

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the application for permits to expand
a rock quarry mine in the Town of Fishkill,
Dutchess County.

- by -

THALLE INDUSTRIES, INC.,

Applicant.

PERMIT APPLICATION No. 3-1330-00049-02001

DECISION OF THE DEPUTY COMMISSIONER

NOVEMBER 3, 2004

DECISION OF THE DEPUTY COMMISSIONER¹

In this proceeding, Thalle Industries, Inc. ("applicant") has applied for a mined land reclamation permit for a proposed expansion of its existing rock quarry mine which is located on the east side of Route 9 in the Town of Fishkill, Dutchess County. Applicant, in conjunction with its application for a mined land reclamation permit, is requesting a variance from the minimum setback requirements of section 422.2(c)(3)(iii) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").² Applicant has also applied for a state pollutant discharge elimination system permit and an air pollution control permit.

Administrative Law Judge ("ALJ") Edward Buhrmaster, in his rulings on party status and issues dated December 10, 2003 ("Rulings"), determined that there were no issues requiring adjudication and that the permit applications should be remanded to staff of the Department of Environmental Conservation ("Department") for continued processing consistent with the State

¹By memorandum dated October 8, 2004, the Commissioner of the Department of Environmental Conservation delegated decision making authority in this proceeding to the Deputy Commissioner for Air and Waste Management.

²The variance is contained in special condition 15 of the draft mined land reclamation permit. See Issues Conference Exhibit ("Exh.") 7A.

Environmental Quality Review Act ("SEQRA") and other relevant statutes and regulations. The ALJ directed that the final permits issued to applicant be consistent with any permit revisions made during the issues conference and in the Rulings.

Fishkill Ridge Community Heritage ("FRCH"), a group that opposes the proposed expansion, has filed an appeal from the Rulings. FRCH, by its appeal, challenges the ALJ's determination that the potential effect of the proposed expansion on the timber rattlesnake and its habitat is not a substantive and significant issue warranting an adjudicatory hearing. FRCH has not appealed as to any other issue that it had proffered for adjudication.

For the reasons that follow, FRCH's appeal is denied, the Rulings of ALJ Buhrmaster are affirmed and I find that there are no issues requiring adjudication in this proceeding.

BACKGROUND

Mining has been conducted at the rock quarry, located on the east side of Route 9 in the Town of Fishkill ("Town"), since the early 1950's. Applicant has operated the rock quarry mine ("mine") and supplied crushed stone aggregate to the local and regional market since the 1980's. See Draft Environmental

Impact Statement -- Thalle Industries, Inc., Fishkill Operations ("DEIS"), Vol. 1, at 18. Applicant proposed to expand its mine by 29 acres. The expansion area would be located immediately east and south of the existing mine.³

The Department is lead agency under SEQRA for review of this action, and a multi-volume DEIS has been prepared.

There are no issues between Department staff and applicant. The Town, in which the mine and the expansion area are located, supports the proposed expansion. The Town has indicated that the expansion of the mine would be consistent with local land use regulations governing mining in general and the use of the project site in particular. The Town has emphasized the socio-economic benefits of the expansion for the Town and the region. See Rulings, at 3.

A number of organizations, customers and business associates, "many of whom praised Thalle for operating a neat, safe and well-managed facility," voiced support for the proposed expansion during the legislative public hearing on the proposed mine expansion. See id.

³ A location map identifying the existing quarry operation and the proposed expansion area appears in the DEIS, Vol. 1, at Figures 1 & 8.

The environmental organization Scenic Hudson negotiated certain changes to the proposed project with applicant, resulting in a stipulation which led to several amendments and additions to the draft mined land reclamation permit. These changes included enhanced mitigation measures, as well as slightly reducing the expansion area acreage. Furthermore, the expansion of the quarry would allow a different bench configuration that will better mitigate visual impacts. *See, e.g.,* Rulings, at 4; Issues Conference Exhs. 12-A & 12-B; DEIS, Vol. 1, at 152; & Issues Conference Transcript ("Tr."), at 50-56.

Among the issues that FRCH proposed in its petition for party status were the effects of the proposed mine expansion on stormwater management, groundwater, air quality and the timber rattlesnake and its habitat.⁴

At the issues conference, FRCH argued that, given the suitability of habitat for timber rattlesnakes in the vicinity of the mine and the proximity of the mine to active dens of this threatened species, it is possible that rattlesnakes inhabit or use the site, particularly in the summer months, and that

⁴FRCH withdrew several of the other issues that it had presented in its petition for party status. *See, e.g.,* Tr. at 576 (withdrawal of noise as an issue); Tr. at 242-243 (withdrawal of traffic as an issue); & Tr. at 578, 580 (withdrawal of visual and aesthetic impacts as an issue).

expansion of the mine would be an illegal "taking" of this species. Pursuant to Department regulation, the timber rattlesnake is designated as a "threatened species" in New York State. See 6 NYCRR 182.6(b)(5)(v). The active dens to which FRCH refers are located to the west of the mine, on the opposite side of Route 9. See, e.g., DEIS, Vol. 1, at 47 & 86.

POST-ISSUES CONFERENCE SUBMISSION OF AFFIDAVITS

On October 20, 2003, subsequent to the issues conference but before the ALJ issued the Rulings, FRCH moved to supplement its petition for party status on the timber rattlesnake issue with the offer of six affidavits. The ALJ concluded that, based on his review of the affidavits which in large part contained information that was several years old, FRCH had not demonstrated good cause for its late filing, and that FRCH's motion to supplement its petition could be denied. Notwithstanding the foregoing, the ALJ for purposes of a more comprehensive record granted the motion and considered the affidavits with respect to the proposed timber rattlesnake issue. See Rulings, at 15.

Pursuant to a schedule established by the ALJ, applicant and Department staff were provided an opportunity to

respond to FRCH's motion to supplement its petition. See Rulings, at 14. Both applicant and Department staff submitted timely responses.⁵

The ALJ reviewed in detail each of the six post-issues conference affidavits that FRCH submitted, together with the responses of Department staff and applicant:

1) Affidavit of Ann LaGoy. The affidavit of Ms. LaGoy, who is president of FRCH, recounted two live timber rattlesnake sightings on the east side of Route 9, about a half mile south of the mine. However, as noted in the Rulings, neither of the individuals who allegedly made the sightings was willing to document his account for use by FRCH. See Rulings, at 19-20;

2) Affidavit of Christopher A. Amato, Jr., Esq. Mr. Amato, the attorney for FRCH, referenced an alleged observation of a rattlesnake in a junked car north of the Thalle mine. The name and address of the witness, however, was not known. See Rulings, at 20;

3 & 4) Affidavit of William Wolf and Affidavit of Gino Caprio, two tree trimming service employees. These two employees of a tree trimming service claimed to have seen a dead rattlesnake in the summer of 2003 on the east roadside of Route 9, about one quarter mile north of the mine. Their affidavits, however, do not indicate how the rattlesnake got to the roadside or how it met its death. As the ALJ noted, if the snake had been run over while trying to move west to east across Route 9, this would support applicant's position that vehicular traffic presents a considerable hazard to the timber rattlesnake and that Route 9 acts as an effective barrier to snakes moving eastwards from dens on the west side of Route 9. See Rulings, at 20-21;

5) Affidavit of Dr. Edwin McGowan. Dr. McGowan's affidavit referenced a timber rattlesnake survey that he conducted on lands

⁵Included in the submissions was the October 28, 2003 affidavit of Dr. Theodore Kerpez, the Region 3 Wildlife Manager, that addressed the points raised in FRCH's six post-issues conference affidavits and demonstrated their lack of credibility.

adjoining the mine on May 11, 2000. Although May is the time of year that rattlesnakes emerge, Dr. McGowan did not observe any timber rattlesnakes during his survey. He did, however, observe a northern copperhead. According to Dr. McGowan, copperheads are known to share den sites with timber rattlesnakes. Department staff and applicant, however, note that the presence of copperheads is not a reliable indicator that rattlesnakes are present. Department staff further indicate that Dr. McGowan's survey, which found no timber rattlesnakes, supports the position that there are no rattlesnakes in the area adjoining the mine. See Rulings at 21-23; and

6) Affidavit of Dr. William Brown. Dr. Brown, who is FRCH's consultant, stated in his affidavit that, based on information provided in the other affidavits, there is a "reasonably high probability" that there are one or more active rattlesnake dens in the vicinity of applicant's mine. He argued that another survey by a competent rattlesnake field biologist at the appropriate time of year should be conducted. Based on the record, however, the ALJ concluded that no additional survey was necessary and that the timber rattlesnake issue had been adequately addressed in the draft environmental impact statement for the proposed rock quarry mine expansion. See Rulings, at 23.

For the most part, the affidavits were based on second hand and unsubstantiated accounts. Cf. Matter of Dalrymple Gravel & Contracting Co., Interim Decision of the Commissioner, September 24, 2002, at 7-8 (anecdotal statements, second hand information and conjecture about rattlesnakes "hardly provide a basis for discrediting the observations and conclusions of Applicant's expert and of [the DEC wildlife biologist]").

FRCH's arguments with respect to the timber rattlesnake and its habitat, including the information that was contained in the affidavits submitted following the issues conference, were considered in detail in the Rulings, and rejected. See Rulings,

at 9-25. The ALJ ruled that FRCH failed to meet its burden of persuasion that an issue exists as to whether the mine expansion would constitute an adverse modification of timber rattlesnake habitat or amount to an illegal taking of the species under New York's Endangered Species Act.

FRCH APPEAL

FRCH appealed only the ALJ's ruling on the timber rattlesnake, and did not challenge the ALJ's determination that no substantive and significant issue exists with regard to stormwater management, groundwater impacts and air quality impacts. FRCH, in its appeal on the timber rattlesnake issue, reiterates the arguments that it presented during the issues conference. FRCH argues that applicant has failed to fully evaluate the project's potential impacts on the timber rattlesnake and its habitat, and that, accordingly, the record is insufficient for the Department to make the necessary findings under SEQRA and the New York Endangered Species Act. FRCH criticizes the Rulings for rejecting the "expert testimony" of FRCH's two snake consultants in favor of applicant's consultant who, according to FRCH, lacks the necessary credentials to study timber rattlesnakes.

FRCH maintains that reports of timber rattlesnake sightings on the east side of Route 9 near applicant's mine warrant consideration in an adjudicatory hearing. FRCH criticizes applicant's on-site surveys that were conducted in 1996, 1999 and 2000, arguing that those surveys did not provide a reliable basis for concluding that no timber rattlesnakes utilize the area of the proposed expansion and that a new survey should be conducted.⁶

FRCH also states that the ALJ, to the extent that he determined that FRCH did not demonstrate "good cause" for the post-issues conference submission of the six affidavits, was in error.

-- Replies to the FRCH Appeal

Replies in opposition to the FRCH appeal have been received from applicant, Department staff and the Town.

Applicant argues in its reply that the Rulings are entitled to substantial deference and that the ALJ correctly

⁶ Applicant in 1996 (May 7, May 8, June 4, June 5 and September 18), 1999 (May 25 and 26) and 2000 (November 9) had conducted field studies in the proposed mine expansion area to identify vegetation and wildlife and to assess the area as potential timber rattlesnake habitat. See DEIS, Vol. 1, at 45-46.

applied the "substantive and significant" standard in determining that there was no adjudicable issue with respect to the timber rattlesnake. Applicant submits that FRCH offered only speculations and hearsay as to the presence of timber rattlesnakes on the project site.

Applicant further maintains that its multiple site surveys included an assessment of the area as potential rattlesnake habitat⁷ and that the timing and scope of those surveys were appropriate.

Several of the dates on which applicant conducted surveys were either chosen to coincide with the spring emergence of the timber rattlesnake or rattlesnake movement to summering habitat. With respect to the survey dates conducted in the fall (September 18, 1996 and November 9, 2000), applicant indicated that the dates were either early enough to still observe rattlesnakes in the field (September date) or at a time when

⁷As stated in the project DEIS, "[o]n each of [the field study] site visits, the observers specifically looked for Timber Rattlesnakes or any sign of rattlesnake use of the area. In addition, personnel at the existing quarry were interviewed to determine if Timber Rattlesnakes have ever been observed on or near the property. People associated with adjacent properties were also contacted to determine if snakes had been observed on adjacent properties in the past. Several reports prepared by other consultants regarding Timber Rattlesnakes on nearby properties west of Route 9 were also reviewed." DEIS, Vol. 1, at 45-46.

indications of timber rattlesnakes such as skins and matted leaves could still be found (November date). Applicant notes that the survey that it conducted in May 1999 covered the proposed expansion area in its entirety, and that the credentials and experience of its consultant demonstrated and confirmed his qualifications to conduct the rattlesnake search.

In addition, applicant argues that FRCH has no basis to challenge the ALJ's finding that FRCH did not have good cause for its late submission of the six affidavits. As applicant correctly notes, the ALJ in fact received the affidavits into the record and considered them in the Rulings.

Department staff, in its reply to FRCH's appeal, also argues that FRCH failed to raise a substantive and significant issue with respect to the timber rattlesnake and its habitat. Department staff agree that applicant's site surveys were adequate and were conducted by a competent consultant. According to Department staff, FRCH's contentions about the timber rattlesnake are not supported by fact and the information that FRCH presented is contradictory and unreliable. Furthermore, Department staff rejects FRCH's claim that the presence of a copperhead in the project area means that timber rattlesnakes are present.

Department staff similarly rejects FRCH's challenge of the ALJ's determination that there was no good cause for FRCH's late submission of the affidavits. Department staff indicates that the ALJ gave full consideration to FRCH's affidavits notwithstanding their untimeliness.

The Town also submitted papers in opposition to the FRCH appeal. The Town's papers do not specifically address the timber rattlesnake issue, but outline the reasons that the Town favors applicant's proposed expansion of the existing mine. According to the Town, the proposed expansion would maintain sound commercial and industrial growth and balance for the area, assure a continued source of real property tax revenue, provide for preservation of local employment opportunities, and fulfill the Town's desire to attract or maintain industrial uses in a district zoned for industry.

-- FRCH Reply and Responses

Following the submission of responding papers from the Town, Department staff, and applicant, FRCH submitted a reply in further support of its appeal. FRCH argues in its reply that neither applicant nor Department staff addressed the finding by FRCH's consultant that "large areas" of rattlesnake denning habitat exist within 500 meters of the project site or that there

is "a reasonably high probability" that an active den site exists in close proximity to applicant's quarry.

FRCH reiterates its argument that applicant's wildlife surveys were inadequate and conducted at the wrong time of the year to find timber rattlesnakes. FRCH again challenges the qualifications of applicant's consultant to undertake timber rattlesnake studies. FRCH also argues that the references in the affidavits to timber rattlesnakes on the east side of Route 9 near applicant's mine were dismissed without justification.

Procedurally, neither the ALJ nor the Commissioner authorized FRCH to submit a reply. As a result of that unauthorized submission, permission was granted, by letter dated January 27, 2004, to applicant, Department staff and the Town to respond to FRCH's reply if they so chose.

By letter dated February 2, 2004, Department staff moved to strike FRCH's unauthorized reply from the record.⁸ Department staff further stated that it "rests on the record that [Department staff has] already made at the Legislative Hearing

⁸ In fact, immediately following submission of FRCH's unauthorized reply, Department staff, by letter dated January 26, 2004, noted that the Rulings had not authorized FRCH to submit a reply, and moved that FRCH's reply be stricken.

and Issues Conference as well as the papers already submitted [by Department staff] on this appeal.”

Applicant, although advocating that FRCH’s unauthorized and untimely reply be stricken, presented a further rebuttal to the points raised in FRCH’s reply. Applicant noted that although Dr. Edwin McGowan, FRCH’s consultant, had identified potentially suitable denning habitat in an area about 500 meters north of the project site, no timber rattlesnake dens were found at that location. Applicant further argued that the ALJ had fully evaluated the statements made by FRCH’s consultant. As applicant noted, the ALJ in his Rulings found that no actual timber rattlesnake den had been located north or east of applicant’s existing mining operation, and that the only known dens are west of the quarry, on the other side of Route 9, and separated from the area east of Route 9 by that heavily traveled traffic corridor. See also Rulings, at 22.

Moreover, as applicant noted, FRCH’s consultant evaluated the area that he identified as suitable habitat in the month of May, at a time of spring emergence of timber rattlesnakes, when a number of timber rattlesnakes should have been in the vicinity of any den. No timber rattlesnakes, however, were observed by FRCH’s consultant. Applicant also

referenced the previously submitted affidavit of Bernard Ruf, the Director of Sharpe Reservation, a youth camp of about 2,000 acres of land northeast, east and southeast of the proposed expansion area. Mr. Ruf had reported that no rattlesnakes have been seen on the Sharpe Reservation property. See also Rulings at 22-23.

Applicant indicated that the question of whether any additional surveys were necessary had been thoroughly considered and rejected by the ALJ. According to applicant, FRCH's challenge to the qualifications of applicant's consultant were fully rebutted by his resume and experience. Applicant noted that the ALJ specifically evaluated the credentials of applicant's consultant and referenced the ALJ's conclusion that the consultant's "competence as a timber rattlesnake surveyor cannot be seriously questioned." See Rulings, at 18.

Applicant argued that it was clear from the Rulings that the ALJ had fully considered the post-issues conference affidavits that FRCH submitted. Applicant also argued that Department precedent supported the manner in which the ALJ applied the substantive and significant standard in this proceeding.

The Department's permit hearing regulations establish

when appeals may be made and what papers may be submitted. Appeals of an ALJ's ruling to include or exclude any issue for adjudication are authorized by section 624.8(d)(2)(i) of 6 NYCRR. Other parties may submit briefs or other arguments in support of or in opposition to the appealed issue(s). However, no other submissions are authorized unless permission is granted by the ALJ or the Commissioner, and any unauthorized submissions are not entitled to consideration. See, e.g., Matter of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5 (rejecting two untimely letters offering additional argument and attempting to raise new issues where parties did not seek and receive permission to submit them).

However, after due consideration, I have decided to exercise discretion to receive FRCH's reply into the record, as well as the responses of Department staff and applicant to FRCH's reply. I do this, in part, because an opportunity was given to Department staff, applicant and the Town to comment on the reply. This cures any potential prejudice. Furthermore, in the specific circumstances of this matter, receiving these submissions in the record provides further elaboration to certain of the arguments presented. Although I appreciate the reasons underlying the motions made by applicant and Department staff to strike FRCH's reply, and I recognize that, to a notable extent, FRCH's reply is

repetitious of its earlier submission, I shall deny those motions.

DISCUSSION

The issues conference is the point where the subject matter for any adjudicatory hearing is considered. Pursuant to the Department's permit hearing regulations at 6 NYCRR Part 624 ("Part 624"), a potential party must demonstrate that an issue is both "substantive" and "significant" for it to be adjudicable. 6 NYCRR 624.4(c)(1)(iii).

The Part 624 regulations define both of these terms. An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." 6 NYCRR 624.4(c)(2). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." 6 NYCRR 624.4(c)(3).

Moreover, where, as here, Department staff has reviewed the applications and determined that the proposed expansion of

the rock quarry mining operation will conform to all applicable statutory and regulatory requirements, the burden of persuasion is on a potential party proposing an issue that the issue is substantive and significant. 6 NYCRR 624.4(c)(4).

In determining whether an adjudicable issue exists, the ALJ "must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments [that the ALJ authorizes]." 6 NYCRR 624.4(c)(2).

In areas of the Department staff's expertise, its evaluation of the application and supporting documentation is an important consideration in determining whether an issue is adjudicable. See Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2; Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2.

Judgments must be made as to the strength of the proof offered by a potential party. Assertions by potential parties cannot simply be conclusory or speculative but must have a factual or scientific foundation. See Matter of Bonded Concrete,

Interim Decision of the Commissioner, June 4, 1990, at 2.
Conducting an adjudicatory hearing "where 'offers of proof, at best, raise [potential] uncertainties' or where such a hearing 'would dissolve into an academic debate' is not the intent of the Department's hearing process." Matter of Adirondack Fish Culture Station, Interim Decision of the Commissioner, August 19, 1999, at 8 (citing Matter of AZKO Nobel Salt Inc., Interim Decision of the Commissioner, January 31, 1996, at 12).

That a consultant or expert for a potential party takes a position opposite to that of the applicant or Department staff does not of itself raise an issue. See, e.g., Matter of Jay Giardina, Interim Decision of the Commissioner, September 21, 1990, at 2 ("Offers of expert testimony contrary to the application are not . . . necessarily adequate in and of themselves to raise an issue for adjudication. This is especially true where the basis for the contrary expert opinion is not identified or where it is apparent that the expert opinion has not taken into account all proposed project mitigation").

A potential party's position with respect to a proposed substantive and significant issue must be supported by a factual and/or scientific foundation; absent such a foundation, an issue will not be adjudicable. Moreover, the offers of proof of a

potential party, even where supported by a factual or scientific foundation, may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff including staff's pre-issues conference review of an application, the SEQRA documents, the record of the issues conference, and authorized briefs, among other relevant materials and arguments.

Where an issues ruling of an ALJ is appealed, substantial deference is given to the ALJ on factual issues. Matter of Saratoga County Landfill, Second Interim Decision, October 3, 1995, at 3. The responsibility of "sifting through offers of proof and responses" is that of the ALJ. Matter of Hyland Facility Associates, Third Interim Decision of the Commissioner, August 20, 1992, at 2. Where an ALJ rules that a factual issue does or does not meet the threshold for adjudication, the commissioner will first review whether the ALJ has properly applied the substantive and significant standard. Where a commissioner determines that the substantive and significant standard has not been properly applied, however, the commissioner will not defer to the administrative law judge but may conduct an independent review.

Upon review of the record, I find that the ALJ correctly applied the substantive and significant standard in

this proceeding. The ALJ's analysis is comprehensive and reasoned and his application of the standard is well-balanced in his consideration of the offers of proof. FRCH, in its appeal, has failed to rebut the ALJ's analysis and has failed to show that the ALJ in any way misapplied the substantive and significant standard.

A review of the Rulings clearly demonstrates the thoroughness of the ALJ's analysis. The Rulings, in evaluating timber rattlesnake habitat, direct specific attention to denning, transient and summering habitat. The ALJ considered applicant's wildlife surveys in terms of focus, timing and comprehensiveness and found them to be satisfactory. The ALJ also found that the competence of applicant's consultant could not be seriously questioned. As the ALJ stated:

the mine expansion area has already been examined in a comprehensive and targeted manner by [applicant's consultant], himself a competent surveyor The project has not changed since the Draft EIS was accepted, nor have the circumstances related to it The information provided by FRCH, including the information contained in its supplemental submission, does not suggest that impacts to timber rattlesnakes were inadequately addressed in the Draft EIS, which states that since there are no known den sites on the east side of Route 9, and the establishment of a new den site by snakes crossing the highway and other intervening land uses would be unlikely, the Thalle property is not considered to be potential rattlesnake habitat [citation omitted].

. . . .In the absence of reliable information that timber rattlesnakes actually inhabit the area east of

Route 9 on or in close proximity to Thalle's mine expansion area, there is no adequate basis for requiring further survey work. Nor is there any need to further consider impacts of mining and blasting upon members of the species.

Rulings, at 23. I fully concur with the ALJ's determinations, and his conclusion that no substantive and significant issue exists for adjudication in this matter. My review of the record also confirms that the ALJ properly distinguished State v Sour Mountain Realty Corp., 276 AD2d 8 (2nd Dept 2000), on which FRCH relies, from the factual circumstances of the current proceeding.

The conclusions of Department staff's independent evaluation of a proposed issue are particularly important in determining whether or not an issue is substantive and significant. In this proceeding, Department staff relied on the analysis and evaluation by Department staff's own expert, Dr. Theodore Kerpez. Dr. Kerpez's competence and experience with respect to rattlesnake behavior and ecology is well-recognized. See, e.g., Issues Conference Tr. at 221 (FRCH counsel commenting that Dr. Kerpez is a "competent [expert] with regard to timber rattlesnake behavior and ecology"). His comments at the issues conference helped clarify aspects of the timber rattlesnake issue, and his October 28, 2003 affidavit demonstrated from a scientific point of view the lack of credibility, as well as other deficiencies, in FRCH's post-issues conference affidavit

submission.

FRCH's arguments with respect to the timber rattlesnake and its habitat, including the information that was contained in the affidavits submitted following the issues conference, were addressed in detail in the Rulings, and rejected. The record clearly demonstrates that FRCH failed to meet its burden of persuasion.

With respect to the six post-issues conference affidavits, FRCH argues that the ALJ was in error when he determined that there was not "good cause" for their late submission. Based on my review of the affidavits and the applicable regulations governing post-issues conference submissions, I concur with the ALJ that FRCH failed to demonstrate good cause for its supplemental submission and that the ALJ could properly have excluded the affidavits. At this stage in the proceeding, however, I shall not disturb the ALJ's determination to accept the affidavits into the record. Moreover, FRCH's argument is misplaced as the ALJ fully considered the affidavits in the Rulings.

I have reviewed the remaining arguments presented by FRCH that are not specifically addressed here and found them

lacking in merit.

FRCH's SUBMISSION OF "NEW INFORMATION"

Under cover of a letter dated April 16, 2004 ("cover letter"), FRCH submitted a document entitled "March 2004 Assessment of Potential Impacts to Eastern Timber Rattlesnakes Related to the Proposed 'Sterling Forge Estates' Project, Town of Tuxedo, New York" ("Assessment"). FRCH indicated that the Assessment contains new information that was not previously reasonably available to FRCH and argues that it may be properly considered in this proceeding. FRCH states in the cover letter that the Assessment "contradict[s] certain key conclusions and assumptions" in the Rulings, and that it supports FRCH's contention that substantive and significant issues exist in this proceeding with respect to the timber rattlesnake.

Specifically, FRCH alleges that the Assessment presents four findings that are directly contrary to Department staff's position in the instant proceeding. According to FRCH:

(1) the Assessment indicates that the Department has required "[e]xhaustive, [m]ulti-[y]ear [r]attlesnake [s]tudies" for the Sterling Forge Estates project in contrast to the studies

that were conducted at applicant's site. Cover Letter, at 2-3;

(2) the Assessment "confirms" that activities located within one and a half miles of a known den site may pose a threat to timber rattlesnakes, and that rattlesnakes will cross roadways in the course of their seasonal migration. Cover Letter, at 3-4;

(3) the Assessment indicates that applicant's timber rattlesnake analysis is "[f]atally [f]lawed" because it failed to employ qualified personnel to conduct its rattlesnake survey and failed to identify or evaluate potential denning habitat within 500 meters of the project site. Cover Letter, at 4-5; and

(4) the Assessment "confirms" that a failure by "[n]on-[e]xperts to observe rattlesnakes in a particular area is not a reliable indicator that rattlesnakes are not present." Cover Letter, at 5.

By letter dated April 23, 2004, applicant objected to "yet another untimely and unauthorized submission" by FRCH, and asked that the submission be rejected. Department staff, by letter dated May 18, 2004, argued that the record in this matter is closed and that FRCH's submission should be stricken.

I have evaluated the arguments that FRCH presents in the cover letter and the information and facts in the Assessment. In that regard, I have also considered applicant's April 23, 2004 letter and Department staff's May 18, 2004 letter that address FRCH's submission. Although FRCH, under the guise of submitting the Assessment, is reiterating a number of previously made arguments, the Assessment does provide some relevant comparative information. Accordingly, for purposes of a more complete record, I will exercise my discretion to include FRCH's submission and the responding letters of applicant and Department in the record of this proceeding.

Both applicant and Department staff, in their letters, rebut each of the "findings" articulated by FRCH. With respect to the question of studies (which relates to the first and fourth of FRCH's "findings"), applicant has conducted various field studies of the area and has conducted an environmental review pursuant to SEQRA. These studies were conducted at times of the year (spring and fall) when timber rattlesnakes could have been detected or when evidence of their presence would have been apparent. Furthermore, the Rulings demonstrated that the applicant's surveys, in terms of focus, timing and comprehensiveness, were appropriate. See Rulings at 17-19. Applicant has also sought and obtained information from local

residents regarding the presence (or absence) of timber rattlesnakes. See also DEIS, Vol. 3, Appendix 8 (timber rattlesnake study).

FRCH refers again to its six affidavits, describing them as "sworn testimony documenting several rattlesnake sightings on the east side of Route 9 in the immediate vicinity of the [proposed rock quarry expansion] site." Cover Letter, at 5. As previously discussed, the affidavits submitted by FRCH were fully considered in this proceeding and found to be speculative or otherwise deficient. See, e.g., Rulings at 19-23; Affidavit of Dr. Theodore Kerpez, sworn to on October 28, 2003.

As to the qualifications of applicant's consultant (which relates in part to the third "finding"), the ALJ thoroughly addressed that matter in the Rulings and found that applicant's consultant was competent to perform the timber rattlesnake surveys. Similarly, the submissions of applicant and Department staff support the suitability of applicant's consultant, in light of his training, education and experience in the field. Based on my review of the record, FRCH's arguments on this subject lack merit.

Furthermore, the arguments made by Department staff and

applicant that applicant's mine and expansion area are not comparable to the Sterling Forge Project Area ("Sterling Forge") are compelling. Their analyses of the two sites, and the distinguishing characteristics between the two, rebut all of FRCH's "findings".

Department staff's letter response contained a comparative review by Dr. Theodore Kerpez (Region 3 Wildlife Manager) that underscored the significant differences between Sterling Forge and the applicant's proposed expansion area and indicated the errors in FRCH's findings. In terms of size, Sterling Forge comprises 575 acres of land and is approximately twenty times larger than applicant's proposed expansion site. Sterling Forge is ringed by six known rattlesnake dens, including one of the largest such dens in the State, and is bordered on all sides by undeveloped and undisturbed rattlesnake habitat. According to Department staff, for at least four of the dens, "there is a large swath of undisturbed habitat between the den and the Sterling Forge project site, providing the snakes excellent access to the site." See May 18, 2004 letter of Department staff, at 1.

In stark contrast, there are only two known dens near applicant's proposed expansion area and they are to the west of

that area, on the other side of Route 9. Between these two dens and the proposed expansion area are numerous obstacles including a heavily trafficked highway (Route 9), a sand and gravel mine, and the applicant's existing rock quarry. Id. Furthermore, Department staff note that applicant's expansion site does not have any good potential rattlesnake basking areas, while Sterling Forge has several. See May 18, 2004 letter of Department staff, at 2; see also applicant's April 23, 2004 letter, at 4-5 (commenting on the lack of any similarity between the location of rattlesnake dens at Sterling Forge and at applicant's proposed expansion area and also noting the significant difference in the size of Sterling Forge as compared to applicant's proposed expansion area).

With respect to the roadway in Sterling Forge and Route 9, there is no similarity. The roadway that FRCH references in Sterling Forge is a county road, with a significantly lower traffic volume than heavily trafficked Route 9 near applicant's mine. In fact, the average daily traffic volume on Route 9 is approximately ten times greater than the county road in Sterling Forge. See applicant's April 23, 2004 letter, at 5.

Considering the level of traffic on Route 9, there is little possibility of any rattlesnake surviving a crossing of the

highway from dens west of the highway to applicant's existing mine or its proposed expansion area, let alone a crossing back to the dens. Moreover, at Sterling Forge there are rattlesnake dens on both sides of the county road, while there are no known dens on applicant's side of the highway. The only known dens are west of the proposed expansion area - on the opposite side of Route 9. See May 18, 2004 letter of Department staff, at 2.

FRCH's April 16, 2004 submission does not advance its position on the potential effects of the proposed expansion on the timber rattlesnake and its habitat. The distinguishing factors between Sterling Forge and applicant's site further support the position taken by applicant and Department staff that no adjudicable issue exists with respect to timber rattlesnakes at applicant's site. Accordingly, the information contained in the Assessment and the arguments in the cover letter provide no basis for challenging the ALJ's determination that there are no adjudicable issues in this proceeding.

CONCLUSION

Based on my review of the record, I find that there are no issues requiring adjudication in this matter and I affirm the Rulings.

Accordingly, I remand this matter to Department staff to complete the processing of the permit applications consistent with the requirements of SEQRA and other applicable statutes and regulations, and to issue the permits consistent with the revisions that were made during the issues conference and by the Rulings.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

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

November 3, 2004
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