

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of:

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

Application No.
0-9999-00096/00005

ALJ Wissler

**MEMORANDUM OF LAW IN OPPOSITION TO AMICUS PETITION AND BRIEF
OF THE NEW YORK CITY WATERSHED INSPECTOR GENERAL**

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TABLE OF CONTENTS

I. INTRODUCTION	1
II. THE NYCWIG HAS NOT MET THE STANDARDS FOR AMICUS STATUS	3
A. The NYCWIG Has Not Met the Requirements of 6 NYCRR Part 624.5(d)(2)	3
B. The NYCWIG's Lack of Standing	5
III. THE NYCWIG HAS NOT MET THE STANDARDS FOR LATE FILING OF A PETITION.....	8
A. Good Cause Does Not Exist to Grant the Watershed Inspector General's Petition For Amicus Status at This Advanced Stage of the Applicant's Permit Application Proceedings.	8
B. Acceptance of the NYCWIG as an Amicus Party Will Significantly Delay These Application Proceedings and Unreasonably Prejudice Other Parties	10
C. The NYCWIG's Amicus Brief Will Not Materially Assist in the Determination of Any Issue Raised in This Proceeding	11
IV. THE ISSUES RAISED BY THE NYCWIG ARE NEITHER SUBSTANTIVE NOR SIGNIFICANT	12
A. Cumulative Impact Analysis.....	13
B. Wetland Protection	15
V. CONCLUSION.....	16

TABLE OF AUTHORITIES

Page No.

Administrative Decisions

<i>Matter of the Application of the Al Turi Landfill, Inc.</i> , 1998 WL 1670484 (ALJ's Ruling on Issues and Party Status, June 19, 1998)	3
<i>Matter of 4-C's Development Co.</i> , 1996 WL 1744626 (ALJ's Supplemental Rulings on Issues, March 7, 1996)	8
<i>Matter of St. Lawrence Cement Company, LLC</i> , Second Interim Decision, 2004 WL 2026420 (Sept. 8, 2004)	9
<i>Matter of the Proposed Field-Wide Spacing and Integration Rules</i> , 2004 WL 390200 (ALJ's Ruling on Issues and Party Status, Feb. 20, 2004)	8

Cases

<i>Industrial Liaison Commission v. Williams</i> , 72 N.Y.2d 137, 143 (1988)	15
<i>Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven</i> , 85 N.Y.2d 854 (1995)	14

Statutes and Regulations

6 NYCRR § 617.9(b)(8)	10
6 NYCRR § 624.5	1
6 NYCRR § 617(9)(b)(8)	12
6 NYCRR § 624.4	2, 12
6 NYCRR § 624.4(b)(5)	10
6 NYCRR § 624.4(c)(3)	15
6 NYCRR § 624.5	1, 2
6 NYCRR § 624.5(b)(1)(b)	4
6 NYCRR § 624.5(b)(1)(v)	3, 4
6 NYCRR § 624.5(c)(2)	8
6 NYCRR § 624.5(c)(2)(i)	8

6 NYCRR § 624.5(c)(2)(ii).....	10
6 NYCRR § 624.5(d)(2).....	3, 7
6 NYCRR §§ 624.2.....	4
6 NYCRR §§ 624.5(b)(1).....	3
Executive Order No. 86.....	3, 5, 6, 16

Treatises

Environmental Impact Review in New York, Gerrard, Ruzow, Weinberg, § 5.10(4) at 5-61.....	14
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I. INTRODUCTION

This Memorandum of Law is submitted by Crossroads Ventures LLC (the "Applicant" or "Crossroads") in opposition to the Petition for Amicus Status, Request to File a Late Petition and the Amicus Brief submitted by James Tierney, New York City Watershed Inspector General ("Mr. Tierney or NYCWIG"). The NYCWIG apparently seeks to "Monday morning quarterback" the environmental review of this Project and utilize amicus status to, in effect, oppose the Project and allege issues he believes should be adjudicated, after not even attempting to file a timely Petition, and waiting more than nine months after amicus petitions were due. As discussed herein, the NYSDEC Permit Hearing regulations pertaining to amicus briefs do not envision nor permit such a prejudicial result.

The NYCWIG has neither met the criteria for amicus status nor does he have standing to intervene in a Part 624 hearing. Moreover, a quick reading of his Proposed Brief reveals that, for the most part, it does not identify "legal and policy issues that need to be resolved" as required by 6 NYCRR § 624.5. The NYCWIG's request is actually a petition for full party status masquerading as a request for amicus status. As admitted by the NYCWIG, "the amicus brief and associated exhibits provide factual information," and "seeks to submit technical information ..." (NYCWIG Petition, pp. 1 and 3 (Emphasis added)). It is clear from 6 NYCRR § 624.5, that an amicus is not permitted to provide factual and technical information as does the NYCWIG's Petition and Proposed Brief. Further, the NYCWIG is in no better position than either CPC or NYCDEP, who have already attempted—and in our view failed-- to raise the substantive and significant issues the NYCWIG is attempting to advance.

Not only has the NYCWIG failed to meet the burden of establishing eligibility for amicus status, he has in no way met the standards to file a late petition. Most notably, the NYCWIG does not even attempt to demonstrate good cause or indeed any reasonable explanation for the 9-month late filing -- because no good cause can exist. His submission has already severely prejudiced Crossroads and does not materially assist in the determination of issues raised in this proceeding.

Finally, with respect to NYCWIG's Proposed Brief, none of the alleged issues merit additional response, and each has been fully briefed by Crossroads, CPC and NYCDEP or they

will be responded to in the Final Environmental Impact Statement ("FEIS"). The alleged issues and factual information pushed by the NYCWIG are either duplicative, irrelevant or immaterial. None are substantive or significant as defined in 6 NYCRR § 624.4. While the NYCWIG claims to request "amicus status" it is clear that he is using "amicus" status as a full party would to introduce evidence and request adjudication on all of his alleged issues. (NYCWIG Proposed Brief, p. 5).

The NYCWIG's Petition must be denied. If the NYCWIG is permitted to enter the proceeding at such a late time, there is nothing that will prevent any other party, at any time, from requesting either amicus or party status. The NYCWIG has not met the criteria imposed by 6 NYCRR § 624.5 for either amicus status or late filing. The NYCWIG should not be treated differently from any other party or person who seeks to jump on board this late in the process, without demonstrating good cause, and simply restate or reargue issues raised by other proposed Intervenors. Principles of due process, judicial economy and the benefits of an orderly proceeding outweigh any meager and unsubstantiated contribution that could be made to this extensive record by the NYCWIG.

II. THE NYCWIG HAS NOT MET THE STANDARDS FOR AMICUS STATUS

The NYCWIG has not met the criteria of 6 NYCRR § 624.5(d)(2), amicus status. The NYCWIG has failed to allege, let alone prove, any of the elements required to be granted amicus status. Moreover, based on Executive Order No. 86 ("E.O. 86"), the NYCWIG does not possess the authority to intervene in a Part 624 hearing, and thus, does not have standing.

A. The NYCWIG Has Not Met the Requirements of 6 NYCRR § 624.5(d)(2).

As clearly provided for in 6 NYCRR § 624.5(d)(2), to achieve amicus status, the NYCWIG must: (i) file an acceptable petition pursuant to 6 NYCRR §§ 624.5(b)(1) and (3); (ii) identify a legal or policy issue which needs to be resolved by the hearing; and (iii) demonstrate that it has a sufficient interest in the resolution of such issues and through expertise, special knowledge or unique prospective that may contribute materially to the record on such issue. It is axiomatic that the NYCWIG must demonstrate each of these criteria in order to achieve amicus status. He simply has not done so.

Initially, the NYCWIG has failed to file an acceptable petition pursuant to 6 NYCRR §§ 624.5(b)(1) and (3). Specifically, the NYCWIG has failed to "identify the precise grounds for opposition or support", as required by 6 NYCRR § 624.5(b)(1)(v). As admitted in the NYCWIG's Petition:

Petitioner seeks to serve as a "friend" of the administrative court. Therefore, this petition and the attached amicus brief is not specifically in the nature of "grounds for opposition or support" identified in 6 NYCRR § 624.5(b)(1)(v).

(NYCWIG Petition, p. 3). (emphasis supplied).

Admittedly, the NYCWIG states he has not met a threshold requirement for amicus status. A similar situation was confronted by the ALJ in the *Matter of the Application of the Al Turi Landfill, Inc.*, 1998 WL 1670484 (ALJ's Ruling on Issues and Party Status, June 19, 1998) in which the ALJ did not grant party status or amicus status to the county in which the landfill was located. As noted by the ALJ in *Al Turi*:

The county's filing does not meet the requirements of full party or amicus status since it does not identify precise grounds for opposition or support. (6 NYCRR

§ 624.5(b)(1)(v)). In fact, the first page of his petition (Exhibit No. 68) notes that the county wants to make clear that at this stage at the proceedings "it is neither opposing nor supporting that application."

(Emphasis supplied).

In *Al Turi*, the ALJ determined that the failure to take a position on the application was a basis for denying the petition. The facts in the present matter are no different from *Al Turi*. The NYCWIG admits that he neither opposes nor supports the application, but would just like to submit a brief. Based on this admission alone, the NYCWIG's Petition must be denied.

Not only has the NYCWIG failed to meet the criteria established in 6 NYCRR § 624.5(b)(1)(b), but he has also failed to identify the nature of the legal or policy issues to be briefed. In fact, the NYCWIG admits, "the enclosed amicus brief and associated exhibits provide factual information." (NYCWIG Petition, p. 1, emphasis supplied). It is further admitted that he seeks to "submit technical information" concerning water quality impacts that might arise from the proposed project. (NYCWIG Proposed Brief, p. 3, emphasis supplied). While the NYCWIG alludes to some amorphous policy issues that might arise, he fails to identify any of them in either his Petition or Proposed Brief. Instead, a majority of the effort in both the Petition and Proposed Brief is spent discussing factual information related to the sensitivity of the proposed project site, issues related to stormwater controls, cumulative impact analysis, pesticides and herbicide use, and wetland protection. This novel approach is not, nor should it be, permitted in an amicus brief. The NYCWIG's Proposed Brief is, in effect, additional proposed testimony offered in the context of the Issues Conference, but without providing any other opportunity to respond.

The definitions of "amicus status" and "argument" contained in 6 NYCRR §§ 624.2 (c) and (e), respectively, clearly limit the role of an amicus party to its traditional role in an appellate review. Introduction of "written argument" does not include "factual" or "scientific information" or even expert opinion—and certainly not facts not to be proffered for the record.

Finally, the NYCWIG has not demonstrated that he has a sufficient interest in the resolution of this issue or possesses the special knowledge or a unique perspective that may contribute materially to the record on such issue. Specifically, as discussed below, the NYCWIG does not have standing to be a petitioner in this matter, therefore, he does not have an interest in

the resolution of this issue. Moreover, the NYCWIG does not possess specific knowledge, expertise or a meaningful perspective on this particular project or site. Many of the NYCWIG's allegations have already been fully advanced or explored by both of the proposed Intervenor. For the most part, NYCWIG either reiterates issues raised by both CPC and NYCDEP, or alleges irrelevant, incomplete and immaterial factual information that will neither result in a modification of the project, denial of a permit or significant permit conditions.

B. The NYCWIG Lacks Standing to Petition Amicus Status.

The New York City Watershed Inspector General is an Assistant Attorney General who serves by a joint appointment of the Governor and the Attorney General. This position was established pursuant to the 1997 New York City Watershed Memorandum of Agreement ("MOA") and Gubernatorial E.O. 86. Apparently, while referencing E.O. 86, the NYCWIG ignores its express terms and fancifully attempts to expand his limited authority in order to intervene in this proceeding. E.O. 86 sets forth the powers, duties and responsibilities of the New York City Watershed Inspector General. Nowhere in E.O. 86 is the NYCWIG granted the authority to intervene in an administrative hearing. As indicated below, a summary of these powers, duties and responsibilities are as follows:

- to 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;
- to subpoena witnesses, administer oaths or affirmations, take testimony and compel the production of such books, papers, records and documents as the Watershed Inspector General may deem to be relevant to an investigation undertaken pursuant to this Order;
- to commence, prosecute and settle proceedings relating to civil and criminal violations;
- to coordinate with the New York City Watershed Program Coordinator within the Executive Chamber;
- to cooperate with any agency or department possessing regulatory authority relating to the use, operation and protection of the Watershed;
- to apply for search warrants pursuant to article 690 of the Criminal Procedure Law;
- to report, on an annual basis, to the governor and the Attorney General, a listing of enforcement actions completed and activities undertaken;
- to recommend legislative, regulatory and management practice changes;
- to undertake any other investigations and enforcement actions, or enter into civil, administrative or criminal orders or settlement agreements, pursuant to the

- authority otherwise vested by law in the position of an Assistant Attorney General;
- to have full and unrestricted access to all records, reports, audits, reviews, documents, papers, recommendations or other material available to all agencies and departments over which the Governor has executive authority, and all public benefit corporations the heads of which are appointed by the Governor, for the purpose of carrying out this Order; and
 - to request such information, assistance and cooperation from any Federal, State or local government department, board, bureau, commission, authority or other agency or unit thereof for the purpose of carrying out this Order.

Nothing in the E.O. 86 even remotely grants the NYCWIG authorization to intervene in a Part 624 permit hearing. The majority of the powers provide the NYCWIG with the power to investigate and prosecute alleged civil and/or criminal violations. In the instant case, the NYCWIG is seeking to intervene in a Part 624 permit hearing based on SEQRA documents and draft SPDES permits, not civil or criminal violations. Moreover, a review of the New York City Watershed MOA reveals that the NYCWIG is mentioned only once in the entire MOA. Section 152 (State Partnership Programs) of the MOA discusses the establishment of the NYCWIG's office and defines its purpose as providing enforcement of laws and regulations pertaining to the use, operation and protection of the watershed. While the NYCWIG alleges that E.O. 86 allows him to "cooperate with agency or department possessing regulatory authority ...," clearly this is not cooperation. Instead, it is a complete disagreement with NYSDEC Staff, who have issued a draft SPDES permit. There is simply no authorization for the NYCWIG to intervene in a Part 624 permit proceeding for review of a development proposal in the NYC Watershed.

As clearly indicated in the documents creating the position of the Watershed Inspector General, the NYCWIG possesses no authority to intervene in a Part 624 hearing. Indeed, the NYCWIG could have no such authority without plunging the Office of the Attorney General into an ethical quagmire. The Attorney General, among its constitutional and statutory authorities is to represent State agencies, such as the NYSDEC in challenges to permit issuance by those agencies. The very technical staff and lawyers seeking to participate herein are members of the same law firm -- the Attorney General's Environmental Protection Bureau-- who will be called upon to defend NYSDEC's ultimate decision on the requested permits. (See NYCWIG Petition, p. 2). In light of this role, it is inconceivable how the NYCWIG can seek amicus status in the proceeding and completely ignore both the ethical dilemma and the draft SPDES permit issued

by NYSDEC staff, of which, many permit conditions directly address the faulty technical and factual information sought to be introduced with respect to pesticides, among others.

Clearly, the NYCWIG's failure to meet, or even address, the criteria of 6 NYCRR § 624.5(d)(2) mandates that his Petition be denied. Any other result would be contrary to the plain reading of the regulations and prior precedent.

III. THE NYCWIG HAS NOT MET THE STANDARDS FOR LATE FILING OF A PETITION

The NYCWIG has offered his petition for Amicus Status at an outrageously late date. The Issues Conference has concluded; final submissions for the record have been made; briefs have been submitted; and replies have been offered. Although the regulations contemplate late petitions for intervention, *see* 6 NYCRR § 624.5(c)(2), they clearly set forth the standards that must be met in order for a late party to be allowed to join the pending proceedings. Furthermore, as proffered by the NYCWIG, a mere statement that the standards have been met will not suffice. The burden is on the party offering the late submission to offer a complete explanation for its inability or unwillingness to follow the established procedures and timelines applicable to the other parties participating in the application proceedings. *See Matter of the Proposed Field-Wide Spacing and Integration Rules*, 2004 WL 390200 (ALJ's Ruling on Issues and Party Status, Feb. 20, 2004) (noting that a late request for party status was denied, in part, because two of the three factors that must be demonstrated pursuant to 6 NYCRR § 624.5(c)(2) were not addressed in the party's application). Meeting these requirements becomes even more important when, as here, the proposed party is attempting to join the proceeding at a time when the other participants have completed their Issues Conference participation. The NYCWIG has not met this burden.

A. Good Cause Does Not Exist to Grant the Watershed Inspector General's Petition For Amicus Status at This Advanced Stage of the Applicant's Permit Application.

The "good cause" requirement of 6 NYCRR § 624.5(c)(2)(i) requires more than a mere statement that good cause exists for a late petition or filing. ALJ rulings and Commissioners' decisions confirm the proposition that the explanation must provide a substantial reason to allow the consideration of the late application or petition that is beyond a simple decision on the part of the proposed petitioner or party to remain an observer of the proceedings until such time that an issue of concern to the proposed party is not treated in the manner desired by the proposed party. For example, in *Matter of 4-C's Development Co.*, 1996 WL 1744626 (ALJ's Supplemental Rulings on Issues, March 7, 1996), ALJ O'Connell found good cause for the addition of a new issue when the party proposing the issue could not have known of the issue until a draft permit

had been issued by NYSDEC staff. The draft permit, however, was not issued until four days after the deadline for the submission of petitions for party status.

The NYCWIG's petition for amicus status asserts that good cause exists for its late petition because it seeks to comment on additional submissions made to the NYSDEC during the course of the Issues Conference. Unlike the *4-C's* matter, however, all NYSDEC draft permits applicable to this Applicant were issued either before the Issues Conference began or on the first day of the Issues Conference -- that first day attended by Mr. Tierney. The NYCWIG, in fact, commented on the original NYSDEC draft permits during the public comment period. Critically, however, the NYCWIG failed to submit any comments on the revised SPDES permits that were the subject of a public notice in November 2004. It would seem, therefore, that the NYCWIG is arguing that good cause exists for entertaining applications to participate as a party (amicus or otherwise) because topics of interest to him were the subject of discussion and supplemental submissions during the Issues Conference and he has just now decided it is convenient for him to further comment. Such a stance is not supported by decisions and rulings in other NYSDEC permit proceedings.

In *Matter of St. Lawrence Cement Company, LLC*, Second Interim Decision, 2004 WL 2026420 (Sept. 8, 2004), a party comprised of a coalition of various environmental advocacy groups sought to add an additional party to the coalition. The group seeking inclusion had participated in the early stages of the permit application proceedings but had withdrawn because of miscommunications with and among the coalition concerning the group's participation. The ALJs, however, denied the coalition's request to allow the group to re-join the coalition. The good cause showing required more than an explanation as to the reason that the group had withdrawn from the coalition. The ALJs sought a demonstration of the need to wait until the closing days of the Issues Conference to request that the group be allowed to join the coalition.

Not unlike the additional group the coalition party sought to add in *St. Lawrence*, the NYCWIG has been content to sit on the sidelines and by his own admission, with complete awareness of the status of the proceeding during the Issues Conference and let the NYCDEP and the CPC introduce and advocate for issues and concerns of importance to him. In apparent recognition of the other proposed parties' ineffectiveness at raising substantive and significant

issues for adjudication, though, the NYCWIG is now attempting rescue these groups with a last-minute pitch to bolster their positions by claiming that there are additional issues in need of consideration. However, as indicated in the Affirmation of Daniel A. Ruzow, the NYCWIG has failed on numerous occasions to seek to participate in the Issues Conference when such late intervention might have been more logical or excusable. The NYCWIG has not provided any explanation that even approximates good cause for enhancing its level of participation at this exceedingly late stage of the Applicant's permit application proceedings.

Nor is the NYCWIG's belated review of the Issues Conference transcript and limited experience in SEQRA proceedings a basis for demonstrating good cause. (*See* NYCWIG Proposed Brief, p. 5). As explained in Applicant's Brief (*see* p. 41), there is no requirement for preparation of a fully engineered SWPPP at this stage of development or as part of a DEIS or FEIS. Moreover, the Issues Conference (a uniquely NYSDEC invention) does not, and was never, designed to substitute for SEQRA's requirement that all substantive comments on a DEIS be responded to in an FEIS. (*See* 6 NYCRR § 617.9(b)(8)). The NYCWIG's "disappointment" is premature, but in no case is it a basis for being granted amicus status.

B. Acceptance of the NYCWIG as an Amicus Party Will Significantly Delay These Application Proceedings and Unreasonably Prejudice Other Parties.

A late petition for party status will not be accepted if it will significantly delay the proceedings or unreasonably prejudice other parties. 6 NYCRR § 624.5(c)(2)(ii). The NYCWIG attempts to argue that entertaining his petition will not significantly delay these proceedings because his brief is being submitted at the same time as the other parties' briefs. Although Your Honor has had the benefit of participation in every step of this proceeding, the regulations place fairly significant limitations on the available time after the closings of the Issue Conference record in which to render rulings on issues and party status. *See* 6 NYCRR § 624.4(b)(5). To the extent that time for consideration of the record and timely filed briefs has been suspended for the determination of this application, such diversion of attention already represents a significant delay. Moreover, unless the NYCWIG is suggesting that he be allowed to introduce not only argument but "factual" and "scientific information" without giving the other parties an opportunity to respond, additional time will be required to formulate and submit additional reply briefs to address concerns raised in the NYCWIG's petition. The suggestion,

therefore, that consideration of the NYCWIG's petition will not further delay these already extensive and lengthy proceedings is absolutely ludicrous.

Consideration of the NYCWIG's petition also will unreasonably prejudice the Applicant and the other parties. The NYCWIG maintains that no other party will be surprised because they have received the comments that were previously submitted by his office. However, the NYCWIG is seeking to provide more than comments and would offer a "brief and exhibits [that] discuss legal and policy issues concerning what [he] believe[s] to be 'substantive and significant' issues that merit full administrative adjudication." (NYCWIG Petition, p. 3). Moreover, the application by the NYCWIG contains new and/or different arguments and commentary regarding technical data which was presented during the course of the Issues Conference. Such additional argument will clearly prejudice the Applicant. (*See*, Ruzow Affirmation, p. 2). There exists, therefore, a strong argument that not only will the NYCWIG's petition actually prejudice the Applicant, it is intended to prejudice the Applicant. The NYCWIG should not be allowed to come in after the close of the Issues Conference portion of the permit application proceedings in an attempt to raise adjudicable issues simply because he believes that the CPC and NYCDEP have not done an adequate job.

C. The NYCWIG's Amicus Brief Will Not Materially Assist in the Determination of Any Issue Raised in This Proceeding.

The addition of the NYCWIG as an Amicus party will not materially assist in the determination of issues raised in this permit application proceeding. *See* 6 NYCRR § 624.5(c)(2)(iii). The record created to this point in the proceedings has been developed through offers of proof on topics that have been raised, negotiated, considered and responded to by the Applicant, the NYSDEC and the other prospective parties. Volumes of data, information and analysis exist and are available to the ALJ and, if necessary, the Commissioner during the final decision-making process. One more brief discussing "whether the detailed technical concerns raised in our SEQRA comments have been effectively addressed or satisfied by the new submissions" not by a petitioner with no legitimate basis for intervention will not advance the purposes of this proceeding.

IV. THE ISSUES RAISED BY THE NYCWIG ARE NEITHER SUBSTANTIVE NOR SIGNIFICANT

Assuming, *arguendo*, Your Honor entertains NYCWIG's application, none of the issues raised by the NYCWIG are substantive or significant as defined in 6 NYCRR § 624.4. As is demonstrated in this Memorandum of Law, as well as in the Affidavit of Kevin Franke, the NYCWIG has not met its burden of persuasion.

All that is offered by the NYCWIG are opinions or conjecture, which lack proof and a clear demonstration of which regulatory standard criteria has not been met by the Applicant. Since, in many instances, the NYCWIG does not possess studies or factual information to rebut the information in the Draft Environmental Impact Statement ("DEIS"), the studies prepared by Crossroads' experts and the decision of the NYSDEC staff, he is required to make a showing that the alleged defects are likely to affect permit issuance or modification to the Project in a substantial way. This, he has not done.

Initially, this Memorandum of Law will not address the purely factual arguments raised by the NYCWIG, which include sensitivity of the project site, issues related to stormwater controls, and pesticide and herbicide use. With respect to those purely factual and technical issues, which are not permitted to be addressed by an amicus, we refer Your Honor to the Affidavit of Kevin Franke.

As indicated in the Affidavit of Kevin Franke, in many instances, the NYCWIG has failed to completely read the DEIS or understand the breadth and scope of the Applicant's permit applications. Moreover, much of the alleged factual and technical information discussed by the NYCWIG is either duplicative of CPC's failed arguments, irrelevant or immaterial. Notwithstanding our belief that none of the issues raised by the NYCWIG require adjudication, all of the substantive comments raised by the NYCWIG, as well as any comments raised by any other party on the DEIS during the public comment period, will be responded to in the FEIS for this Project, assuring both literal and substantive compliance of SEQRA. (*See* 6 NYCRR § 617(9)(b)(8)). As clearly referenced in Mr. Franke's Affidavit, many of the alleged issues of the NYCWIG, including sensitivity of the proposed project site, stormwater controls, pesticide

and herbicide use and wetland protection were either fully addressed in the DEIS, or further addressed in the Issues Conference and the associated testimony and numerous exhibits.

A. Cumulative Impact Analysis

The only alleged issue raised by the NYCWIG that in any way rises to a legal or policy level is that of cumulative impacts. However, as discussed herein, and as more fully argued in Applicant's Brief, such does not merit participation by the NYCWIG or consideration in the context of a substantive and significant issue.

It must be remembered that Department Staff has concluded that "[t]he DEIS provides a hard look as to the issue of ... cumulative/secondary impacts." (NYSDEC Reply Brief, p. 5). Further, this issue was fully addressed and briefed in the Applicant's Brief (Section II.K) and the Applicant's Reply Brief (Section II.K), however, a few comments are worth noting.

The NYCWIG seeks to expand "cumulative impact analysis" to study purported cumulative impacts without meaningful limitation and significantly, without regard to limits imposed under New York Law. In its simple, one page, discussion of cumulative impacts, the NYCWIG references an academic study prepared by Dr. Gerrit Canap which confirms that the "secondary growth" analysis contained in the DEIS was correct, but further commented that there would be potential high levels of new development and construction disturbance over time (10-50 years) in the Catskills, including the West Hudson Watershed. Mr. Canap's conclusion was not based solely on the proposed Belleayre Resort Project, but as admitted by the NYCWIG, was based on "proximity to the New York City metropolitan area, proposed casinos and other relevant circumstances." Such general considerations are in no way tied to the development of this Project and cannot be the focus of a meaningful cumulative impact analysis because they lack the required nexus to the Belleayre Resort.

Basically, the NYCWIG wants the Applicant to guess and study purely speculative impacts to the entire Catskill region based on its "proximity to New York City metropolitan area, proposed casinos and other relevant circumstances," whatever those may be. (Apparently not even Mr. Tierney or his staff have any idea what the Applicant should look at, they just think whatever is, it should be studied.) While several casinos have been proposed or discussed for the

southern Catskills along NYS Route 17, they are over 30 miles distant (as the crow flies) from the Belleayre Resort and separated by a mountainous region with few connecting roads.

As fully discussed in the Applicant's Brief, the SEQRA regulations require that a DEIS evaluate potential significant adverse environmental impacts including "reasonably related short-term and long-term impacts, cumulative impacts and other associated environmental impacts." (6 NYCRR § 617.9(b)(5)(iii)(a)). Similar to the arguments raised by both CPC and NYCDEP, the NYCWIG's criticisms focus on the alleged failure to analyze cumulative impacts of the Belleayre Project in connection with yet undefined projects and/or development trends. It is axiomatic that in order to review cumulative impacts, an action must be "proposed" and contain a sufficiently defined plan to facilitate the analysis of potentially significant environmental impacts. In the case of the issues raised by the NYCWIG, either nothing proximate to the Belleayre Resort is proposed at this time or there is no "plan" (as recognized by the Court of Appeals in *Long Island Pine Barrens Society v. Planning Board of the Town of Brookhaven*, 85 N.Y.2d 854 (1995)) to facilitate the analysis of potentially significant cumulative impacts.

As indicated in "Environmental Impact Review in New York", Gerrard, Ruzow, Weinberg, § 5.10(4) at 5-61, based on a reading of several court decisions, the following three circumstances must be present in order for cumulative impact review to be mandatory:

- the projects will have significant impacts;
- the projects spring from, or are included in, a common plan or policy; and
- the projects are specifically identified.

In the speculative issues raised by the NYCWIG, the above analysis is not even possible. In its one page discussion of cumulative impacts, the NYCWIG has failed to demonstrate that any, let alone all, of the elements are present. Thus, there is no mandatory requirement for additional cumulative impact review because a clear component is missing.

With respect to the exercise of discretion by the Department to consider the cumulative effects of the Belleayre Resort and the other theoretical issues raised by the NYCWIG the same result is appropriate. One would have to venture into pure speculation in order to pretend to

complete the analysis, and such a step is not appropriate or sanctioned by SEQRA. (*Industrial Liaison Commission v. Williams*, 72 N.Y.2d 137, 143 (1988)). There would be no reasonable basis upon which the Department could rely to utilize such a study's conclusions under 6 NYCRR § 624.4(c)(3).

The NYCWIG has failed to carry its burden of persuasion that the cumulative impacts should be adjudicated or considered further.

B. Wetland Protection

The NYCWIG's alleged issue regarding wetland protection has thoroughly been addressed by the Applicant in SE 12. On February 25, 2002, the U.S. Army Corps of Engineers issued a jurisdictional determination for the project site after performing a site inspection. That jurisdictional determination identified those wetlands that were avoided to the maximum extent practicable when designing the Project. The avoidance and minimization of impacts to jurisdictional wetlands is evidenced by DEIS Table 3-26A. After a subsequent September 23, 2004, site visit, the Project was adjusted to avoid areas the Army Corps may seek to identify as jurisdictional wetlands, as indicated in SE 12. There is simply no adjudicable issue with respect to this Project's impacts on wetlands, and the NYCWIG has failed to provide, how, in any way, his argument is substantive and significant as defined in Part 624. Again, this is factual, neither a legal or policy issue, that cannot be properly addressed in an amicus brief in any event.

V. CONCLUSION

The NYCWIG's application is an unnecessary intrusion on the orderly conduct and completion of these proceedings. The NYCWIG makes no attempt to meet the requirements required by Part 624 to meet amicus status, and fails to even take a stance on the Project. Moreover, instead of arguing proposed legal and policy issues, the NYCWIG attempts to redefine the status of amicus and chooses to argue purely technical and factual issues, which is not permitted. In a further abuse of the process, the NYCWIG has made no effort whatsoever to meet the requirements for a late filing, failing to even touch upon the issue of good cause or to explain its nine month delay in seeking participation. The claims raised by the NYCWIG that he is here to help and is only serving as a "friend" is a transparent ruse. As clearly outlined in his Petition and Proposed Brief, the NYCWIG is here to oppose the Project, delay the proceeding, and urge for further adjudication. The NYCWIG had numerous opportunities to properly enter this proceeding and chose not to. With respect to his comments on April 23, 2004, many have already been responded to, and the remainder will be addressed, as necessary, in the FEIS.

What is even more disturbing about the NYCWIG's attempt to intervene in the proceeding at this time, is that he is placing the Attorney General's Office in a position involving a potential conflict of interest. It is the Attorney General's Office which will be called upon to defend any permits issued by NYSDEC, the same office which is now challenging the adequacy of those permits. The NYCWIG's behavior is even more outrageous because he is capriciously expanding his authority pursuant to E.O. 86 to even obtain standing in this proceeding. Finally, the NYCWIG attempts to strip from the Applicant the right to challenge his assertions and conclusions by effectively denying the Applicant the opportunity to respond and to cross-examine NYCWIG Staff that have made these baseless factual and technical allegations. A "friend" of the court would have at least attempted to meet the regulatory standards rather than cordially seeking to participate at the last minute -- a full nine months after petitions for party status were due in this matter.

Based on the NYCWIG's admitted failures to meet the standards for amicus or late filing, the issue of what is presented in his proposed amicus brief should not even be reached. However, in the event that Your Honor reaches such a point, it is clear from both Mr. Franke's

Affidavit, as well as the Applicant's Brief and Reply Brief, that none of the issues raised by the NYCWIG are substantive and significant. For the most part, the NYCWIG's issues have already been fully addressed by the Applicant, and are duplicative of those raised by the other proposed Intervenor. The only non-factual issue raised by the NYCWIG, cumulative impacts, seek to expand the study of impacts beyond any rationally supportable requirement in an effort to have the Applicant study speculative projects and economic trends that the NYCWIG cannot even identify. The NYCWIG has taken such a stance in opposition to the Project, that he is unable to fairly examine the DEIS and associated testimony and exhibits, instead he continues to ignore relevant factual and technical information, blindly parroting criticisms already addressed numerous times in the proceeding to date.

The NYCWIG's Application must be denied. Any other result will violate precedent and regulation, severely prejudice the Applicant, and open the floodgates for this type of improper application.