is annexed to the Applicant's Hydrogeologic Assessment, part of Exhibit 6, Figure HA-2. Thus, the foregoing concerns raised with respect to potential impacts to the Clove Creek aquifer beneath the Applicant's site are consistent with the Town's purpose and intent in its designation of CEA 6.

This same concern for the aquifer is reflected at the county level. The Applicant has referred to and cited portions of a report commissioned by the Dutchess County Water and Wastewater Authority and published in 1992. See, e.g., Hydrogeologic Assessment, part of Exhibit 6, pp. 6-7. Entitled, "Water Supply Protection Plan For Dutchess County, NY, October 1992," the report delineates aquifer protection areas within Dutchess County and proposes wellhead protection areas for those land areas around a well from which contaminants can impact water quality, evaluates contamination threats, and proposes strategies to protect drinking water supplies. As part of the proposed strategy with respect to mines and quarries, the report states, at page 7-26:

Several towns and villages allow commercial mining and quarrying activities within their wellhead protection areas. The operation of mining and quarrying activities may threaten water quality due to possible fuel spills and disposal of wash-water in the area. Mined areas may be especially susceptible to ground water contamination due to lack of separation between the land surface and the ground-water table.

After recommending that mining within a wellhead protection area only be allowed by special permit, the report continues, also at page 7-26:

If mining and quarrying activities are allowed with a special permit, design standards should be adopted to minimize the threat of contamination. Design standards should address the following concerns:

- 1) the extent of active excavation;
- 2) the discharge of wash water;
- 3) minimum separation of five feet between the final land surface elevation and the annual high water table, as established through observation wells or the use of a ground-water fluctuation predictive tool such as the one developed by USGS;....

As with the Village, Town and County, this same paramount concern for the quality of the waters of the Clove creek aquifer is confirmed by the Department's own prior determinations in this matter. Indeed, the existing permit for the Applicant's mine, which it now seeks to modify through these proceedings, contains Special Conditions 3 and 4 which provide:

3. Mining shall proceed according to the approved plans with the ultimate final reclamation topography as depicted on the approved plans with final floor elevations at approximately 250 feet. Mining below the high water table is prohibited except for temporary settling basins currently in use.
4. All necessary precautions shall be taken to prevent contamination of Clove Creek by silt, sediment, fuels, solvents, lubricants, debris or any other pollutant associated with mining and mining procedures.

Moreover, although Department Staff asserts that there have been no reported instances of aquifer contamination as a result of mining below the water table in New York, this does not obviate the need for a permit review appropriate to the unique circumstances of this matter. The necessity for such a case by case permit review is supported by the Department's own study entitled, "Upstate New York Groundwater Management Program Summary" (Exhibit 18), which states, at page 30,

DEC knows of no instance when significant groundwater quality or quantity problems have occurred at mines in New York State. In issuing Mined Land Reclamation Permits, DEC evaluates possible impacts on groundwater in the vicinity of mining sites.

Department Staff's overriding concern to ensure that groundwater quality is not compromised is reflected in the cautious and reasoned language of the SEQOR negative declaration issued with respect to the modification application on January 9, 2002, and part of Exhibit 6, which states:

The proposal involves mining into the groundwater which ultimately will create a 22 acre lake. There is always the potential for contamination of surface and/or groundwater at any industrial facility, including mine sites. Potential contaminants at mine sites are generally limited to fuels and lubricants whereas other types of industrial uses generally have a broader range of potential contaminants. Although petroleum spills are possible at any location, there is nothing to suggest that petroleum contaminants will enter surface or groundwaters at this site or other mine sites. The Department's study of mining in aquifers ("Upstate New York Groundwater Management Program") states, in part, that "DEC knows of no instance when groundwater quality or quantity problems have occurred at mines in New York State". While it is possible that adverse impacts could occur, such impacts are not likely. Proper operating precautions and emergency response, if needed, should avert any significant impacts to groundwater resources during and following the lake excavation.

The additional inquiry here with respect to potential impacts to the Clove Creek aquifer will enable Department Staff to determine if the provisions of the proposed draft permit are adequate, if other or more stringent conditions should be included, or if the negative declaration of January 9, 2002, should be amended or rescinded pursuant to the provisions of 6 NYCRR 617.7(e) and (f), respectively.

#### **Ruling Five**

FRC has raised substantive and significant issues with respect to potential impacts to the Clove Creek aquifer occasioned by the Applicant's proposal to mine below the water table. Issues have been raised with respect to (a) the types of

the mining equipment to be used in mining below the water table, (b) the organic and inorganic compounds to be used in their operation, (c) the location of that equipment during mining operations in the waters of the 22 acre pond, (d) the type and nature of contaminants that could be introduced into the aquifer as a result of mining below the water table, (e) the adequacy of the proposed spill prevention and response plan, (f) the location and thickness of the layers of the aquifer beneath the Applicant's site, (g) the direction and velocity of groundwater flows through the aquifer, (h) the boundaries of the zone of influence, cones of depression and zone of contribution of the wells in the Village's Clove Creek well field, and whether, if at all, those boundaries intersect with the Applicant's site, and (i) the appropriate design and placement of monitoring wells, and the adequacy of testing and response protocols. All of these issues are significant inasmuch as they raise doubts as to the Applicant's ability to meet regulatory standards, that is, its ability to engage in the proposed mining activity without compromising water quality standards in the Clove Creek aquifer, requiring further inquiry. All of these issues are significant inasmuch as they could result in the imposition of other or more stringent permit conditions, a major modification of the proposed action, or could result in a denial of the requested permit modification.

### **Stormwater Impacts to Clove Creek**

#### **Positions of the Parties**

Department Staff asserts that potential impacts to the waters of Clove Creek, a Class C(TS) stream, occasioned by implementation of the stormwater diversion plan proposed by the Applicant raise issues that are substantive and significant, requiring adjudication. (Issues Conference Brief submitted on behalf of Department Staff, dated October 29, 2004, p. 1) In light of the Applicant's redesign of the diversion plan, the Department Staff states that it lacks sufficient information with respect to the existing drainage swale proposed to carry water from Route 9 to Clove Creek. In particular, Department Staff notes at pages 8 and 9 of its brief, that its review of the stormwater diversion plan "has resulted in the conclusion that the Applicant has not submitted sufficient information for Staff to assess the potential impacts of increased volumes and velocities to the drainage swale and potential for increased erosion and sedimentation to Clove Creek. Additionally, Staff is unable to assess the adequacy of the Stormwater Diversion Plan to handle the outflow from existing catch basins on Route 9." These issues are substantive, Department Staff maintains, since they



raise sufficient doubt as to the Applicant's ability to meet regulatory standards such that a reasonable person would inquire further. The specific regulatory standard the Department Staff cites is 6 NYCRR 422.2(c)(4) which requires that a mining plan describe the proposed method for preventing pollution, reducing soil erosion, and minimizing the effects of mining. Moreover, these issues are significant since they could result in a denial of the permit modification request, a major modification to the proposed project, or the imposition of significant permit conditions. Department Staff further asserts that these stormwater flow issues involve information not available to it prior to issuing its SEQR negative declaration in January 2002, or the issues conference of April 2003. Accordingly, Department Staff considers this "new information" within the meaning of 6 NYCRR 617.7, and notes that its further SEQR review in this matter cannot proceed in the absence of further adjudicatory inquiry.

The position taken by Dr. Groff, on behalf of FRC, is consistent with the Department Staff's. In assessing the proposed diversion plan as depicted in Exhibits 24 and 24A, Dr. Groff asserts that elevations indicated on the plans are not certified, precluding an accurate determination of stormwater discharge volumes and velocities. (T, 9/17/04, p. 142) This information is essential if certain design concerns are to be addressed, asserted Dr. Groff. In particular, knowing water velocities would allow a determination of the size of particles that might be transported by stormwater discharges and the potential for the system to clog, he maintained, while noting that the slope of the proposed diversion channel is very shallow, that site inspections indicate that a number of culverts in the proposed route of the diversion plan are presently clogged, and that the plan calls for the introduction of three more discharge pipes. (*Id.*, p. 143) In Dr. Groff's view, the proposed plan is just that, a plan and not a design. (*Id.*, p. 144)

While not proffering expert opinion in support of its position, the CREF also expressed the concern that the stormwater diversion plan proposed by the Applicant could introduce contaminants to Clove Creek thus introducing them, in turn, to the aquifer beneath the site of the future Snook Road well field. (T, 9/17/04, pp. 50-72)

The Applicant believes that the stormwater diversion plan it has proposed will ensure that stormwater from Route 9, as well as from the land uses on the east side of Route 9 across from its site, will not enter its property. (T, 9/17/04, pp. 21-27) With respect to the potential for erosion in the drainageway causing a

contravention of water quality standards in Clove Creek, the Applicant pointed out that stormwater discharges from the industrial site across Route 9 from the Applicant's mine were authorized by a SPDES permit, and that retention basins on that industrial site would be retained, meaning that only larger storm events would actually be conveyed by the proposed diversion plan. (*Id.*, p. 30) Moreover, a series of photographs taken during a light rain on September 8, 2004, along the path of the proposed drainageway from Route 9 to Clove Creek, depicting grasses, brush and other vegetation along its entire length, were introduced to show the natural erosion controls already extant.

### **Discussion**

Pursuant to 6 NYCRR 624.4(c)(1)(i) and (ii), in raising an adjudicable issue, Department Staff is not required to demonstrate that an issue is both substantive and significant as an intervenor must do, but need only assert that the issue either relates to a dispute with the applicant over a substantial term or condition of the draft permit, or to a matter cited by Department Staff as a basis to deny the permit. Accordingly, Department Staff's assertion that the application lacks sufficient information to assess the potential impacts of increased volumes and velocities to the proposed drainage swale and the potential for increased erosion and sedimentation to Clove Creek would be a basis for permit denial, thus raising an adjudicable issue. However, in this proceeding, Department Staff has demonstrated that the issue of potential impacts to Clove Creek occasioned by the stormwater diversion plan proposed by the Applicant is both substantive and significant, a position supported and demonstrated by FRC as well. The applicable regulatory section, 6 NYCRR 422.2(c)(4), as noted by Department Staff, imposes on the applicant for a mining permit the following requirement:

A description of the applicant's proposed method for preventing pollution, reducing soil erosion, and minimizing the effect of mining on the people of the State shall be required when and to the extent necessary to achieve compliance with the regulations of the department relative to: land use; air and water quality; solid waste management; the use and protection of waters; the protection of the natural resources of the State including soil, forests, water, fish, wildlife, and all aquatic or terrestrial related environment, and to any other applicable standards.

The apparent reach and intent of this regulatory provision is very broad. The obligation to prevent pollution, reduce soil erosion, and minimize the effects of mining on the people of the State is not circumscribed by the site specific mining activities of the applicant nor the borders of its property. This obligation may require the applicant to address pollution and erosion concerns whose source is beyond the limits of its proposed mine, but which, if not addressed, would be introduced to its site. Thus, as here, while the source of the stormwater flow is located off the Applicant's site, that flow, if not otherwise directed, would continue to impact the Applicant's mine site. Accordingly, the stormwater diversion plan proposed by the Applicant falls within the purview of the requirements of 6 NYCRR 422.2(c)(4).

Both Department Staff and FRC have raised concerns which address the design of the proposed stormwater diversion. Without more information with respect to flow volumes and velocities, the adequacy of the system to operate without clogging or overtopping cannot be assessed. The stormwater diversion plan proposed by the Applicant must not itself become a source or cause of erosion in the area, resulting in increased turbidity or the contravention of any other water quality standard articulated in 6 NYCRR part 703.

Moreover, the impact of the proposed diversion to the waters of Clove Creek must not be underestimated. Pursuant to 6 NYCRR 862.6, the section of Clove Creek immediately to the south of, and flowing northward adjacent to the Applicants property, is classified Class C(TS). According to 6 NYCRR 701.8, Class C fresh surface waters are waters "suitable for fish propagation and survival." In addition, as 6 NYCRR 862.3(h) states, the designation (TS) means "that the designated waters are suitable for trout spawning." But it is this section of Clove Creek that the stormwater diversion plan will most impact. Whether increases in the volume or velocity of waters entering Clove Creek as a result of the proposed channeled diversion of stormwater will affect trout spawning areas or juvenile trout populations in this section of Clove Creek is unknown in the absence of further inquiry, an inquiry mandated by the requirements of 6 NYCRR 422.2(c)(4).

With respect to these matters as they uniquely apply to the concerns raised by CREF, however, it is important to again consider the hydrogeologic information provided in Sheet 5 of USGS Open-File Report 82-81, entitled "Water-Table." This map shows that while Clove Creek flows northward at the western boundary of both the Applicant's property and the Village's Clove

Creek well field, when it is north of the well field it flows generally northwest until emptying into the Fishkill Creek. At its closest point, Clove Creek is approximately six tenths of a mile from the intersection of Route 9 and Snook Road, and its flow is always away from Snook Road. Moreover, groundwater flows, as noted earlier are generally to the southwest from the Snook Road area, meaning that they flow toward Clove Creek. Based upon this data, it is not reasonable to assume that any pollutant entering the waters of Clove Creek at the site of the Applicant's mine or the discharge point of the proposed stormwater diversion plan could contaminate the waters of the aquifer beneath any well field to be developed along Snook Road.

### **Ruling Six**

Department Staff and FRC have raised issues that are substantive and significant regarding potential impacts to Clove Creek occasioned by the stormwater diversion plan proposed by the Applicant, in particular, as to erosion impacts, stormwater volumes and velocities, and the impact to trout. These issues are substantive since they cast doubt as to the Applicant's ability to meet regulatory standards such those as imposed by 6 NYCRR 422.2(c)(4), as well as water quality standards, such that a reasonable person would inquire further. These issues are also significant since they could result in a denial of the requested permit modification, a major modification of the project, or the imposition of other or more stringent permit conditions. Accordingly, these are issues for adjudication.

### **ISSUES NOT REQUIRING ADJUDICATION**

Two issues need not be adjudicated as part of this proceeding, the variance requested by the Applicant and Department Staff's negative declaration as to the proposed permit modification.

First, with respect to the variance application, neither Department Staff nor any petitioner expressed any opposition thereto. Accordingly, no substantive and significant issue has been raised requiring adjudication.

Second with respect to Department Staff's SEQR negative declaration as to the proposed permit modification of January 9, 2002, FRC has argued that such a finding was in error and that a full environmental impact statement (EIS) should be prepared in this matter. FRC's claim that Department Staff erred is not supported by the record.

As lead agency for the purpose of SEQR in this matter, Department Staff, after a review of the modification application and supporting materials, made its determination of significance pursuant to the mandates of 6 NYCRR 617.7. In the exercise of that discretion, Department Staff determined, pursuant to 6 NYCRR 617.7(a)(2), no EIS would be required since, in the language of the regulation, "that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant."

The dictates of the Department's hearing permit procedures are clear in this regard. Where, as here, the Department is the lead agency for SEQR, a SEQR determination by Department Staff may be reviewed only under certain narrow circumstances. As 6 NYCRR 624.4(c)(6)(i)(a) provides:

As part of the issues ruling, the ALJ may review a determination by staff to not require the preparation of an environmental impact statement. Where the ALJ finds that the determination was irrational or otherwise affected by an error of law, the determination must be remanded to staff with instructions for a redetermination. In all other cases, the ALJ will not disturb the staff's determination.

At both the issues conference held on April 4, 2003, and when reconvened on September 17, 2004, the member of Department Staff responsible for the environmental review in this matter explained, in great detail, the analysis undertaken by the Department in the discharge of its duties pursuant to SEQR. (See, e.g., T, 4/4/03, pp. 211-221; T, 9/17/04, pp. 203-208.)

Upon my review of the record in this matter, I find that Department Staff has taken the requisite "hard look" mandated by SEQR and that there is no basis to conclude Department Staff's SEQR negative declaration in this matter of January 9, 2002, was in any way irrational or otherwise affected by an error of law. Merson v. McNally, 90 N.Y.2d 742, 751-52, 665 N.Y.S.2d 605, 609-610 (1997); see also Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986). Indeed, the language of the negative declaration quoted earlier as well as Department Staff's concerns with respect to the proposed stormwater diversion plan indicate that it has exercised its mandated discretion under the SEQR regulations in a most reasoned, rational and responsible manner. Moreover, as Department Staff has pointed out, the proposed stormwater diversion plan constitutes "new information" within the meaning

of 6 NYCRR 617.7(e) and (f), enabling Department Staff to revisit its determination of January 9, 2002, should the factual circumstance so dictate.

### **APPEALS**

As provided in 6 NYCRR 624.8(d)(2), during the course of a hearing, a ruling by the Administrative Law Judge to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis. While such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling as required by 6 NYCRR 624.6(e)(1), this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Accordingly, any appeals in this matter must be received at the Office of Deputy Commissioner Carl Johnson, c/o Louis A. Alexander, Assistant Commissioner, 625 Broadway, Albany, New York 12233-1010, no later than the close of business on Friday, May 20, 2005. Moreover, responses to the initial appeals will be allowed and such responses must be received as above no later than the close of business on Friday, June 3, 2005.

The appeals and any responses sent to the Commissioner's Office must include an original and two copies. In addition, one copy of all appeal and response papers must be sent to me and to all other persons on the enclosed Service List at the same time and in the same manner as to the Commissioner. Service of any appeal or response thereto by facsimile transmission (FAX) is not permitted and any such service will not be accepted.

Appeals and any responses thereto should address the ALJ's rulings directly, rather than merely restate a party's contentions and should include appropriate citations to the record and any exhibits introduced therein.

Dated: Albany, New York  
April 20, 2005

**New York State Department of  
Environmental Conservation**

\_\_\_\_\_/s/\_\_\_\_\_  
**Richard R. Wissler**

**Administrative Law Judge**

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