

February 4, 2005

VIA HAND DELIVERY

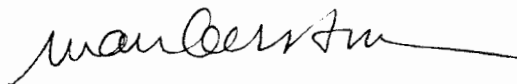
Honorable Richard R. Wissler
Administrative Law Judge
New York State Department of Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway
Albany, New York 12233

Re: Belleayre Resort at Catskill Park; Application Number 0-9999- 00096/00005

Dear Judge Wissler:

Enclosed please find the Catskill Preservation Coalition's Memorandum of Law in Support of the Watershed Inspector General's Petition for Amicus Party Status and Request to File a Late Petition.

Very Truly Yours,



Marc S. Gerstman, Esq.

Enclosure

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New York State Department of Environmental Conservation

In the Matter of the Application of

CROSSROADS VENTURES, LLC

For the Belleayre Resort at Catskill Park

**for permits to construct pursuant to the Environmental
Conservation Law**

MEMORANDUM OF LAW

**Submitted by the Catskill Preservation Coalition in Support of
the Watershed Inspector General's Petition for
Amicus Party Status and Request to File a Late Petition**

Application No. 0-9999-00096/00005

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**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Application of:

**Application No.
0-9999-00096/00005**

**CROSSROADS VENTURES, LLC
for the Belleayre Resort at Catskill Park Project
for permits to construct and operate pursuant to
the Environmental Conservation Law**

MEMORANDUM OF LAW

**Submitted by the Catskill Preservation Coalition in Support of the
Watershed Inspector General's Petition for
Amicus Party Status and Request to File a Late Petition**

I. Preliminary Statement

The Catskill Preservation Coalition (hereinafter, "CPC") submits this Memorandum of Law in support of the New York City Watershed IG's ("Watershed IG") Petition for *Amicus* Party Status and Request to File a Late Petition in the above captioned administrative proceeding. The Watershed IG's Petition satisfies the requirements of 6 NYCRR § 624.5(b)(1)(3).

The Petition sets forth the Watershed IG's unique role and qualifications to be granted *amicus* party status, and good cause for filing late. See e.g. In the Matter of the Applications of Hydra-Co Generations Inc. and Babcock & Wilcox Solvay Power Inc., Interim Decision of the Commissioner (April 1, 1988) (finding that the Department of Public Service's expertise regarding a matter under review was sufficient to establish "good cause" to allow a late filing and party status).

In addition, the Petition properly describes how the Watershed IG's participation will materially assist the Administrative Law Judge and Commissioner of the Department of Environmental Conservation ("DEC") in the determination of issues throughout the permit and State Environmental Quality

Review Act (“SEQRA”) proceedings regarding the proposed Belleayre Project at Catskill Park (“Project”). The Watershed IG’s participation will neither significantly delay the proceeding, nor unreasonably prejudice the other parties.

The New York City Watershed IG enjoys a unique status pursuant to the 1997 New York City Watershed Memorandum of Agreement (“MOA”) and Gubernatorial Executive Order No. 86 for the Year 1998. See Watershed IG’s Petition, Exhibit A. The MOA is an enforceable¹ agreement between several of the parties to this proceeding, which, in pertinent part, led to the adoption of the negotiated Watershed Regulations² by the New York City Department of Environmental Protection (“DEP”) pursuant to Public Health Law § 1100. MOA Article III. The Watershed Regulations adopted pursuant to the MOA were designed “[t]o ensure the continued, long-term protection of the City’s drinking water supply and minimize...adverse impacts on the Watershed communities.” MOA Public Comment and Review Notice, page 3. The Watershed Regulations were also designed “to work in conjunction with existing federal and state regulations and provide additional regulations tailored to this unique living watershed.” *Id.* Therefore, the Watershed IG’s responsibilities pursuant to the MOA equates into a strong interest in the statutes and regulations administered by the DEC and DEP relating to water quality and water quality impacts in the Watershed. See 6 NYCRR 624.5(b)(1)(ii).

The DEP, CPC and DEC all contend that water quality impacts from stormwater and the offered Stormwater Pollution Prevention Plan (“SWPPP”) must be adjudicated. The Watershed IG has a particularized interest in the New York City water supply and water quality impacts of the Project, and the issues presented by CPC, DEP and DEC for adjudication. The post of the Watershed IG was created for the express purpose of “enhanc[ing] current efforts to protect the New York City drinking water supply from activities that have the potential to

¹ MOA § 181 states that “[t]he respective commitments of the Parties in this Agreement are in consideration of each other, thereby making this Agreement a legally binding contract enforceable by any aggrieved Party...”

² The City of New York’s Petition for Full Party Status, dated April 23, 2004, states that “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.” Page 8.

adversely affect the New York City Watershed reservoirs and tributaries.” Executive Order No. 86.

Among the Watershed IG’s powers, duties and responsibilities, is “[t]o cooperate with any agency or department possessing regulatory authority relating to the use, operation and protection of the Watershed.” Executive Order No. 86 § 3e. Through the Petition, the Watershed IG will provide reasonable assistance to DEC, an executive agency, regarding DEC’s regulatory permitting and SEQRA authority over the Project, the size and scale of which is unprecedented and unparalleled elsewhere in the New York City Water Supply Watershed.

Lastly, the Watershed IG previously submitted to DEC, technical comments concerning the adequacy and scope of the Applicant’s Draft Environmental Impact Statement (“DEIS”), and specifically, the Project’s potential significant adverse impacts on New York City’s water supply and water quality. The Watershed IG’s comments were referred to repeatedly during the Issues Conference and introduced during the proceedings. See Letter of the Watershed IG, dated April 23, 2004; *and* TR 3327. Any suggestion that the Watershed IG’s recognized participation in the remainder of these proceedings will prejudice the Applicant or any other party is without merit, and fails to recognize the significance of the information which was newly developed during the Issues Conference relating to the Applicant’s estimation of the New York City Water Supply Watershed water quality and supply impacts.

The Watershed IG’s Petition for *Amicus* Party Status and Request to File a Late Petition should be granted in all respects.

II. The Watershed Inspector General is an Appropriate *Amicus* Party

DEC’s permit hearing procedures require that a person seeking *amicus* status in an administrative proceeding file a petition that meets the requirements of 6 NYCRR § 624.5(b)(1) and (3). A proposed *amicus* party must identify in the petition for party status, its “environmental interest in the proceeding; any interest

A. Environmental Interest

The Petition identifies the Watershed IG's "environmental interest" at page 2, stating that "the proposed Belleayre Resort at the Catskill Park is a major development within the New York City Watershed that has the potential to have significant adverse impacts on drinking water quality." This statement is supported in the letter to DEC, dated April 23, 2004, and the *Amicus* Brief, dated January 21, 2005. Furthermore, the post of the Watershed IG was created pursuant to MOA § 152(b), "to provide enforcement of laws and regulations pertaining to the use, operation, and protection of the Watershed."

Both draft SPDES permits for the Project would allow direct discharges into headwaters of the Ashokan and Pepacton Reservoirs, which together provide approximately ninety percent (90%) of the City's drinking water. See Watershed IG's *Amicus* Brief, pages 1-2, fn 1. Importantly however, "[m]any of the soil types located on the Project site have characteristics (high erosivity, clay or colloidal-type particles, low percolation rates, etc.) that can present significant erosion and water quality concerns." *Id.* Exhibit A.

The location of a project in a municipality and the municipality's governmental interests in responsible development are sufficient to demonstrate an adequate environmental interest warranting party status. See In the Matter of Sour Mountain Realty, Inc., Interim Decision of the Commissioner (July 18, 1996). As in Sour Mountain, *supra*, the Project site here lies within the geographic territory of the Watershed IG's jurisdiction. In addition, the Petition requests permission to discuss issues relating directly to the Watershed IG's "governmental interests,"

including: “natural conditions at the project site related to water quality...; the technical adequacy of the proposed program and permit to limit contaminants in runoff both during and after construction; the sufficiency of the assessment of cumulative growth inducing impacts; the adequacy of the integrated pest management program that will govern the use of pesticides and herbicides at the project site; and wetland delineation and destruction.”

B. Statutory Interest

The Watershed IG is interested in the statutes and regulations administered by the DEC and DEP relating to water quality and water supply in the New York City Watershed. See Executive Order No. 86. The Project entails the application for, and the DEC’s consideration of, the terms and conditions of two SPDES permits pursuant to ECL Article 17. Because the proposed Project is in the City’s watershed, the Applicant’s SWPPPs must also comply with the requirements of the New York City Watershed Regulations, 10 NYCRR Part 128. In addition to the powers, duties, and responsibilities previously mentioned, *supra* at 2-3, the Watershed IG may “conduct and supervise investigations of alleged violations of the MOA, any statute, rule or regulation of the State, and any permit or order issued by the State.” Executive Order No. 86 § 3a. Therefore, the Watershed IG has a discrete and well defined interest in the permits being applied for by the Project Applicant, and the underlying laws and regulations, i.e., ECL Article 17, 10 NYCRR Part 128, and the MOA, as well as the DEC’s and DEP’s faithful execution of those laws and regulations.

C. Grounds for Intervention

The Petition for *amicus* status means that the Watershed IG’s involvement will not necessarily be “in the nature of ‘grounds for opposition or support’ identified in 6 NYCRR § 624.5(b)(1)(v).” Watershed IG’s Petition for *Amicus* Party Status and Request to File a Late Petition, page 3. Rather, the unique role

of the Watershed IG and the sensitive environmental location of the Project dictate that a full and complete analysis be performed before any decisions or rulings on this Project are made. The Watershed IG's participation will assist the Commissioner by facilitating the presentation of an accurate record for her consideration, and will help overcome the Applicant's obfuscation of the issues which are critical to the environmental review.

Furthermore, pursuant to 6 NYCRR 624.5(e)(2), an *amicus* party has limited rights. The *amicus* party "has the right to file a brief and, at the discretion of the ALJ, present oral argument on the issues identified in the Administrative Law Judge's ruling on its party status but does not have any other rights of participation or submission." *Id.* (emphasis added). The Watershed IG's *amicus* brief is limited to a discussion of the adequacy of the existing proposals in the DEIS and draft permits to mitigate significant adverse impacts to the water supply and water quality of the New York City Water Supply Watershed. As such, the Watershed IG's arguments are limited to ensuring that the responsibilities underlying the position and regarding the Watershed are fulfilled.

D. Issues to be Briefed

The Watershed IG will provide legal and policy information on issues which meet the requirements of 6 NYCRR 624.5(b)(3)(i), i.e., that the "nature of the legal or policy issues to be briefed" by the Watershed IG meet the criteria of an "adjudicable issue" pursuant to 6 NYCRR 624.4(c). The Watershed IG's *Amicus* Brief properly identifies the New York City water supply and water quality issues which are "substantive and significant," and which are the subject of significant dispute between the Applicant, DEC staff, DEP and the Interveners. These issues include the SWPPP, the Applicant's cumulative impacts analysis, the proposed Integrated Pest Management Program, and wetland delineation and impacts.

For instance, in accordance with the DEP's concurrent jurisdiction over water quality impacts in the New York City Water Supply Watershed pursuant to 10

NYCRR Part 128 and 15 RCNY Chapter 18, the DEP offered testimony at the Issues Conference that the documentation supplied by the Applicant in support of its SWPPPs is wholly inadequate to merit the issuance of the Draft SPDES permits. TR 1568. The issue of the adequacy of the SWPPPs is “significant” because “it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit.” 6 NYCRR 624.4(c)(3). The Watershed IG’s Petition also identifies this issue as being “substantive,” due to physical limitations of the project site, including slope and erosivity. See Watershed IG’s *Amicus* Brief, Exhibit A.

E. The Unique Role of the Watershed Inspector General

The position of the Watershed IG was created for the express purpose of “enhanc[ing] current efforts to protect the New York City drinking water supply from activities that have the potential to adversely affect the New York City Watershed reservoirs and tributaries.” Executive Order No. 86. Therefore, the Watershed IG is in a unique and unusually “special position with respect to” significant adverse impacts which the Project may have on the water supply and water quality of the New York City Water Supply Watershed. 6 NYCRR 624.5(b)(3)(ii).

The Watershed IG’s Petition for *Amicus* Party Status and Request to File a Late Petition has therefore met all of the requirements of 6 NYCRR 624.5(d)(2).

III. The Watershed Inspector General's Late Petition is Supported by Good Cause, Will Not Cause Significant Delay or Unduly Prejudice any of the Parties, and Will Materially Contribute to the Determinations of the Administrative Law Judge and Commissioner

The DEC's permit hearing regulations provide the Administrative Law Judge with discretion to allow a person seeking party status, including *amicus* party status, to file a late petition. 6 NYCRR 624.5(c)(2). The petition should³ demonstrate that:

1. there is good cause for the late filing;
2. that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
3. that participation will materially assist in the determination of the issues raised in the proceeding.

Id.

The Watershed IG's Petition readily meets these three requirements. The Catskill Preservation Coalition concurs that the Watershed IG's participation will not significantly delay the proceeding, or unreasonably prejudice any of the parties.

³ See In the Matter of Thalle Industries, Inc., Rulings of the Administrative Law Judge on Issues and Party Status (December 10, 2003), *aff'd* by the Deputy Commissioner (November 3, 2004). The Administrative Law Judge, applying the regulatory provisions governing late petitions for party status, 6 NYCRR 624.5, to a citizen group/party's late submission of new evidence, allowed the evidence although the citizen group failed to establish "good cause." The ALJ stated that he "chose[] to consider the supplemental submissions in the interest of making a ruling that [wa]s informed by all the information that ha[d] been made available" during the proceeding. Id. at 24.

A. The Watershed Inspector General Demonstrated Good Cause for Filing Late

On April 23, 2004, the Watershed IG submitted detailed technical comments to the DEC concerning the adequacy of the DEIS and the adequacy of the Applicant's evaluation of water quality and water supply impacts. After the release of the first draft SPDES permits and the passage of the date to submit petitions for party status, and throughout the Issues Conference, the Applicant submitted newly developed information concerning the Watershed's water quality and water supply impacts and impact evaluation.

This newly submitted information led to the submission of a revised SPDES permit application on November 12, 2004, as well as substantial changes to the Project in response to the U.S. Army Corps of Engineer's site inspection and determination concerning the presence and location of jurisdictional wetlands. See Applicant's Supplemental Exhibit 12, October 28, 2004 Letter to ALJ Wissler from Kevin Franke of the LA Group. In response, DEC issued amended draft SPDES permits #4, which were available for public review and comment as late as December 17, 2004. In addition, "almost none of the concerns presented in the 29 detailed technical comments" which the Watershed IG's office submitted to DEC on April 23, 2004, have been addressed. Watershed IG's *Amicus* Brief, page 6.

The newly developed information, the changed face of the draft SPDES permits for the Project, and the Applicant's failure to respond to any of the comments which the Watershed IG's Office made on April 23, 2004, constitute

the Watershed IG's "good cause" for late filing. See e.g. In the Matter of 4Cs Development Corp., Supplemental Rulings on Issues (March 7, 1996) (the Administrative Law Judge determined that because the draft permit stormwater management plan was not released until after the deadline for the filing of party status, the municipality in which the project was proposed to be sited had shown "good cause" for its late filing), *aff'd on appeal*, Second Interim Decision of the Commissioner (May 1, 1996) (the municipality's late filing was not expressly subject to an appeal).

The extensive Issues Conference led to the development of a record by parties to the MOA, which identified numerous significant concerns regarding the inadequacy of the Applicant's evaluation of Watershed water quality and water supply impacts. Consistent with Executive Order No. 86, these issues require the participation of the Watershed IG in this proceeding. See Executive Order No. 86 (stating that "WHEREAS, the parties to the MOA have agreed that a Watershed IG should be appointed to enhance current efforts to protect the New York City drinking water supply from activities that have the potential to adversely affect the New York City Watershed reservoirs and tributaries").

The Issues Conference culminated in serious disagreement between CPC's, DEC staff's, DEP's and Applicant's experts concerning the adequacy of the Applicant's evaluation and mitigation of impacts to the New York City Water Supply Watershed water quality and supply. CPC, DEP, and, in part, DEC,⁴ argued that these issues are "substantive and significant," and must become the

⁴ See DEC Staff Post Issues Conference Brief, Proposed Issue 12, Stormwater, page 15 (stating that "...Staff recommend that stormwater hydrology continue to full adjudication").

subject of a full adjudicatory hearing. See CPC Post Issues Conference Brief, pages 94 – 123. Given the disparity of the analyses which were presented during the Issues Conference, in part based on the Watershed IG's comments dated April 23, 2004, the Watershed IG's involvement is appropriate at this juncture.

B. Participation by the Watershed Inspector General Will Not Significantly Delay these Proceedings, or Unreasonably Prejudice any of the Parties

Participation by the Watershed IG will not significantly delay these proceedings, nor unreasonably prejudice any of the parties. The Watershed IG's letter of April 23, 2004, put the Applicant and all related parties on notice of the Watershed IG's concern with the adequacy of the Applicant's analysis of water quality and water supply impacts. These concerns were confronted by the Applicant's experts during the Issues Conference, TR 3327, and were echoed by CPC's experts, TR 1569-70, and the DEP's experts, 1685-86, and 1912-1915. See *also* CPC Post Issues Conference Brief, pages 95-96 (citing the Watershed IG's list of "specific design details" which a SWPPP must contain, and the relevance of these requirements to the City of New York's expert's finding that the DEIS miscalculates "pre-development flow").

The Watershed IG's *Amicus* Brief restates the concerns expressed in the April 23, 2003 letter to the DEC, in light of the information provided during the

Issues Conference, and is similarly limited to the specific issues which the Watershed IG requested permission to discuss at page 3 of the Petition. *C.f. In the Matter of Keyspan Energy Development Corporation, Ruling on Proposed Adjudicable Issues and Petitions for Party Status* (June 21, 2002) (the Administrative Law Judge stated that “granting the petition at this late date w[ould] result in substantial delay...[and] require reconvening an issues conference session or setting an additional briefing schedule to create a record on [the petitioner’s] proposed adjudicable issues), *aff’d*, Interim Decision of the Commission (November 15, 2002). In contrast, the Watershed IG’s limited application for merely *amicus* party status cannot be said to create a possibility for “significant delay” since the adjudicable issues identified in the Watershed IG’s *Amicus* Brief were also identified as adjudicable by CPC’s and DEP’s experts, and in part, by DEC staff. The Issues Conference need not be “reconvened” if the Watershed IG is given *amicus* party status.

C. The Watershed Inspector General’s Participation Will Materially Assist the Administrative Law Judge and Commissioner in the Determination of New York City Water Supply Watershed Water Quality and Supply Related Issues

The Watershed IG’s participation “will materially assist in the determination of the issues raised in the proceeding.” 6 NYCRR 624.5(c)(2). CPC, DEP and the Watershed IG contend that water quality and water supply

impacts are “substantive and significant” issues which are adjudicable. See CPC’s Post Issues Conference Brief, page 94. The Watershed IG is charged with a duty similar to DEC and DEP, to “protect the New York City drinking water supply from activities that have the potential to adversely affect the New York City Watershed reservoirs and tributaries.” Executive Order No. 86. The Watershed IG’s expertise on water quality impact evaluation, stormwater control mechanisms, the use of pesticides in the Watershed, and the impact of nutrient loading of watercourses in the Watershed is bolstered by the Watershed IG’s staff of experts, including Mr. Charles Silver, PhD, Watershed I.G. Scientist.

The Watershed IG’s office possesses specialized expertise concerning the Project site, and unique intersection of DEC’s and DEP’s jurisdiction in the New York City Water Supply Watershed. The Watershed IG’s April 23, 2004 letter states that “[t]he project site is characterized by a combination of intense rain fall/snow melt events, low soil percolation, high soil erosivity, and colloidal soil particles that can remain suspended for many months and steep slopes, all of which create significant challenges with respect to the protection of water quality.” *Id.* at page 7. In the *Amicus* Brief, the Watershed IG states that “[t]his highly sensitive environmental context bears strongly on the question of whether issues related to water quality arising from the propose Project are substantive and significant so as to warrant adjudication. Much of this information was not marshaled in the DEIS, and thus, has not been fully developed by further comment. These site attributes are also highly relevant to the scope, detail and methodology employed in the assessment of potentially adverse environmental

impacts associated with the Project in the DEIS.” Id. at page 5, and Exhibit A pages 5-10.

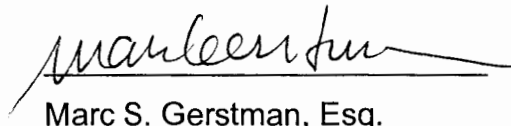
IV. Conclusion

The Watershed IG’s participation in the adjudicatory hearing should be granted. The Watershed IG’s specialized knowledge and unique role will materially contribute to the Administrative Law Judge’s and Commissioner’s determinations, and will not significantly delay or unreasonably prejudice any of the parties. Furthermore, the Watershed IG’s late filing is excused by the Applicant’s evolving SPDES permit applications, DEC’s late changes to the draft SPDES permits, and altered wetland impacts, which were all caused by the extensive Issues Conference record on the issues of concern to the Watershed IG. The record makes it abundantly clear that New York City Water Supply Watershed water quality and supply issues, including the SWPPP, cumulative impacts, and pesticides issues remain “substantive and significant,” and must be adjudicated.

To: Honorable Richard Wissler
Administrative Law Judge
New York State Department of Environmental Conservation
Office of Hearings and Mediation Services
625 Broadway
Albany, NY 12233

Dated: February 4, 2005
Albany, New York

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