



THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

MICHAEL A. CARDOZO
Corporation Counsel

HILARY MELTZER
Phone: (212) 788-1585
Fax: (212) 788-1619
hmeltzer@law.nyc.gov

April 23, 2004

VIA OVERNIGHT MAIL

Honorable Judge Richard R. Wissler
Administrative Law Judge

PETITION FOR FULL PARTY STATUS

In the Matter of the State Pollutant Discharge Elimination System
Application Nos. 0-9999-00096/00005 and 0-9999-00096/00009
Belleayre Resort at the Catskill Park Property, Towns of Middletown and Shandaken

INTRODUCTION

The City of New York ("City") hereby petitions for full party status in the proceedings concerning the above-referenced State Pollutant Discharge Elimination System ("SPDES") Applications for the Belleayre Resort at the Catskill Park Property located in the Towns of Middletown and Shandaken. The City petitions for full party status to demonstrate that the Applicant does not meet the standards for issuance of the Permits by the New York State Department of Environmental Conservation ("DEC") and to challenge the sufficiency of the Project's Draft Environmental Impact Statement.

As explained below, the City has a unique and critical role in the evaluation of whether DEC should issue the SPDES Permits and thus meets the standards for full party status. 6 New York Codes, of Rules and Regulations ("NYCRR") § 624.5. Furthermore, the City may properly raise issues regarding the sufficiency of the Applicant's DEIS because DEC is the lead

agency in the State Environmental Quality Review (“SEQRA”) process. 6 NYCRR § 624.4(c)(6)(i)(B).

The City’s foremost concern in these proceedings is water quality. Many high quality tributary streams protected under federal, State, and City law are on or near the site of the proposed Belleayre Resort. These tributaries ultimately feed the Ashokan and Pepacton Reservoirs, which together supply half of the City’s drinking water. If this Project moves forward as currently designed, it will have devastating impacts on water quality. Perhaps most critically, construction of the Big Indian portion of the Project will cause further impairment to the Ashokan Reservoir which has been designated as impaired because of excessive sedimentation on the Statewide list of impaired water bodies that DEC must prepare pursuant to Section 303(d) of the Clean Water Act. As demonstrated below, the serious inadequacies in the Applicant’s current stormwater pollution prevention plans (“SWPPPs”) will cause further degradation of the Ashokan. In addition, the Applicant’s repeated references to the capacity of both reservoirs to assimilate phosphorus based on the current Total Maximum Daily Loads (“TMDLs”) exhibit its failure to acknowledge and mitigate the Project’s serious environmental impacts. Similarly, the Applicant has not accounted for the secondary growth and concomitant impacts on water quality that will result from the Project.

In addition, the DEIS fails to analyze and compare a range of reasonable alternatives to the proposed Project. The impact statement identifies four limited development options and rejects each of them for the purported failure to generate sufficient profit to be economically feasible. This analysis is itself fatally flawed, as it overstates costs and thus understates expected profit. Moreover, the identification of alternatives does not comport with the Scope which requires the DEIS to “include a discussion of a different mix of resort

components....” Final Scoping Document, at 5.3. No such assessment was conducted. Furthermore, the DEIS fails to consider a reduction in scale for the Project, which would allow all components to remain but at least some of them would be reduced in size. Overall, the DEIS’s failure to compare environmental impacts of a single development alternative with the impacts of the proposed Project eviscerates SEQRA’s mandate to assess a range of reasonable alternative.

OFFER OF PROOF

The City submits as its offer of proof the “New York City Department of Environmental Protection’s Comments on the Draft Environmental Impact Statement and Draft State Pollutant Discharge Elimination System Permits for the Proposed Belleayre Resort at Catskill Park Project,” dated April 22, 2004 (“DEP SEQRA Comments”). As witnesses to testify to the facts forming the bases for the City’s objections to the draft SPDES permits and to the adequacy of the DEIS, the City will call upon some or all of the following Expert Panel: Brenda Drake, P.E.; Joseph Damrath, CPESC; Jeffrey Donohoe; Charles Cutietta-Olson; Michael A. Principe, Ph.D. Summaries of the qualifications of these witnesses are set forth in Attachment A; complete curricula vitae will be made available at the Issues Conference or upon request by any party.

THE PROPOSED DEVELOPMENT

Both Draft SPDES Permits are directly associated with the Belleayre Resort at Catskill Park (the “Project”), a 2000-acre recreational development proposed by Crossroads Ventures, LLC.¹ The Project site spans the Towns of Shandaken (Ulster County) and

¹ We note that the Applicant continually refers to the Project as a development of some 500 acres rather than acknowledging that the plans call for disturbing essentially every conceivably buildable area on the site.

Middletown (Delaware County), including headwaters of the Ashokan and Pepacton Reservoirs, portions of New York City’s Catskill and Delaware Water Supply Systems, respectively. It is adjacent to the DEC-owned Belleayre Mountain Ski Center (“Ski Center”). The Project includes a total of 400 hotel rooms, 351 additional hotel and housing units, a 21-acre single-family residential subdivision, and two 18-hole golf courses. The Project is divided into two interrelated but geographically distinct developments: Big Indian Plateau (“Big Indian”), which would be developed on 1,242 acres east of the Ski Center, and Wildacres Resort (“Wildacres”), which would be developed on 718 acres west of the Ski Center. Big Indian and Wildacres would require the construction of separate wastewater treatment plant (“WWTPs”), and therefore the Project requires two SPDES Permits.

Summary of SPDES Permit Application No. 0-9999-00096/00009
(Wildacres Permit)

The Wildacres Draft Permit regulates surface discharges of treated effluent from the Wildacres WWTP, as well as stormwater discharges from the SWPPP at Wildacres. With respect to wastewater, the Draft Permit indicates that the Wildacres Resort Sewer Works Corporation² proposes to discharge an average of 112,000 gallons per day of treated effluent into an unnamed tributary of the Emory Brook. The Wildacres Permit indicates that the WWTP will discharge effluent into an irrigation pond, which will be used for spray irrigation at the golf course. The surface water discharge to the tributary of Emory Brook is subject to a number of Water Quality Based Effluent Limitations (“WQBELs”), including limits for phosphorus, fecal coliform, and nitrogen. The effluent limitations and monitoring requirements for the irrigation

² We use the term “Applicant” to refer collectively to the three related entities seeking approvals for the Project as a whole: Crossroads Ventures, LLC, the Wildacres Resort Sewer Works Corporation, and the Big Indian Plateau Sewage Works Corporation.

pond are less stringent than the monitoring requirements for the discharge to the tributary of Emory Brook.

DEC has also determined that certain stormwater discharges on the Wildacres site require an individual SPDES permit for the operation phase. In particular, the Wildacres Draft Permit regulates releases from a series of micro-detention ponds (“Outfalls 03-15”). The Applicant proposes to discharge stormwater from these micro-detention ponds directly into an unnamed tributary of Emory Brook. The Draft Permit calls for Outfalls 03-15 to be monitored for phosphorus, total suspended solids, and pesticides. The SPDES permits also sets forth daily maximum effluent limitations for a variety of pesticides that the Applicant will be using on the golf course.

In addition to these SPDES provisions, the Wildacres Draft Permit also contains special monitoring requirements for phosphorus and pesticides at several designated micro-detention ponds, ambient surface waters, and groundwater wells. The Draft Permit also includes Best Management Practices (“BMPs”) related to golf course irrigation, fertilizer use, pesticide management, construction phases, and erosion control.

The erosion control BMPs are particularly important because they require the Applicant to comply with GP-02-01 SPDES General Permit for Stormwater Discharges (“General Permit” or “GP-02-01). Under this General Permit, the Applicant must develop a comprehensive SWPPP, including plans for managing stormwater both during construction and after a project is complete. The construction phase stormwater plan is to be focused on preventing erosion and sedimentation; in the operational phase, stormwater plans are required to be designed to ensure that stormwater on the site is captured, treated, and released in a manner to

reduce pollutants, such as phosphorus and pesticides, in the runoff from the site and to avoid off-site erosion.³

Summary of SPDES Permit Application No. 0-9999-00096/00005
(Big Indian Draft Permit)

The Big Indian Draft Permit regulates surface water discharges of treated effluent from the Big Indian WWTP. It indicates that the Big Indian Plateau Sewage Works Corporation⁴ proposes to discharge 87,000 gallons per day of treated effluent into Birch Creek (“Outfall No. 1”). Birch Creek is a headwater of the Ashokan Reservoir. This surface water discharge is subject to a number of WQBEL, including limits for phosphorus, fecal coliform, and nitrogen.

In addition to directly discharging into Birch Creek, the Big Indian WWTP will also discharge effluent into several irrigation ponds (“Outfall No. 2”). The Big Indian Draft SPDES Permit contains flow limitations, WQBELs, and monitoring requirements for these discharges. Similar to the Wildacres Draft Permit, the effluent limitations and monitoring requirements are less stringent for the irrigation ponds than they are for the surface water discharges. The Applicant plans to use the treated effluent for spray irrigation of the golf course, and thus the Big Indian Draft Permit also contains special monitoring requirements for groundwater on the site.

The Big Indian Draft Permit makes reference to a third Outfall on the Big Indian site, though the Permit makes clear that this outfall does not require a SPDES Permit. Outfall No. 3 is sanitary waste discharged into a subsurface treatment system (“SSTS”) and it is annexed

³ Because this project is in the City’s watershed, the Applicant’s SWPPPs must also comply with the requirements of the New York City Watershed Regulations. See “Rules and Regulations for the Protection from Contamination, Degradation and Pollution of the New York City Water Supply and Its Sources,” 10 NYCRR Part 128; 15 Rules of the City of New York (“RCNY”) Chapter 18 (the “Watershed Regulations”).

⁴ See footnote 2 above.

to the Gate House. Although, as a result of its size, the SSTS does not require a SPDES permit from DEC, it will require permits from DEP under the Watershed Regulations, 10 NYCRR § 128-3.8; 15 RCNY § 18-38, and from the Ulster Department of Health, under the New York State Public Health Law.

Finally, the Big Indian Draft SPDES Permit delineates special monitoring requirements and best management practices related to stormwater discharges from the site during and after construction, including specific requirements relating to phosphorus, pesticides, spray irrigation, and erosion control. The Big Indian Draft Permit also requires the Applicant to develop erosion control and stormwater plans pursuant to GP-02-01. Notably, unlike the Wildacres Draft SPDES Permit discussed above, this SPDES permit does not treat stormwater discharges as individual outfalls, but instead as non-point source discharges. That is, the Big Indian SWPPP is not specifically part of the Big Indian Draft SPDES Permit. As discussed below, however, there is no factual basis for this distinction and the Big Indian Draft Permit should be withdrawn, and should not be reissued unless it can be modified to regulate stormwater discharges from the Big Indian site appropriately. Because the DEIS includes the Big Indian SWPPP, we address both SWPPPs in this Petition.

THE CITY'S ENVIRONMENTAL INTEREST IN THESE PROCEEDINGS

An intervening party must establish “an adequate environmental interest” to participate as a full party in the issues conference and adjudicatory hearing. 6 NYCRR § 624.5(s)(1)(iii). Generally, the standard for demonstrating an environmental interest is “very low and challenges to an intervener’s environmental interest have rarely been sustained.” See, e.g., In the Matter of the Application of E. Tetz & Sons, Inc., NYSDEC No. 3-3352-00255/00001, 2003 N.Y. Env. Lexis 20, 24 (March 20, 2003).

A municipality has a cognizable environmental interest in a SPDES Issues Conference and Adjudicatory Hearing when the draft permit allows for a discharge in the municipality's water supply. See e.g., In the Matter of the Application of Seven Springs, LLC, NYSDEC No. 3-5599-00041/00001, 2002 NY. Env. Lexis 42 (August 23, 2002) (intervening municipalities had "an adequate environmental interest" largely because the proposed Project's runoff would enter their surface water supply). Here, the Project is located within the watersheds of the Ashokan and Pepacton Reservoirs. These Reservoirs are critical components of the City's Catskill and Delaware water supplies, which together provide approximately ninety percent (90%) of the City's drinking water. These water supply systems provide high quality, unfiltered drinking water to millions of residents of New York City and New York State. Both SPDES permits would allow for direct discharges into headwaters of these reservoirs. The discharges of wastewater and stormwater will contribute phosphorus, pesticides, and sediment to these highly sensitive water bodies. Without question, the City has an environmental interest in ensuring that any SPDES permit that is issued is based upon facts and data and proper models, and that the terms and conditions will adequately protect its water supply from harmful contamination. In particular, because the Ashokan Reservoir has been identified by DEC as impaired because of silt and sediment, any proposed permits that will allow additional sediment loading to the Ashokan must be viewed with extreme scrutiny. See 2004 Section 303(d) List for New York State, at <http://www.dec.state.ny.us/website/dow/part1.pdf> (last visited, April 19, 2004).

Moreover, in accordance with 6 NYCRR Part 617, the City is an involved agency in the Project's SEQRA review because of its discretionary permit authority over numerous aspects of the Project under the Watershed Regulations, including stormwater and wastewater facilities. 10 NYCRR §§ 128-3.6(a), 128-3.8(a), and 128-3.9(b)(3); 15 RCNY §§ 18-36(a), 18-

38(a)(1), and 18-39(b)(3). In accordance with the Watershed Regulations, the City has the authority to review the Applicant's construction of WWTPs, as well as its SWPPPs, construction of impervious surfaces, and design of subsurface treatment systems.

Thus, the City has an environmental interest not only in challenging the issuance of, as well as the terms and conditions contained in the SPDES Permits, but also, particularly because DEC is the lead agency, in challenging the sufficiency of the Project's entire DEIS. The City's status as a full party in the SPDES Permit hearings for the Project is, therefore, imperative for fulfillment of DEP's mission to protect the water supply and fulfillment of DEP's obligations to control pollution control sources pursuant to the federal Surface Water Treatment Rule for the Catskill/Delaware Supply System.

PART I:
BIG INDIAN AND WILDACRES
DRAFT SPDES PERMITS

LEGAL STANDARD

To be granted full party status, a party must raise issues that are both substantive and significant. See 6 NYCRR § 624.4(c)(1)(iii). An issue is substantive “if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project.” Id. at § 624.5(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.” Id. at 624.4(c)(3). Furthermore, each issue raised must be supported by an appropriate offer of proof either “in the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application.” In the Matter of the Application of Seven Springs, 2002 N.Y. Env. Lexis 42, at 14-15.

Prior administrative rulings made by DEC make clear that a petitioner can articulate an issue that is both substantive and significant “by identifying a material defect or omission in the permit application or *its supporting documentation* that may adversely affect permit issuance.” Seven Springs at 46 (emphasis added); see also In the Matter of Broome County Department of Public Works, Decision of the Commissioner, June 11, 1984; In the Matter of Halfmoon Water Improvement Area, Decision of Commissioner, April 2, 1982. Indeed, DEC can only issue a SPDES permit after it has made “a determination . . . on the basis of a submitted application, plans, or other available information, that compliance with the specified permit provisions will reasonably protect classified water use and assure compliance with applicable water quality standards.” 6 NYCRR § 750-2.1(b). As discussed in the Seven Springs case, § 750-2.1(b) requires DEC to engage in a deliberative process before issuing a SPDES permit. See Seven Springs, at 40. If the information or data provided by the Applicant is inaccurate, contrived, or incomplete, DEC cannot make the requisite rational determination that the SPDES permit provisions will protect water quality.

Here, the issues and corresponding offers of proof set forth below demonstrate that the supporting documentation supplied by the Applicant in support of its SWPPPs is wholly inadequate to merit the issuance of the Draft SPDES Permits. In broad terms, the Applicant has supplied DEC with grossly inaccurate depictions of the stormwater impacts associated with its Project, including impacts from erosion, nutrient loading, and pesticide contamination and the Applicant’s capacity to control or mitigate those impacts post-construction. As a result of its poor analysis of stormwater impacts, the Applicant has submitted stormwater management and erosion control plans that will not protect the quality of surrounding surface waters. Therefore,

pursuant to the standard set forth in 6 NYCRR § 750-2(b), DEC cannot issue SPDES Permits for the Project based on the stormwater plans as proposed.

STORMWATER ISSUES

OVERVIEW

As stated by DEC Staff in its Introduction to the SPDES Fact Sheet, “[o]ne of the prime concerns in developing the [Draft SPDES] permits is that of stormwater management.” See DEC, Introduction to Draft SPDES Permits Fact Sheet (2003). The Project, because of its size, location, and prospective use, would require development of one of the most complex stormwater management plans in the history of the region, if not the history of the State. Not only must the stormwater management and erosion control plans be designed to protect the drinking water of over 9 million citizens of New York State from such harmful environmental contaminants as phosphorus, pesticides, and sedimentation, but this must be accomplished in the context of the steep, environmentally sensitive slopes of the Catskill Mountains that are highly prone to erosion. Indeed, the Project would involve 157 acres of excavation on slopes over 35%. If the Applicant were to construct the proposed Project without managing stormwater with the utmost precision and skill, during both the construction and operation phases, the environmental impacts of the Project to the New York City Watershed and Catskill Mountains could be catastrophic, far outweighing any economic benefits created by the Project. Therefore, in order to ensure that water quality is protected, a full adjudicatory hearing should be held on the issues set forth below.

ISSUE ONE: THE STORMWATER MODELS AND DESIGNS SUBMITTED BY THE APPLICANT IN SUPPORT OF THE DRAFT SPDES PERMITS ARE INCOMPLETE, INACCURATE, AND MISLEADING

Discussion: The data on which the Applicant has based the design of the SWPPPs is riddled with factual errors. This issue is “substantive” because DEC cannot, under

§ 750.2.1(b), issue a SPDES permit based on flawed factual information. The issue is “significant” because the Applicant must redesign its SWPPPs based on accurate data.

The inputs that the Applicant used to run its stormwater models – HydroCAD (used to estimate volumes and velocities of stormwater runoff) and WinSLAMM (used to estimate pollutant loadings in the stormwater runoff) – are unsupportable and give rise to misleading analyses. As a result, the designs for all of the stormwater management and erosion control facilities specified in the SWPPPs are inadequate.

Although for developing the water budget,⁵ the Applicant used precipitation data from the highest mountain in the region – an average of over 63 inches a year, the highest volume of precipitation among the various available data sources, for running HydroCAD and WinSLAMM, the Applicant selected data from Tannersville, where the average annual precipitation was only 32 inches, the lowest volume in the region. These choices obviously caused the Applicant’s design of stormwater management facilities to be substantially undersized. Moreover, the Applicant rejected readily-available data from nearer and more comparable sites – including precipitation data collected at Belleayre Mountain itself – in favor of data sources from elsewhere in the region that distorted the modeling. See DEP SEQRA Comments, § IV.a.1.

In addition, in choosing input data relating to phosphorus concentrations for the WinSLAMM model, the Applicant used theoretical values from the literature rather than actual data from the Project site, even though DEP provided site-specific data based on several years of

⁵ We note that the Applicant's analysis of irrigation needs and groundwater impacts is also distorted because of the unrepresentative data it used for the water budget analyses. By using higher precipitation values than can reasonably be expected on the Project site, the Applicant has underestimated the need for irrigation water and thus failed to disclose the impacts of its irrigation needs on local groundwater resources.

intensive monitoring at the site. Because the theoretical values selected were higher than the actual phosphorus concentrations in the stormwater runoff under pre-development conditions, the Applicant's modeling predicted a smaller increase in phosphorus loading than will actually occur. See DEP SEQRA Comments, § IV.a.2.

Similarly, the Applicant made many fundamental errors in choosing "design points" used in running the HydroCAD and WinSLAMM models. Design points, the "point of interest" on which the pre-development vs. post development impact modeling is based, must be chosen at locations where runoff must be controlled before being discharged from the proposed developed areas. The Applicant chose design points far removed from the development-points for which the drainage areas include large tracts of virgin forest surrounding the Project in addition to the Project site itself. This effectively dampens the changes in stormwater quality and quantity attributable to development of the Project in the model output. DEP SEQRA Comments, § IV a.9.

Moreover, one design point located at the Big Indian site is entirely misrepresentative because an overwhelmingly large portion of the runoff from the drainage area does not even reach the design point, as it is conveyed downslope of the design point by several culverts not identified in the analysis. Similar examples exist at Wildacres acres.

Each of the above described issues regarding the Applicant's use of the model is a serious flaw, with important impacts on the accuracy of the modeling results. Regarded as a whole, the modeling exercise amounts to a gross misrepresentation of the site's topographical constraints and drainage characteristics resulting in predictions of runoff rate, quantity and quality that are severally underestimated.

As set forth in the DEP SEQRA Comments and as the Expert Panel will testify at the Issues Conference, because of these modeling errors, the SWPPPs have not been designed properly to address the actual volumes and pollutant loadings in stormwater runoff from the site, either during or after construction.

Offer of Proof: In addition to the sections of the DEP SEQRA Comments cited below, the Expert Panel will elaborate and provide further evidence of the Applicant's miscalculations. The following bullet points summarize key areas of the City's proof.

- The inputs the Applicant used for the WinSLAMM model have underestimated the volumes of stormwater runoff from the site during and after construction. As a consequence, the stormwater management and erosion control facilities are undersized and will not adequately capture and treat runoff. DEP SEQRA Comments, § IV a. and b; Appendices C-1 and C-4.
- By using theoretical rather than actual data for phosphorus loadings, the Applicant has substantially underestimated the increment in post-development phosphorus runoff over pre-development conditions. DEP SEQRA Comments, § IV; Appendix C-4, at 6-8.
- The precipitation rates that the Applicant uses as input in the water budget analysis are higher than those can reasonably be predicted for the Project site, and thus result in an drastic underestimation of the need for irrigation and the impacts on groundwater resources. DEP SEQRA Comments, § IV a.1; Appendix C-4.
- The delineated study areas do not encompass the entire developed area, and thus the Applicant has not provided a stormwater plan that identifies and mitigates stormwater impacts from the entire development. DEP SEQRA Comments, § IV a.4; Appendix C-1, at 2 (generally); 8 (entire Big Indian site is not included in defined study area); 9 (Applicant has not delineated drainage swale along Giggle Hollow Road that discharges directly into Giggle Hollow); 10 (entire Wildacres site not included in development area). By excluding impervious surface areas such as the Big Indian Parking lot, the Applicant has underestimated pollutant loadings. Appendix C-1, at 16.
- The Applicant has not conducted a through investigation of drainage features located off-site (surrounding private property), and thus has inadequately detailed critical aspects for analysis including locations of the necessary "points of interest" on which the pre-development vs. post-development

impact modeling is based. This misrepresentation led to the improper selection of design points on the Project site. The improper selection of design points in turn led to improper design of stormwater controls throughout the SWPPP. DEP SEQRA Comments, § IV a.5 and a.9; Appendix C-1, at 2-3, 7; Appendix C-4, at 4.

- The Applicant has not correctly delineated post-development catchments (watersheds) for the Project site. Pre-development and post-development catchments must remain the same in order for the model results to be accurate. The Applicant has not maintained this crucial consistency. For example, the Wildacres drainage delineations depict six subcatchments in the pre-development condition, divided into forty-six smaller subcatchments in the post-development analysis. DEP SEQRA Comments, § IV a.9; Appendix C-1, at 4; Appendix C-2, at 2; 7; 11 (subcatchments 200 and 300 at the Wildacres site). Furthermore, the subcatchment areas are not consistent between the HydroCAD and WinSLAMM models. These discrepancies create misleading analyses of pollutant loadings. DEP SEQRA Comments, § IV a.9; Appendix C-1, at 16.
- The calculation of the concentration timing of the runoff leaving the site is also critical. It must be based on data gathered at the site with strict attention to topography, watershed length and the existing drainage features found during the site evaluation. In this case, the Applicant has left sheet flow out of the equation in all cases. By eliminating sheet flow, the Applicant has increased runoff concentration times in the pre-development condition. In this way, the pre-development scenario is misrepresented and the post-development departure is minimized. DEP SEQRA Comments, § IV a.7; Appendix C-1, at 4-5.
- Many other errors were noted in the review including specific discrepancies in the routing of stormwater flow on the plans vs. in the model schematics, errors in drainage area calculations, discrepancies in drainage areas values used in the comparison of developed vs. undeveloped conditions, inappropriate baseline values for pollutant loading and precipitation and missing qualitative and quantitative data. Appendix C-1, at 4.
- Even using the Applicant's underestimates of post-development stormwater runoff, the SWPPPs are inadequate to handle the estimated volumes of runoff from the site. In one instance at the Big Indian site, for example, runoff from approximately 74+ acres of the development is discharged, calculated at a rate of 254.7 cubic feet per second for the 100 yr, 24 hr. storm event to a drainage swale that travels 2100 feet downslope along the new Big Indian/Friendship Road access road to a pond located on steep terrain approximately 400 feet above Birch Creek. The feasibility of developing a means of safely controlling such a discharge is entirely questionable. Appendix C-1, 9-10.

- At some of the Applicant’s stormwater ponds, the rate at which stormwater leaves the pond is greater than the rate at which it enters the pond. This indicates that there are errors in the Applicant’s design points and/or in the input data to its modeling of stormwater volume. Such errors will lead to increased erosion and nutrient loading. Appendix C-1, at 5, 8.
- The Applicant has not provided stormwater flow paths and their associated times of concentrations in its design plans. Therefore, the Applicant has not met its burden to provide estimations of hydraulic loadings and total runoff. Appendix C-1, at 3-4, 6.
- At several design points, post-development flows are higher than pre-development flows for 10-year and 100-year storm events. This will lead to increased sediment and nutrient loadings off-site caused by on-site stormwater runoff in the post-development phase. DEP SEQRA Comments, § IV a.8; Appendix C-1, at 5.
- The size and configuration of a number of the micro-detention ponds are inadequate or inappropriate for the management of predicted flows and maintenance of water quality. DEP SEQRA Comments, § IV a.2; Appendix C-1, at 12.
- The WinSLAMM model does not incorporate an analysis of nutrient loads carried over from one micro-detention pond to the next, thereby underestimating post-development phosphorus loadings. DEP SEQRA Comments, § IV a.6; Appendix C-1, 13.

ISSUE TWO: THE APPLICANT HAS FAILED TO IDENTIFY KEY WATERCOURSES ON AND ADJACENT TO THE PROJECT SITE

Discussion: The map that the Applicant used to design its stormwater and erosion control plan omits key watercourses on and adjacent to the Project site. DEP SEQRA Comments, § IV a.5. The issue is substantive because the Applicant has not complied with the applicable regulation, which requires applicants for SPDES permits to delineate “springs [and] other surface water bodies . . . listed in public records or otherwise known to the applicant in the mapped area [within one mile beyond the property boundaries of the source].” 6 NYCRR § 750-1.7 (emphasis added). Furthermore, the provisions of the General Permit GP-02-01, with which the Applicant must comply under the Draft SPDES Permits, require that SWPPP designs contain

a delineation of “on-site and adjacent off-site surface waters, wetlands, and drainage patterns that could be affected by the construction activities.” Because the Applicant has not supplied this essential information, DEC cannot, under § 750-2.1(b), issue the SPDES permits. The issue is “significant” because the Applicant will have to redesign its stormwater plans after considering these currently omitted watercourses.

Two of these unidentified watercourses, one at Big Indian and one at Wildacres, are “waters of the United States” under the Clean Water Act.⁶ This is highly significant in regards to Big Indian because it is likely that the site’s micro-detention ponds will directly discharge to these currently misclassified waters. Therefore, for the same reasons that the Wildacres site requires an individual SPDES permit for stormwater, the Applicant must obtain an individual stormwater permit for the Big Indian site. DEP SEQRA Comments, § IV a.5, b.2.

In addition to failing to identify these jurisdictional watercourses, the Applicant has failed to map many ephemeral or intermittent streams on and adjacent to the Project site. The existence of these stream channels fundamentally affects drainage patterns on and downslope of the site. Accordingly, the Applicant has not and cannot possibly demonstrate that the SWPPPs accurately address runoff on and from the Project site during and after construction. Without a thorough evaluation of these watercourses, the Applicant cannot meet its burden of addressing off-site impacts of stormwater after it leaves the Project site. DEP SEQRA Comments, § IV a.5.

⁶ In addition to the issues relating directly to the Draft SPDES Permits discussed in the text, we note that these watercourses connect certain wetlands on the site, formerly identified by the Army Corps of Engineers as “isolated” and thus not requiring permits under Section 404 of the Clean Water Act, with other waters of the United States. On information and belief, the Army Corps is reconsidering its determinations regarding these wetlands.

Finally, the Applicant has not analyzed the impacts of construction and operation of the Project on the quality of the ephemeral and jurisdictional streams. Such impacts include increased sedimentation and nutrient loading, as well as uncertainty as to whether the stormwater plan will interfere with the recharge, habitat, and biotic integrity of these watercourses. Id.

Offer of Proof: As set forth in the DEP SEQRA Comments and accompanying maps, and as the Expert Panel will testify:

- There are surface water springs and intermittent streams and ephemeral conveyances both onsite and offsite that are not shown on the Applicant's site plans. DEP SEQRA Comments, § IV a.5., b.2; Appendix C.4 at 5.
- The impacts that development will have on these streams has not yet been determined by the Applicant. DEP SEQRA Comments, § IV a.5; Appendix C.4 at 5.

ISSUE THREE: THE PLANS FOR CONTROLLING EROSION AND
SEDIMENTATION DURING CONSTRUCTION ARE INADEQUATE TO
PREVENT SERIOUS DOWNSTREAM IMPACTS

OVERVIEW

The Project as a whole, and particularly construction of the golf courses, will involve regrading extraordinary swaths of land. This work necessarily involves disturbing the natural cover and exposing large areas of unstabilized soil to stormwater during construction, creating the threat of significant erosion and downstream sedimentation. The Applicant has proposed to expose between 25 and 50 acres of unstabilized soil at a time during the construction process, and has not proposed sufficient measures to stabilize disturbed areas on the Project site's steep slopes. See DEIS, Appendix 11, at 5. Exposing such a vast area violates the applicable legal standard, which limits the amount of exposure to five acres. See GP-02-01 Pt. III.D.2 (4) and GP-93-06. Moreover, the specific plans for controlling stormwater during construction will allow for discharges that are entirely inappropriate for the site, given its

topography and geology, and which will give rise to significant erosion and off-site impacts. Particularly because the Ashokan Reservoir, which ultimately receives stormwater from the Big Indian site, is already impaired because of erosion and sedimentation, the SPDES Permits cannot be issued based on the Applicant's current erosion and sediment control plans.

NYCDEP has extensive experience with the disastrous impacts associated with large-scale construction in the vicinity of the Project site. Most recently, and in a location with topography similar to the Wildacres site approximately 9 miles away, construction work at the Hanah Country Inn & Golf Resort caused extensive erosion leading to serious off-site sedimentation impacts in the Pepacton reservoir basin. The Hanah project involved vastly less disturbance, on slopes that are significantly less steep, than the proposed Belleayre Resort – the principle access road at Hanah is only 2,800 feet long with a maximum of 10% grade. Nonetheless, despite the Hanah developers' implementation of perimeter sediment controls prior to the start of clearing and grading, and installation of sediment traps and temporary diversions during construction, construction of the access road and other portions of the Hanah project caused significant amounts of silt and sediment to be discharged from the site. The potential for similar, but far more serious, consequences with respect to construction of the Belleayre Resort is obviously very serious – particularly because the Big Indian site is even more environmentally sensitive than the Hanah site.

Indeed, because the steep terrain, and the necessity of essentially carving a plateau out of a mountaintop to allow for construction of the proposed golf courses, DEP has serious reservations about the ability of any SWPPP to effectively control erosion during construction of this Project.

Sub-Issue A. The Applicant's Plan to Expose 25 Acres of Soil Violates the Applicable Legal Standard

Discussion: In direct contravention to the applicable legal standard, the Applicant has proposed in the construction phasing and erosion control plan to expose up to 25 acres of unstabilized soil at a time within each reservoir basin. This issue is “substantive” because General Permit GP-02-01, which the Applicant must comply with under the Draft SPDES Permits, expressly states that “there shall be no more that five (5) acres of disturbed soil at any one time without prior written approval from the [DEC].” GP-02-01 Pt. III.D.2 (4).⁷ Moreover, there is no substantive basis provided that would support DEC’s issuance of the exemption from the 5-acre standard and, in addition, DEC’s waiver cannot occur until the Applicant has complied with SEQRA. This issue is “significant” because the Applicant will have to revise its erosion control plan based on the 5 acre rule.

The Applicant’s proposal to expose more than five acres of unstabilized soil at one time is not only illegal, but also would have serious consequences. The most intensive portion of the Applicant’s Project, the development of Big Indian, will take place in the sensitive watershed of the Ashokan Reservoir. The Applicant’s proposal to expose 25 acres or more at a time creates an imminent risk for further sedimentation to the Ashokan Reservoir which, as noted above, is already impaired because of excessive silt and sediments. Moreover, as discussed in Sub Issue D below, even after the Applicant has finished “stabilizing” each 25-acre swath in accordance with the SWPPPs, it is very likely that that soil will still be susceptible to

⁷ In addition to complying with this provision, the Applicant must also comply with the City’s Watershed Regulations, which incorporate the standards set forth in the DEC SPDES Permit for Stormwater Discharges from Construction Activities, GP-93-06. See 10 NYCRR § 128-3.9(b)(3); 15 RCNY § 39(b)(3). Like the current DEC standards, GP-93-06 allows for only 5 acres of soil disturbance at one time. GP-93-02, Appendix E, Paragraph E.1.

erosion because the Applicant has failed to outline adequate stabilization techniques to mitigate erosion impacts on the site's steep slopes.

Offer of Proof: This legal argument requires no factual proof beyond the content of the DEIS cited above. The Expert Panel will be available to testify regarding the sedimentation impacts that will result if the 5-acre rule is not applied to the Applicant's construction activity.

Sub-Issue B. The Applicant's Planned Use of Level Spreaders on Slopes Greater than 10% During the Construction Phase Contravenes the Applicable Standards

Discussion: The Applicant has improperly proposed using level spreaders to discharge from its temporary stormwater detention ponds on steep mountainous slopes during the construction phase. This issue is "substantive" because the Draft SPDES Permits require the Applicant to comply with all provisions of GP-02-01. GP-02-01 requires erosion control plans to comply with the *New York Standards for Erosion and Sedimentation Control* (commonly referred to as the "Blue Book"). The Blue Book only allows the use of level spreaders "where the area below the level lip is uniform with a slope of 10% or less and the runoff will not re-concentrate after the release." See Blue Book at 7A.13. The Applicant will be discharging the stormwater from its level spreaders on slopes greater than 10% and, in some cases, on slopes as great as 60%. This issue is "significant" because the Applicant must provide for an alternate method of discharging stormwater from its detention ponds.

Generally, level spreaders are used in order to discharge stormwater in a shallow, unconcentrated flow or sheet flow, thereby mimicking the natural flow of rainwater. The Applicant plans to use these devices to prevent erosion during the construction phase. However, the Applicant's proposed use of level spreaders on steep slopes will result in the exact opposite effect. The stormwater discharged from the Applicant's proposed level spreaders will likely

form definitive channels that will intermingle with existing intermittent and ephemeral stream channels. This will increase erosion, particularly on the steep slopes of the Big Indian site. These channels also have the potential of short-circuiting the Applicant's construction phase stormwater and erosion control plans by carrying stormwater flow in unanticipated directions. Unless the Applicant redesigns the outfalls from the detention ponds, the SWPPPs are fundamentally flawed and cannot be the basis for SPDES permits. DEP SEQRA Comments, § IV a.10.

Offer of Proof: The Expert Panel will testify to the Applicant's proposed use of level spreaders on steep slopes during the construction phase and its corresponding water quality impacts. As set forth in the DEP SEQRA Comments:

- The DEIS states that level spreaders will be used to discharge stormwater from detention ponds during the construction phase at Big Indian. Based on the locations of these ponds, it is clear that some of the outfalls will be on slopes of 30-50%.⁸ DEP SEQRA Comments, § IV a.10; Appendix C-1, at 7.
- Flows discharged from these devices will reconcentrate below these level spreaders and therefore likely enter existing channels and/or erode new unstable channels, causing increased sedimentation to the Ashokan and its headwaters. Id.

Sub-Issue C. The Applicant Must Provide a Complete Erosion Control Plan for the Entire Construction Site

Discussion: The Applicant has not set forth a comprehensive, detailed erosion control plan for the entire developed area and therefore has marginalized impacts to areas that are particularly sensitive to erosion. This issue is “substantive” because GP-02-01 requires the Applicant to “provide a construction phasing plan describing the intended sequence of

⁸ Because, as discussed in Sub-Issue C below, the Applicant has not met its burden to provide adequately detailed erosion control plans in the SWPPPs, we cannot specifically assess the slopes at the actual locations of the level spreaders at this point.

construction activities” as well as “to identify and show on a site map/construction drawing(s) the specific location, size and length of each erosion control strategy.” GP-02-01 Pt. III.D.2 (4) & (8). Without a comprehensive erosion control plan, it is impossible to determine whether the Applicant can meet the applicable regulatory criteria. The issue is “significant” because the SPDES permits cannot be granted in the absence of comprehensive erosion control plans.

Instead of providing erosion control plans for the entire Project, the Applicant proposes specific erosion plans only for a single portion of the site – the area around Giggle Hollow Road and Big Indian Plateau. The erosion control plans for this sensitive portion of the proposed development certainly warrant attention and point out the potential for serious impacts on nearby water bodies: here, the Applicant plans to engage in extensive cutting and filling on 60-70% slopes. Although some details for Giggle Hollow are included as a model for a Project-wide erosion control plans, the Giggle Hollow plan itself lacks sufficient detail to demonstrate that “there will be no increase in suspended, colloidal and settleable solids” in the Ashokan or its headwaters. See GP-02-01 Pt. I.2 and DEP SEQRA Comments, § IV c.1-4.

Offer of Proof: The legal argument that, in the absence of erosion control plans for the entire site, the SWPPPs (and therefore the SPDES Permits) do not meet the applicable standards requires no factual proof. With respect to the inadequacy of the erosion control plans proposed for Giggle Hollow, the Expert Panel will provide testimony on, as well as provide examples of, developed areas that require special erosion control measures. As explained in the DEP SEQRA Comments:

- Although road cuts and golf course fill for fairway 16 will create a disturbance approximately 260 feet long on a slope of 60-70 % along the Giggle Hollow Road, the Applicant has not accounted for groundwater seeps that should be expected to be exposed by road cuts. DEP SEQRA Comments, § IV c.4; Appendix C-1, at 9; Appendix C-2, at 3.

- Stormwater management plans for this area do not account for potential re-concentrated flows from the stormwater discharges initiating as “overland flow” from level spreaders located on steep terrain uphill of the Giggle Hollow Road. Id.

Sub-Issue D. The Applicant Must Re-Design and Supplement the Erosion Control Portions of its SWPPPs

Discussion: As noted in Issue One above, the Applicant’s current erosion control plans are based on inadequate modeling and therefore are not designed for the actual volumes and velocities of stormwater runoff that will occur at the site during construction. This issue is “substantive” because it is likely that implementation of the Applicant’s current plans will result in an increase of turbidity and settleable solids in the affected water bodies. Neither an individual nor a general SPDES Permit can be issued if such degradation will result from a permitted discharge. See GP-02-01 Pt. I.A and 6 NYCRR § 750-2.1(b). The issue is significant because, if any SPDES permit is to be issued, the Applicant must significantly re-design the SWPPPs in order to conform to the applicable standards.

First, as discussed in Issue One above, the Applicant has failed to design a plan that will accommodate the actual volume of runoff from the Project site. As discussed above, the Applicant’s errors in running the WinSLAMM model for the Project incorrectly predict lower volumes of runoff than will in fact occur at the site. Thus, the mechanisms designed by the Applicant will not be able to effectively prevent erosion from occurring throughout the Project site during construction. The Applicant must redesign the erosion control portions of the SWPPPs after reevaluating the amount and velocity of, and pollutant loadings in, the runoff from the Project site. See DEP SEQRA Comments, § IV a.1-12.

Second, as discussed in Issue Two above, the Applicant has failed to identify certain watercourses on and adjacent to the Project site. Many of these watercourses would

affect the design of the erosion control mechanisms called for in the SWPPPs. For example, discharges from the temporary stormwater basins will likely increase the size and flow of these ephemeral streams, both on and below the Project site. The SWPPPs must take these impacts into account or else these channels will cause additional erosion. See DEP SEQRA Comments, § IV a.5.

Third, the erosion control technologies that the Applicant relies upon for stabilizing exposed areas once regrading is complete are not appropriate for use on the slopes of those areas. As a result, even after the SWPPP calls for areas of the site to have been stabilized – and thus allows for new areas to be exposed – the purportedly stabilized areas will remain vulnerable to erosion during storms. Thus, the Applicant has failed to demonstrate the adequacy of its erosion control plan for preventing sedimentation in the affected watercourses. See DEP SEQRA Comments, Appendix C-2, at 5.

Offer of Proof: At the issues conference, the Expert Panel will be available to testify about the following deficiencies in the Applicant's Erosion and Sedimentation Control Plans as identified in the DEP SEQRA Comments:

- The Applicant's modeling of stormwater runoff for purposes of designing erosion controls is fundamentally flawed as the Applicant has not submitted an accurate depiction of stormwater volume, design points, or subcatchments. Thus, these stormwater controls will not prevent erosion at the Project site during the construction phase. They must be re-designed with proper data in order to function properly. DEP SEQRA Comments, § IV a.; Appendix C-1.
- As set forth in the Offer of Proof for Issue Two above, the Applicant has not accurately mapped watercourses on the Project site. Therefore, the impact that these watercourses will have on the design of the construction phase stormwater and erosion control plans has not been determined. Furthermore, erosion impacts to these watercourses is also uncertain at this time. DEP SEQRA Comments, § IV a.5; Appendix C-4, at 5.

- As set forth in the Offer of Proof for Issue Three, Sub-Issue B, the Applicant’s proposed use of level spreaders will increase, rather than reduce, the likelihood of erosion and sedimentation impacts in the surrounding water bodies. DEP SEQRA Comments, § IV a.10; Appendix C-1, at 7.
- As set forth in the Offer of Proof for Issue Three, Sub-issue C, the Applicant has not designed erosion controls for areas that are particularly sensitive to the effects of erosion. As most of these areas are located on the Big Indian site, the lack of specific plans will likely result in increased sedimentation to the impaired Ashokan. DEP SEQRA Comments, § IV c.1, 2, 4; Appendix C-1, at 9; Appendix C-2, at 3.
- The Applicant must provide erosion controls in areas where it plans to discharge its temporary stormwater ponds. DEP SEQRA Comments, Appendix C-2, at 2.
- The erosion control technologies that the Applicant relies upon for stabilizing exposed areas once regrading is complete are not appropriate for use on the slopes of those areas according to Statewide erosion control standards. Thus, even after the SWPPP calls for areas of the site to have been stabilized – and thus allows for new areas to be exposed – the purportedly stabilized areas will remain vulnerable to erosion during storms. Appendix C-2, at 4.

ISSUE FOUR: THE POST-CONSTRUCTION STORMWATER CONTROLS
IN THE SWPPPS ARE INADEQUATE TO PREVENT SERIOUS
DOWNSTREAM IMPACTS

Sub-Issue A. The Applicant’s Pesticide Risk Assessment Is Based upon an Erroneous Assumption about the Site’s Post-Development Site Conditions

Discussion: The LEACHM model the Applicant used to evaluate post-development pesticide transport was run using an inaccurate assumption about the depths of soils at the site after development. Because the Applicant’s modeling was based on significantly greater depths of soil than are in fact proposed at the site after construction, the model greatly overestimates the amount of pesticides that will be attenuated prior to transport to surface and groundwater. See DEP SEQRA Comments, § IV b.1. This issue is “substantive” because DEC Staff cannot, under 6 NYCRR § 750-2.1(b), issue a SPDES permit if that permit is based on

insufficient or flawed factual data. The Wildacres Draft SPDES permit sets forth concentration based effluent limitations that will be rendered meaningless if the Applicant's stormwater plan is implemented as designed. The Big Indian Draft SPDES Permit provides no concentration based effluent limits for the pesticides proposed for use, and so, as written, the permit provides no enforcement mechanism in the event that water quality standards (as established in 6 NYCRR § 703.5) or water quality criteria (as described in DEC T.O.G.S. 1.1.1) are exceeded in surface or groundwaters. See DEP SEQRA Comments, § IV d.6. As stated in Seven Springs, supra, "The corruption and degradation of this presently pesticide free source of drinking water, to any degree should be avoided." Id. at 57. The issue is significant because the Applicant must devise a plan that will ensure compliance with concentration-based effluent limitations as should be contained in the Draft SPDES Permits.

The problem with the Applicant's modeling of pesticide leaching to groundwater is that it was run using a default assumption of 2.5 meters of soil above the water table or bedrock. In fact, the Applicant's plans call for only 6 inches of topsoil on the golf course over gravel and sand underdrains, or, in some areas, other boundary conditions such as bedrock. Rather than allowing for some six feet of soil to act as a filter for pesticides, these conditions will likely channel pesticide-laden runoff into the micro-detention ponds and to surface water resources, or into bedrock fractures and then into groundwater. Thus, DEC, as the permitting authority, cannot issue either Draft SPDES Permit until the Applicant submits an accurate Pesticide Risk Assessment based on actual post-development site conditions.

Offer of Proof: Support for the City's conclusion that the Applicant's Pesticide Risk Assessment is flawed is set forth in the DEP Comments as summarized below. The Expert Panel will testify to the following at the issues conference:

- The Applicant’s pesticide groundwater transport model, LEACHM used soil profiles that were 2.5 meters in depth. However, the Applicant’s own grading plans for the golf courses indicate that there will be extensive cut and fill, and that crushed rock and underdrains will be placed below a 6 to 8 inch soil and turf layer. Thus, the soil profiles used in the model do not reflect the post-development soil conditions. It is therefore likely that the thin/turf layer and underdrains will short circuit the soil absorption process, transporting pesticides to bedrock fractures and/or the micro-detention ponds rather than leaching through 2-3 meters of soil above the water table. The models must be re-run to reflect the proper soil conditions. DEP SEQRA Comments, § IV b.1; Appendix C-1, at 17.

Sub Issue B. The Pesticide Monitoring Wells Set Forth in the Draft SPDES Permits Will Not Adequately Protect Groundwater Resources at the Site

The pesticide monitoring wells set forth in the Draft SPDES Permits will not ensure the protection of water quality. This issue is “substantive” because monitoring requirements in SPDES Permits must “reasonably characterize the nature of the discharge of the monitored pollutant flow.” 6 NYCRR § 750-1.13. Although this specific provision applies to the frequency of monitoring intervals, its language makes clear that monitoring requirements must be able to actually detect pollutants. Thus, water quality monitoring must not only occur on a regularly scheduled basis, but samples must be taken from sources that actually reflect any water quality impacts that are occurring. This is especially important when the monitoring requirement is designed to protect drinking water and sensitive trout-spawning habitat from pesticides which can harm human and aquatic life if not detected. The Draft SPDES Permits at issue here, however, designate groundwater monitoring wells that are entirely insufficient to detect such impacts. This issue is significant because it will require a major modification of the Draft SPDES Permits.

As explained in Sub-Issue A above, pesticide-laden stormwater infiltrating the soils on the site will be intercepted by underdrains some 6-8 inches below the surface. Two of the four wells designated in the Applicant’s SPDES Permits are installed into bedrock 400-700

feet below the golf course; they will not serve as adequate monitoring wells because pesticides are unlikely to reach that deep into the aquifer. To monitor infiltration and pesticide contamination of groundwater, the Applicant should use shallow overburden wells. Moreover, only 15 of the 31 pesticides listed on the SPDES permits can be analyzed by currently Certified Laboratory methods. The SPDES permits should include conditions requiring the Applicant to submit an analytical method validation package for those pesticides that cannot currently be analyzed.

Offer of Proof: The Expert Panel will be available to elaborate on the DEP SEQRA Comments to demonstrate:

- Two of the wells proposed for groundwater are deep bedrock wells and are not located appropriately to monitor potential pesticide contamination in the water of the state. The location of the remaining wells mentioned could not be determined. Appendix C-1, at 17.

Sub-Issue C. The Applicant Cannot Use Level Spreaders At Big Indian During the Operation Phase

Discussion: The Applicant's plan to discharge stormwater from its operation phase micro-detention ponds not only violates the Blue Book's technical standards, but will also create point source discharges on the Big Indian site. This issue is "substantive" because 6 NYCRR Part 750 prohibits the discharge of stormwater through point sources without first obtaining an individual SPDES Permit. The Applicant's current Draft SPDES Permits do not treat the discharges of point sources at Big Indian as individual permitted outfalls. This issue is significant because it will require the Applicant to materially revise its current Big Indian Draft SPDES Permit.

The Applicant has not provided specific designs for the outfalls from most of the micro-detention ponds. In at least one instance, however, the Applicant proposes to use a level

spreader as an outfall once construction of the site is complete. The DEIS suggests that the Applicant may be planning to use level spreaders more broadly for these outfalls. See DEP SEQRA Comments, § IV a.10; Appendix C-1, at 7. As described in Issue Three above, the Applicant's use of level spreaders on steep slopes will likely result in concentrated intermittent stream channels at the Big Indian site. Definitive stream channels are considered point sources under 6 NYCRR § 750-1.2(65). These point sources will likely discharge into the waters of the United States, including the jurisdictional stream described in Issue Two. Therefore, the Big Indian SPDES permit must, like the Wildacres SPDES permit, contain specific effluent limitations and monitoring requirements for its stormwater detention ponds. Correcting this incongruity in the Draft SPDES Permits is the only way to ensure that the Ashokan and its headwaters are protected from water quality impacts from erosion, phosphorus and pesticides.

Offer of Proof: The DEP SEQRA Comments support, and the Expert Panel will be available to testify about, the following conclusions:

- Under the Applicant's current plans for long-term stormwater management in its SWPPPs, it will use level spreaders to discharge stormwater from its detention ponds. The discharge of these level spreaders will re-concentrate into definitive stream channels. DEP SEQRA Comments, § IV a.10; Appendix C-1, at 7.
- These definitive stream channels will enter jurisdictional surface waters as point sources.

WASTEWATER ISSUES

ISSUE FIVE: DISCHARGES FROM THE WILDACRES AND BIG INDIAN WASTEWATER TREATMENT PLANTS TO THE IRRIGATION PONDS MUST BE SUBJECT TO THE SAME EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS AS THE DISCHARGES TO SURFACE WATERS

Discussion: The monitoring requirements and effluent limitations for the irrigation ponds are inexplicably less stringent than the effluent limitations for the surface water

discharges even though they will be receiving the effluent from the same WWTPs. Specifically, the irrigation ponds do not have effluent limitations or monitoring requirements for pH, Biochemical Oxygen Demand, settleable solids, and residual chlorine. This issue is “substantive” because there is no justification for treating the same WWTP differently depending on where the effluent is directed. The Applicant could essentially bypass treatment units at the WWTPs that are required for the Draft SPDES Permits by discharging to the irrigation ponds instead. Moreover, there is no indication that the wastewater will be any less harmful to the environment if it is discharged into the irrigation pond rather than into surface waters. As described in Issue Four, Sub-Issue B, above, with respect to water containing pesticides, when wastewater is used for irrigation of the proposed golf courses, it will likely filter through the 6 to 8 inches of topsoil and thereafter re-concentrate. It will then discharge into either surface waters or a stormwater detention pond. This issue is significant because it requires a change in the current permit conditions.

Offer of Proof: The Expert Panel will testify to the impacts of the following conclusion set forth in the DEP SEQRA Comments:

- Neither Draft SPDES permit has surface water effluent limits for the WWTP discharges to the irrigation ponds. This irrigation water would flow into the stormwater collection and control system after being applied to the golf courses, in the same manner as would natural precipitation. Therefore, if there are bypasses of treatment components at the WWTPs, the effluent could still be discharged to the irrigation ponds without violating the SPDES permits. That is, the SPDES permits as drafted would allow inadequately treated wastewater to be used as irrigation water. DEP SEQRA Comments, § IV. b.5.

ISSUE SIX: THE FLOW LIMITS SET FORTH IN THE DRAFT SPDES PERMITS DO NOT REFLECT THE ACTUAL AMOUNTS OF WASTEWATER THAT WILL BE GENERATED AT THE SITE.

There are several indications that the flow limitations set forth in the Draft SPDES Permits do not reflect the actual sewage flows at the Project site because the Applicant has incorrectly modeled the hydraulic loading estimates for both WWTPs. This issue is “substantive” because the effluent limitations in the SPDES Permits must be based on an accurate depiction of the proposed amount of discharge before they can be issued by DEC. 6 NYCRR § 750-2.1(b). This issue is “significant” because it will require a significant modification of a permit condition. Based on these errors, the Applicant must re-evaluate its calculations of total daily flow from these plants before DEC can issue these SPDES Permits.

Offer of Proof: The Expert Panel will testify to support the following conclusions in the DEP SEQRA Comments:

- The hydraulic loading tables for Big Indian and Wildacres include an error in the estimation of wastewater flow. The Applicant characterized the proposed flow for the ballroom/auditorium is 3 gallons per day (“gpd”) per seat. The DEC Standards for Banquet facilities is 20 gpd/seat. This would increase the sewage inflow at 4000 gpd for Big Indian (Appendix C-2 at 3) and 14,000 gpd for Wildacres (Appendix C-2 at 9).
- The Applicant has omitted the hydraulic loading estimates for various facilities on the Big Indian and Wildacres sites. The omitted facilities would increase the hydraulic load to Big Indian by an addition approximately 1700 gpd at each plant. Appendix C-4 at 3 (Big Indian), 10 (Wildacres).

**PART II:
THE APPLICANT'S DRAFT ENVIRONMENTAL
IMPACT STATEMENT**

OVERVIEW

When DEC, as lead agency under SEQRA, requires a DEIS be prepared, the sufficiency of that DEIS is an appropriate issue for adjudication. 6 NYCRR § 624.4(c)(i)(b). Here, the DEIS is insufficient for many reasons, as detailed in the DEP SEQRA Comments. Among other things, the DEIS fails to provide an adequate analysis of the potential for significant adverse environmental impacts resulting from induced growth associated with the Project. The DEIS also fails to identify or analyze a reasonable range of alternatives to the Project. In addition, because of the deficiencies identified in Part I above (and others discussed in the DEP SEQRA Comments), the DEIS fails to adequately analyze the impacts associated with stormwater runoff from the Project during and after construction as well as impacts relating to wastewater discharges from the Project. Each of these issues is substantive and significant under 6 NYCRR § 624.4(c).

ISSUE SEVEN: THE DEIS DOES NOT ADEQUATELY ANALYZE THE
ENVIRONMENTAL IMPACTS ASSOCIATED WITH INDUCED GROWTH
AND REGIONAL LAND USE CHANGES

Discussion: The DEIS concludes that there is no potential for the development of the Belleayre Resort to induce secondary growth that will adversely impact New York City's drinking water supply and the local environment. See DEIS, Section 7, p. 7-15. It is a curious and faulty conclusion, inconsistent with the argument trumpeted throughout the DEIS that the Project will result in significant economic benefits to the region and also, as demonstrated below, inconsistent with the predictions of appropriate modeling. A more accurate analysis must acknowledge that this Project is almost certain to induce population growth, housing

development and commercial development in the Project's economic impact areas. These accelerations will in turn spur increases in, among other things, impervious surfaces, lawns, phosphorus loads, fertilizer and pesticide use, stormwater flows, wastewater flows and water usage, all of which have the potential to adversely affect the region's water quality. See DEP SEQRA Comments, Sections VI and VII. This potentially significant adverse impact must be analyzed prior to the issuance of a SPDES permit. See Segal v. Town of Thompson, 182 A.D.2d 1043, 1046, 583 N.Y.S.2d 50 (3d Dept. 1992) (annulling negative declaration in which town failed to address future residential developments that would follow newly created water and sewer districts); see also 6 NYCRR § 750-2.1(b) (DEC may not issue a SPDES permit if that permit is based on insufficient or flawed factual data).

The DEIS' conclusion that there are no potential significant adverse impacts expected from induced growth associated with the Project rests, in part, on three case studies which are intended to provide an indication of what kind of potential for such impacts actually exists. However, the case studies are only tangentially analogous to the Belleayre Resort. Two of the case studies presented analyze the development of ski resorts, rather than golf resorts in proximity to ski mountains. See DEIS, Appendix 26, Ch. 6. The third, Greylock Glen in Massachusetts, see id., is not even an active project. None of the case studies presented in the DEIS examine induced growth patterns and impacts associated with an established resort destination of the size and scope of Belleayre Resort – a four-season destination that would include construction of two 18-hole golf courses, and a variety of lodging, restaurant and retail facilities. See DEP SEQRA Comments, § III.i.

As a result, the case studies presented in the DEIS do not provide NYCDEC with an understanding of the potential for induced growth impacts associated with this Project. A

look at other, analogous case studies reveals the potential for impacts from, among other things, improvement of roadway access during the early stages of development; development in and/or near the host communities tied to the availability of sewer service; capitalization by other developers on the increased tourism associated with the Project; the conversion of residential property to non-residential uses; the creation of housing communities to compete with the development; and rapid increases in housing and land pricing. See DEP SEQRA Comments § V and Appendix A.5. The DEIS' reliance on its case studies is both misplaced and misleading, resulting in an inadequate review of the Project's potential induced growth impacts.

The DEIS also based its conclusion on a model inappropriate for analysis of the Project's induced growth impacts. The DEIS utilized the RIMS II economic impact methodology to analyze the "multiplier" effect of increases in employment and spending that will result from the Project. This methodology provides a "snapshot" in time of how expenditures or employment in one industry ripples through the economy in multiple spending cycles. However, only a generalized perspective is provided. See DEP SEQRA Comments, Appendix B.2, pp.1-2. The REMI model utilized by DEP's consultants offers a more precise rendering of local and regional impacts. Id. at § VI.1. This model more accurately predicts that the economic "shock" of the Belleayre Resort will lead to higher wages and a population increase, which will in turn create more demand for housing and services, and result in adverse environmental impacts. Id. at Appendix B.2, pp. 8-12.

Most importantly, the DEIS fails to adequately account for impacts arising from the demand for new residential housing and the development of additional commercial space along NYS Route 28. The DEIS states that, despite the new employment and recreational opportunities the proposed development would provide, there will be no new residential units

constructed in the primary market area, other than those proposed by the developer. See DEIS, Section 7, pp. 7-14-15. The conclusion is unsupported, and flies in the face of common sense. The REMI model, on the other hand, predicts 158 new residences in the primary market area will result from the Project in its first decade, more than doubling the rate of housing growth recorded in the 1990s. See DEP SEQRA Comments, § VI.3 and Appendix B.2, Table 6. An additional 155 residences will be built outside the primary market area. Id. at § III.i and Appendix B.4, p. 2. Such development will lead to significant adverse impacts on natural resources that were not identified or analyzed in the DEIS. See DEP SEQRA Comments § III.i; Appendix C.5.

The DEIS' analysis of new commercial development in the NYS Route 28 corridor is similarly flawed. The DEIS indicates that the Project will induce a demand for an additional 76,600 square feet of commercial space. See DEIS, Appendix 26, p. 7-6. However, the DEIS dismisses the likelihood that new commercial development would occur along NYS Route 28, and argues instead that all commercial development will funnel into existing spaces in nearby villages. However, there would be significant development pressure to accommodate at least some of this induced demand along NYS Route 28, due to the desire for enhanced access, parking and visibility not available in villages and hamlets. See DEP SEQRA Comments, § VI.4. Such pressure may lead to the conversion of existing residential spaces into commercial spaces, as well as new developments. These new developments, in close proximity to the Project site, will result in impacts on headwater streams in the vicinity of the Project, such as stream temperature alterations and contamination from stormwater runoff. See Appendix C.4, pp. 3, 5.

Thus, increases in impervious surfaces and natural resources modifications resulting from new residential and commercial development have not been considered in the DEIS. The DEIS' failure to analyze the potentially significant adverse impacts associated with

secondary residential and commercial development is similar to the insufficiency found in the Negative Declaration overturned in Segal v. Town of Thompson. In that case, private companies had provided sewage service to about 600 homes. Due to financial difficulties, new sewer and water districts were created with the capacity to serve more users. Opponents to the creation of the districts produced evidence that there were approximately 1300 lots in the area, and the potential for 800 new homes to be built. The court found that the new districts would have more than doubled the number of homes that could be served in the area, and that the environmental review failed to address the effect the new capacity would have on the rate of development of the vacant lots within the districts. See Segal v. Town of Thompson, *supra*; see also Schulz v. New York State Dep't of Env'tl Conservation, 200 A.D.2d 793, 606 N.Y.S.2d 459 (3rd Dep't 1994) (negative declaration failed to take "hard look" at potential adverse effects of construction of sewer system, or creation of material demand for sewer system). Similarly, here the Applicant fails to adequately identify and analyze the potential for new housing and commercial development that will follow on the heels of the resort. In particular, the Project has been predicted to induce 323 housing units and the conversion of between 975 and 1,625 acres of land for residential uses, in addition to commercial development along Route 28. See DEP SEQRA Comments, § VII.1. This induced growth could result in significant adverse impacts not identified or analyzed in the DEIS. As mentioned above, such impacts would include substantial increases in impervious surfaces, lawns, phosphorus loads, fertilizer and pesticide use, stormwater flows, wastewater flows and water usage.

The environmental review of induced growth impacts is clearly insufficient. There is even evidence that induced growth has already begun, and that competing developments are already being pursued on speculation. A hotel in Margaretville, for instance, is pursuing an

expansion which would reportedly add more than 60 rooms. In addition, a cluster housing development has been proposed in Pine Hill. See DEP SEQRA Comments, § VI.6; Appendix B.4, p. 3. Because the DEIS fails to provide an adequate analysis, the issue is both substantive and significant.

Offer of Proof: The data that demonstrates that the DEIS fails to adequately analyze induced growth impacts associated with the Project is summarized below and in the DEP SEQRA Comments. The Expert Panel is available to testify at the issues conference and future adjudicatory hearings.

- Case studies included in the DEIS are not applicable; analogous case studies demonstrate the potential for significant adverse environmental impacts from induced growth. DEP SEQRA Comments, § III.i, Appendices A.4 and A.5.
- Approximately 160 new residential units in the economic impact area will result from the Project in the next 10 years, and an addition 155 over 20 year, resulting in the conversion of between 975 and 1,625 acres of land for residential uses. DEP SEQRA Comments, § III.i, Appendix B.2., Appendix B.4 at p. 3.
- Natural resources modifications could result in increased pesticide and nutrient loading, including as much as 15 kg/year of additional phosphorus loadings. DEP SEQRA Comments, § VII.5, Appendix C.4, pp. 5-6.

ISSUE EIGHT: THE ANALYSES OF SMALLER SCALE PROJECT
ALTERNATIVES AND OF THE NO IMPACT ALTERNATIVE ARE
INADEQUATE

Discussion: A DEIS must include “a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed.” 6 NYCRR § 617.9(b)(5)(v). The range of alternatives that may be analyzed include, among other things,

alternative sites, scale or magnitude, design, timing, and use. Id. Ultimately, a choice among alternatives must be based on an awareness of all reasonable options. See Town of Dryden v. Tompkins County Board of Representatives, 78 N.Y.2d 331, 333-334, 574 N.Y.S.2d 930 (1991). Although the degree of detail required will vary with particular circumstances, a rule of reason applies: the agency must consider a reasonable range of alternatives to the specific project. Id.; see also, Matter of Jackson v New York State Urban Dev. Corp., 67 N.Y.2d, 400, 422, 503 N.Y.S.2d 298 (1986). Here, the DEIS fails to offer DEC a reasonable range of alternatives to consider in evaluating the environmental impacts of the Project. Indeed, the DEIS does not analyze the environmental impacts of any development alternative, including the potential for an alternative to mitigate the Project's potential adverse impacts as required both by SEQRA and by the Final Scoping Document. Therefore, as a matter of law, the DEIS is inadequate.

The DEIS includes an Economic Evaluation Study, the purpose of which was to determine whether either of the two central components of the proposed development (Big Indian Plateau or Wildacres Resort), or any of the other major components contained therein could be eliminated without adversely affecting the feasibility of the remaining component. See DEIS, Section 5.3.4; Appendix 27. The analysis posits five scenarios: 1) all four properties are constructed; 2) elimination of the golf club at Wildacres; 3) elimination of the golf club at Big Indian; 4) elimination of all the Wildacres components; and 5) elimination of all the Big Indian components. See DEIS Appendix 27, HVS International Report, p. 1-6. The analysis concludes that the proposed Project, as planned, is necessary to achieve economic feasibility according to industry standards. See id. As a result of this conclusion, the DEIS forgoes any environmental analysis of any of the proposed alternatives.

The DEIS' alternatives analysis is inadequate. The DEIS states, without citing to a source, that the other options are not feasible because "hotel and resort IRRs [Internal Rates of Return] generally enter into feasible territory once they exceed approximately 14%." DEIS, Appendix 27, HVS International Report, p. 1-9 (emphasis added). According to the calculations made in the DEIS, although each alternative would turn a profit, only the full development would exceed that threshold. However, as explained below, the analysis relies on insufficient data and, as a result, underestimates the feasibility of alternatives.

First, the DEIS projects unrealistically high wages for workers who will operate the Belleayre Resort. See DEP SEQRA Comments, § VIII, Appendix B.1, Table 18. According to the DEIS, workers will earn wages ranging from about 16% - 165% more than workers with comparable jobs in the Tri-County Area. Id. It is unreasonable, and inconsistent with standard economic analysis, to assume that the company that eventually builds and operates the Resort will volunteer to pay wages so drastically out of proportion to what the market demands. Assuming that the Resort pays its workers something closer to market wages, the costs of each alternative would decrease and the potential yield of each would necessarily increase. Thus, each alternative – including the Project itself – would appear more feasible.

Second, the Applicant failed to conduct feasibility analyses of alternatives involving elements of the Project from the different "phases" identified in the DEIS. That is, the Applicant did not analyze the IRRs for the golf and hotel phase aggregated with the IRRs for the detached housing phase. Therefore the proposed alternatives that are rejected as "infeasible" do not represent the true range of alternatives that should have been analyzed. See DEP SEQRA Comments, § VIII. The data clearly show that the IRRs are far higher for the detached housing phase than for the golf and hotel phase. See DEIS, Appendix 27, HVS International Report,

Tables 1-2, 1-3, 5-3, 6-18. In fact, the DEIS maintains that the success of the Project depends to a large measure on the profitability of the detached housing phase. See DEIS, Appendix 27, HVS International Report, p. 1-4. However, the DEIS ignores the positive effect the detached housing phase would have on the feasibility of scaling back other Project elements, including the potential that the IRR of a reduced development would rise above the feasibility threshold. Had the Applicant investigated the feasibility of other combinations of proposed Project elements, it would have identified feasible alternatives to be reviewed in the DEIS.

The DEIS itself makes clear that reducing one or more components of the proposed development could be a viable, though perhaps not as lucrative, investment. See Appendix 27, HVS International Report, Tables 1-2,1-3, 5-3, 6-18. SEQRA does not provide that only the most profitable alternative formulation of a proposed Project need be considered, especially where, as here, the very scale of the proposed Project creates impacts that could be mitigated by reducing the scale. Therefore, an environmental analysis of the smaller projects is required to allow for a full comparative assessment of alternatives. See In the Matter of Dalrymple Gravel & Contracting Co., Inc., NYSDEC Application No. 8-4642-00101/00001-0, Decision of the Commissioner, June 24, 2003 (adequate alternative analysis to permit comparative assessment included “description of each site and an examination of various environmental and economic factors related to each project including ecological resources, groundwater, surface water, noise impacts, air quality, visual resources, archaeological impacts, community impacts, property value impacts, and traffic impacts”).

In addition to eliminating each of the four development alternatives, the DEIS does not comport with the required Scope. Section 5.3 of the Final Scoping Document requires that the DEIS “include a discussion of a different mix of resort components.” Beyond

eliminating either Wildacres or Big Indian, or one of the golf courses, the DEIS attempts no assessment of a mix of components. For example, the DEIS does not consider the elimination of detached lodging units at either Wildacres or Big Indian, or the elimination of Belleayre Highlands and/or Highmount Estates. Other mixtures of Project components could also be assessed. The Scope requires such an assessment, particularly in light of the Applicant's flawed position that none of the handful of development alternatives identified in the DEIS is financially feasible.

Furthermore, the DEIS does not consider any alternative that would allow for any or all the Project's components to be constructed on a smaller scale; that is, all four properties are built, but with fewer hotel rooms, fewer detached lodgings, fewer amenities, etc. The DEIS must include an alternatives analysis that examines alternative sizes to provide for a reasonable range. See, e.g., In re Dalrymple Contracting Company, Inc., DEC Comm'r Interim Decision, Sept. 24, 2002); see also In Sutton Area Community v. Board of Estimate, No. 10147/89, at 6 (Sup. Ct. N.Y. Co. Apr. 18, 1990) (court noted that, as a direct result of the environmental review process, the approved project reflected a lower density alternative to that originally proposed), aff'd, 165 A.D.2d 456, 568 N.Y.S.2d 35 (1st Dept.), rev'd on other grounds, 78 N.Y.2d 945, 573 N.Y.S.2d 638 (1991); Grape Hollow Residents' Ass'n v. Beekman Planning Bd., No. 1986/284 (Sup. Ct. Dutchess Co. Oct. 16, 1986) (EIS failed to consider reasonable smaller-sized project where opponents of a subdivision preferred a smaller number of units).

The DEIS' failure to compare the environmental impacts of even a single development alternative with those of the proposed Project necessitates the identification and analysis of additional alternatives. Without a meaningful analysis that compares the

environmental impacts of the proposed Project to those of other development options, the DEIS makes a mockery of SEQRA's mandate to consider a range of reasonable alternatives.

A DEIS must also analyze the no action alternative. 6 NYCRR § 617.9(b)(5)(v). While the DEIS does include a partial analysis of the no action alternative – including interpretations of its impacts on land use, local and regional planning goals, and socioeconomic benefits – the DEIS does not address the environmental benefits that would result from the no action alternative. See DEIS, Section 5.10. It is incumbent upon the Applicant to examine just such environmental benefits in comparison with the impacts of the proposed development. “The EIS preparer must consider the capability of a site to environmentally improve, recover, or allow for restoration and remediation in the absence of the proposed project. This change goes beyond the characterization of the site as it appears today, which may preclude opportunities for site enhancement and increased value, and requires a balancing of the future no action alternative against the project proposal.” Gerrard, Ruzow and Weinberg, Environmental Impact Review in New York § 5.14 at 2-5; see also In the Matter of the Application of Glen Lake Protective Association, NYSDEC No. AV-5-3-97, Issues Ruling, 12/30/97 (where project posed potential threat to environment, petitioners raised a substantive and significant issue where it offered proof that the environmental benefits of the no action alternative had not been adequately analyzed).

Finally, the DEIS must analyze alternative stormwater management practices, wastewater treatment technologies, water supply techniques and services and access locations and internal roadways, as required by the Final Scoping Document. As discussed in Issues One through Four, above, there are significant unmitigated impacts associated with the Project's SWPPPs.

Offer of Proof: This legal argument requires no factual proof beyond the content of the DEIS cited above. For the reasons presented above, the DEIS alternatives analysis is inadequate, and SEQRA requires that the Applicant prepare an environmental analysis of alternatives. The Expert Panel will provide testimony regarding these shortcomings.

ISSUE NINE: THE APPLICANT HAS FAILED TO MITIGATE THE ANTICIPATED POST-DEVELOPMENT PHOSPHORUS LOADING FROM THE PROJECT SITE

The Applicant acknowledges that the stormwater management facilities set forth in the SWPPPs will not fully mitigate post-development phosphorus loads. The Applicant predicts that the Project will increase the total amount of phosphorus in the Ashokan and Pepacton by 48 kg/yr and 22 kg/yr, respectively. See DEIS, Appendix 10A, at 1. This approach is unacceptable because it does not mitigate a significant adverse environmental impact – all the more so because the increase in phosphorus loading will actually be significantly greater than the Applicant acknowledges. As discussed in Issue One above, because the Applicant’s estimates of pre-construction phosphorus loading from the site are incorrectly high, the estimates of the incremental phosphorus post-construction are incorrectly low. The issue is “substantive” because this failure to mitigate identified impacts violates the Applicant’s obligations under SEQRA. This issue is “significant” because it requires the Applicant to re-design its operation phase SWPPPs to fully mitigate post-development phosphorus runoff at the Project site.

SEQRA requires that significant adverse impacts identified in the DEIS be mitigated the “maximum extent practicable.” See In re MTF Wantagh Dev. Corp. (DEC Comm’r Decision, Sept. 1, 1993) at 1; see also 6 NYCRR § 617.9(b)(5)(iii)(‘b’). Indeed, a DEIS is substantively deficient if it does not propose or discuss adequate measures to mitigate adverse environmental impacts. See Long Island Pine Barrens Soc’y v. Town Bd., 290 A.D.2d 448; 736

N.Y.S.2d (2d Dep't 2002) (holding that a DEIS for a golf course project because developer failed to propose adequate mitigation measures). While a developer need not consider every conceivable mitigation measure in its DEIS, it must at least employ a "rule of reason" in its discussion of prospective mitigation strategies. See Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d. 400, 422 (1986). Here, the Applicant has violated that standard because it has refused to propose or even discuss a strategy for reducing post-development phosphorus runoff to pre-development levels.

Instead of proposing more comprehensive measures that would negate the phosphorus loads associated with its Project, the Applicant makes repeated reference to the unallocated total phosphorus loads for each reservoir, suggesting that the reservoirs can assimilate the increased load from the proposed development. See DEIS, Appendix 10A, at 1. This analysis does not comply with the Applicant's duty under SEQRA to mitigate adverse impacts associated with its Project to the "maximum extent practicable." MTF Wantagh Dev. Corp., at 1. The Applicant has provided no discussion of its decision to not fully mitigate phosphorus loads. In fact, the Applicant seems intentionally to have avoided such a discussion by designing SWPPPs focused on reducing of water temperature rather than on mitigating post-development phosphorus loads. See DEP SEQRA Comments, § IV b.1. While temperature concerns are important, the Applicant makes no showing that mitigating phosphorus and reducing temperature cannot be achieved in tandem. The Applicant has instead engaged in an improper balancing of adverse environmental impacts that is not permitted under SEQRA.

Offer of Proof: The legal insufficiency of the Applicant's failure to fully mitigate the post-development increase of phosphorus does not require a separate offer of proof.

However, DEP will testify to the fact that post-development phosphorus runoff will be significantly greater than the Applicant currently projects. See Issue One above.

CONCLUSION

For the reasons discussed above, the Draft SPDES Permits should not be issued in their current form and the environmental review of the Project is inadequate. The current stormwater plans are poorly designed and will not protect water quality. The erosion control plans are incomplete and not stringent enough to prevent further sedimentation in the impaired Ashokan. The analyses of secondary growth is duplicitous, promising all the benefits of economic growth without acknowledging any of its corresponding burdens. In sum, the DEIS, while thick, is disturbingly thin on substance, especially in areas where it should be highly detailed. The DEIS and Draft SPDES Permits require the rigorous scrutiny that an adjudicatory hearing provides. At this hearing, the City will provide expert testimony on each of the substantive and significant issues set forth below and will show that DEC cannot issue the Draft SPDES permits or issue findings to approve any aspect of the Project based on the Applicant's current plans.

Dated: New York, New York
April 22, 2004

MICHAEL A. CARDOZO
Corporation Counsel of the
City of New York
100 Church Street, Room 6-121
New York, New York 10007
(212) 788-1585

By: _____
Hilary Meltzer, Senior Counsel
Environmental Law Division

Of Counsel
Michael Burger
Daniel Greene

Attachment A

NEW YORK CITY'S PANEL OF EXPERT WITNESSES

Charles Cutietta-Olson is the supervisor of Water Quality Impact Assessment for the NYCDEP Bureau of Water Supply. Mr. Cutietta-Olson has a Masters of Science degree in Environmental Science from Long Island University/C.W. Post Campus. His responsibilities at NYCDEP include design of short and long-term monitoring programs sampling surface water, ground water, and aquatic macroinvertebrates to study and report on impacts from land use changes and long-term trends in water quality. His expertise also includes analysis of environmental data using parametric and non-parametric methods.

Joseph J. Damrath, CPESC is a Certified Professional in Erosion and Sediment Control certified by the CPESC Council with support from the Soil and Water Conservation Society and the International Erosion Control Association. Mr. Damrath is an Environmental Analyst with the West of Hudson Engineering Project Review Group in the NYCDEP Bureau of Water Supply. He has extensive experience reviewing specific aspects of proposed development projects in the City's watershed, including stormwater pollution prevention plans, hydrogeology, wetland assessment, stream assessment, and soil analysis. He also regularly reviews environmental assessments and impact statements prepared pursuant to SEQRA.

Brenda Drake, P.E. is a professional engineer licensed by the States of New York and Pennsylvania. Ms. Drake is the supervisor of the West of Hudson Engineering Design and Review Group in the NYCDEP Bureau of Water Supply. She has extensive experience evaluating all aspects of proposed development projects in the City's watershed, including stormwater pollution prevention plans, wastewater treatment plants, and subsurface sewage treatment systems. She also regularly reviews environmental assessments and impact statements prepared pursuant to SEQRA.

Jeffrey Donohoe is vice president of RKG Associates. His area of expertise is in the fiscal and economic impact analysis of major real estate development projects. Mr. Donohoe has completed numerous real estate market studies, financial feasibility studies, redevelopment plans, and fiscal/economic impact studies. He has an MBA from Bentley College in Waltham, Massachusetts.

Gregory J. Gromicko, P.E., MBA is a registered professional engineer in 10 States. Mr. Gromicko is a Project Manager for EA Engineering PC and has managed various aspects of water and wastewater design/build systems, as well as the installation, operation, and maintenance of many remediation systems. He has a B.A. in chemical engineering from Pennsylvania State University and an MBA from the University of Pittsburgh.

Timothy L Negley is on the staff of EA Engineering PC and has extensive experience analyzing the hydrology of forested watersheds. Mr. Negley has a B.S. in Natural Science from Cornell University and an M.S. in Marine, Estuarine, and Environmental Science from the University of Maryland.

Michael A. Principe, Ph.D. is the NYCDEP Deputy Commissioner for the Bureau of Water Supply. Dr. Principe is an experienced limnologist, a scientist specializing in the study of lakes, with expertise in the New York City water supply. He received a Bachelor of Science degree in Natural Resources from Cornell University in 1973, a Master of Science degree in Environmental Science in 1981 from the SUNY College of Environmental Sciences and Forestry, and a doctorate in Ecology and Limnology from the City University of New York in 1991.