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December 23, 2004

Hon Richard Wissler
Administrative Law Judge
NYSDEC
625 Broadway, 1st Floor
Albany, NY 12233-1010

Re: In the Matter of the Application of BELLEAYRE RESORT at the
CATSKILL PARK PROPERTY
Application Numbers: 0-9999-00096/00005/ 0-9999-00096/00009

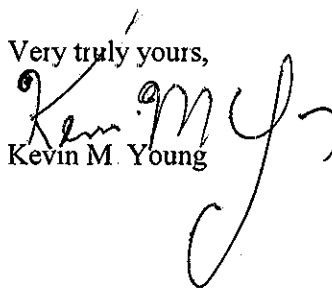
Dear Judge Wissler:

Enclosed please find the Post Issue Conference Memorandum of Law submitted on behalf of the Coalition of Watershed Towns, Delaware County, Town of Middletown and Town of Shandaken,

At the issue conference on June 25, 2004, I explained the history of Public Health Law Article 11 and its relationship to this proceeding. (Trans. pg 2427-2439.) Administrative Law Judge Richard Wissler requested that I supplement that offer of proof with documentary support for that interpretation of Article 11 of the Public Health Law. That written summary is provided in the Post Issue Conference Memorandum of Law submitted herewith. A Separately Bound Appendix has the statutory history of Public Health Law Article 11 dating back to 1885. A copy of that Appendix is included as a PDF file with the e-mail.

Copies are being distributed to all parties by e-mail and by overnight mail.

Very truly yours,


Kevin M. Young

Enclosures

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Marc Gerstman- CPC
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Drayton Grant, Esq

**NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Application of

**Application Numbers
0-9999-00096/00005
0-9999-00096/00009**

**BELLEAYRE RESORT at the
CATSKILL PARK PROPERTY**

**POST ISSUE CONFERENCE MEMORANDUM OF LAW
FOR THE COALITION OF WATERSHED TOWNS, DELAWARE COUNTY,
TOWN OF MIDDLETOWN AND TOWN OF SHANDAKEN**

Dated: December 23, 2004.

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I. Introduction

This Memorandum of Law is submitted on behalf of the Coalition of Watershed Towns ("Coalition"), Delaware County ("Delaware"), the Town of Middletown ("Middletown") and the Town of Shandaken ("Shandaken") collectively known as the Watershed Communities. The Watershed Communities have intervened in this proceeding to address specific issues raised by the City of New York Department of Environmental Protection ("City" or "DEP") in its petition and in its comments on the DEIS. Many of those issues concern matters of law and policy that have implications far beyond the instant application and, if affirmed by Commissioner Crotty in the course of this adjudicatory proceeding, will have profound impacts on all activities in the West-of-Hudson Watershed. With the exception of Delaware County, the Watershed Communities are not taking a position in this proceeding on many of the substantive issues concerning this project. The Watershed Communities have, however, already expressed their support for the economic benefits provided by the project assuming it is able to meet applicable regulatory standards. This memorandum of law requests a ruling by Administrative Law Judge ("ALJ") Richard W. Wissler that no substantive and significant issues have been raised by petitioning interveners under the provisions of the Department Permit Hearing regulations set forth in 6 NYCRR Part 624 ("Part 624") relating to: (1) stormwater and (2) community impacts.

II. Background

The public review of this project started in 2000 with a dispute over lead agency status. Initially, with the approval of the Town of Middletown, the Town of Shandaken sought lead agency status. Shortly thereafter, DEP also sought lead agency status. DEC Commissioner Cahill resolved the issue by determining that DEC is the appropriate lead agency for this project. The DEC staff

conducted a public scoping on this project. Approximately three years and after submitting an early draft of the DEIS to the other involved agencies for comment and responding to those comments, DEC accepted the DEIS as complete and started the public review process. DEC conducted an extensive public comment period on the DEIS including four legislative hearings

The issue conference consisted of 18 days of hearing and testimony, seven site and hamlet visits and/or hikes and the submission of several hundred exhibits. Based upon issues raised during the issue conference and at the request of the DEC staff, additional information was provided by the Applicant relating to stormwater. DEC staff reviewed that information and issued an updated draft SPDES permit for Wild Acres and Big Indian Projects. Neither the Applicant nor DEC staff are seeking an adjudicatory hearing. CPC and the City are the only parties seeking an adjudicatory hearing.

III. The Watershed Communities Interest in this Proceeding

A. Home Rule

The Watershed Communities have intervened in this proceeding because they believe that the positions taken by DEP in this proceeding are contrary to the agreements reached in the 1997 New York City Watershed Memorandum of Agreement (“MOA”). More important, the Watershed Communities believe that the positions taken by DEP, if adopted by Commissioner Crotty in this proceeding, could be the beginning of the end for their communities. The Watershed Communities want to ensure that the other parties to this proceeding comprehend the severe restrictions placed on both existing and new development by the Watershed Regulations. In the West-of-Hudson Watershed (and, in particular, the western portion of the Ulster County and all of Delaware County), the burden of the Watershed Regulations relative to the type of development that exists and is likely

to occur is overwhelming. The Watershed Communities agreed to these severe restrictions with the understanding that consistent with those restrictions, existing development would be allowed to continue and new development would be allowed to occur. Issues regarding the type (i.e., whether new development would be commercial, institutional, recreational or residential) or size (i.e., a major hotel complex versus a small hotel, lot size, bulk restrictions, density) would not be the prerogative of DEP; rather, DEC as lead agency must consider and give deference to the adopted land use plans of the local communities.

Under the MOA and through the New York Department of State ("DOS"), grant funds were made available to the Watershed Communities to improve their planning resources. Under Section 151 of the MOA, New York State agreed to assist in economic development by (i) the establishment and maintenance of a "one-stop shopping" permit program to assist the regulated community in identifying the governmental permits required to implement a regulated activity in the Watershed; (ii) to support responsible, environmentally sensitive economic development project by using existing NYCDEP economic development information centers; (iii) to support regional development programs to promote regional economic development interest; (iv) to provide a public relations and tourism development program to target special programs and resources in the Watershed; (v) to make available existing industrial productivity programs to help increase efficiency of new and existing Watershed businesses; and (vi) to enhance existing worker training and skill development programs by providing training courses to build the skills of the Watershed region's labor markets. In order to ensure that there were funds available for economic development, the MOA created the Catskill Fund for the Future. Section 135 of the MOA requires the City to provide \$59,745,241.65 as an economic development fund to support qualified economic development projects which is defined

as projects which encourage environmentally sound development and which encourages the goals of Watershed protection and job growth in the Watershed Communities located West-of-Hudson.

The MOA intended to strike a balance between the need for Home Rule and the City's need to protect its water supply. It states as follows:

Whereas, the parties recognize that the goals of drinking water protection and economic vitality within the Watershed Communities are not inconsistent and it is the intention of the parties to enter into a new era of partnership to cooperate in development and implementation of watershed protection program that maintains and enhance the economic vitality and social character of the Watershed Communities;

* * *

Whereas, the parties agree that the City's land acquisition program, the City's Watershed Regulations, and the other programs and conditions contained in this agreement, when implemented in conjunction with one another would allow existing development to continue and future growth to occur in a manner that is consistent with the existing community character and planning goals of each of the Watershed Communities; and that the City's land acquisition goals ensure that the availability of developer land in the watershed will remain sufficient to accommodate projected growth without anticipated adverse effects on water quality and without substantially changing future population patterns in the Watershed Communities;

* * *

Whereas, the parties have agreed to act in good faith and to take all the necessary and appropriate actions, in cooperation with one another, to effect the purposes of this agreement.

The State and DEP, as parties to the MOA, realized that the West of Hudson Watershed Communities were on the decline; the backbone of their economy (farming, logging, manufacturing and tourism) was leaving. The population that remained was struggling, had below average income and was aging. There was insufficient economic activity and population to support restaurants, retail, health care and other basic necessities. As Alan Rosa (former Supervisor of the Town of

Middletown), Len Utter (current Supervisor of the Town of Middletown) and Robert Cross (current Supervisor of the Town of Shandaken) testified, the Towns of Middletown and Shandaken were once thriving communities with active Main Streets. (Trans. 4101-4104, 855-863, 864-875.) As Alan Rosa testified, the communities need a base population to support the basic services (e.g, little league, doctors, churches, funeral parlors, Girl Scouts, dentists, insurance agents, lawyers, restaurants, movie theater). Local governments need a base population to pay for basic local services (e.g., highway maintenance, snowplowing, street lighting, water, sewer, police protection, criminal justice, public health, stormwater). (Trans. 4103.) The State and federal government mandates on local governments (e.g., water supply filtration, road improvements, handicap accessibility, new prisons, new courthouse, additional requirements for police protection and fire protection, education mandates, solid waste management, prevailing wage) generally do not differentiate between rural and urban areas. As a result, despite a fiscally conservative Board of Supervisors, counties like Delaware County have some of the highest per capita property tax rates in the State. In the end, the Watershed Communities agreed to the MOA because it was the best deal that they could negotiate. The Watershed Communities were able to obtain protections in the MOA because the State of New York Department of Health (under Governor George Pataki's leadership) leveraged its approval authority over the Watershed Regulations to force the City to negotiate a partnership that, according to the MOA, would "allow existing development to continue and future growth to occur in a manner that is consistent with the existing community character and planning goals of each of the Watershed Communities."

B. Watershed Regulation Severely Limit the Opportunities for Future Development

Because of the restrictions on sewage disposal and impervious surfaces, the Watershed Regulations significantly influence or effect the size of development and its location within the Watershed. Under the Watershed Regulations, the City controls all forms of sewage disposal. Under the Watershed Regulations, a nonresidential applicant or an existing commercial facility has two options for sewage disposal: (1) an intermediate size subsurface sewage disposal system under Section 18-38; and/or (2) a wastewater treatment plant under Section 18-36. An "intermediate size subsurface sewage disposal system is a subsurface sewage disposal system utilizing a septic tank for subsurface disposal, treating sewage or other liquid waste for discharge to the ground waters of the state and where a SPDES permit is required for such system." (Section 18 -16 (a) (55)). While an intermediate size subsurface disposal system may be practical outside the Watershed, the restrictions imposed on such systems under the Watershed Regulations makes such systems impossible on most commercial lots within the Watershed (Section 18-38(a) and (b)). Outside the Watershed, if you do not have adequate soil to install a conventional trench system, an applicant can install a variety of other system such as intermittent sand filters, galley systems, seepage pits, wide chamber gravelless systems, mounds systems, evaporation-transpiration systems, evaporation-transpiration absorption systems or add some form of pretreatment. (See DOH, Part 75, Appendix 75-A.8, A.9 and A.10.) None of the above options are allowed within the Watershed. Within the Watershed, if you add some form of pretreatment, the system is regulated as a waste water treatment system under Section 18-36 and, thus, becomes cost prohibitive. Intermittent sand filters, galley systems, seepage pits, wide chamber gravelless systems, mounds systems, evaporation-transpiration systems and evaporation-transpiration absorption systems are prohibited within the Watershed Regulations (Section 18-38(b)). Within the Watershed, the soil percolation rates must be faster than three minutes per inch

(Section 18-38(b)); outside Watershed, soil percolation rates only need to be faster than one minute per inch (Part 75-A.4(a)(3)). Within the Watershed, an additional area of at least 100% of the primary absorption field shall be set aside as a reserve absorption field; outside the Watershed, it is recommended that an additional area of 50% be set aside for future expansion or replacement, if possible. (Part 75-A.4(a)(5)). While intermediate size subsurface sewage disposal systems that existed as of May, 1997 are grandfathered, the City takes the position that upon any alteration, modification or failure, the regulations applicable to new system apply. (Section 18-38(a)(8)). Under the Watershed Regulations, the City also takes a position that if the system is not used for a year, the system loses its grandfathered status and the facility cannot reopen without complying with the regulations applicable to new systems. (Section 18-38(a)(9) and 18-27(a)(4)). Since most of the existing commercial lots do not meet the requirements for an intermediate size subsurface to sewage disposal system under the Watershed Regulations (i.e., depth to groundwater, set back from a watercourse, depth to bedrock, maximum slopes, area, soil permeability, percolation rate), many existing businesses are precluded from making any alteration, modifications or changes to their existing facility or business. An alteration or modification includes a change in tenant, an increase in intensity of use or change in the nature of the wastewater. For most property owners of commercial lots, the only technologically feasible alternative is a wastewater treatment system.

Under the Watershed Regulations, a wastewater treatment system is essentially any treatment system that requires a SPDES permit (Section 18-16(a) (110)). The Watershed Regulations define a new wastewater treatment plant in Section 18-16 (a) (110) as "any facility which treats sewage or discharges treated effluent in the Watershed, and which requires a permit under Titles 7 or 8 of Article 17 of the Environmental Conservation Law, installed for the purpose of treating, neutralizing, stabilizing or disposing of sewage by removal of contaminants accomplished by unit operations or

processes or by a combination of such operations and processes, including any combination of the following: preliminary treatment, flow equalization, primary settling, biological treatment, chemical treatment, secondary settlement, filtration, aeration, disinfection, sludge processing, or any other processes as may be applicable to a given design for wastewater treatment plant." Wastewater treatment plants include plants that discharge subsurface and/or to a water course. Section 18-36 of the Watershed Regulations regulates the design and operation of all wastewater treatment plants in the New York City Watershed. With a few minor exceptions, Section 18-36 of the Watershed Regulations subjects the design and operation of all wastewater treatment plants to the same stringent requirements regardless of the flow rate. As a result, any wastewater treatment plant built to meet the requirements of the Watershed Regulations (no matter whether it is serving 10 or 20 homes, a small restaurant, a 30 room hotel or 300 homes) will cost easily in excess of \$1 million. (See Exhibit A for a listing from EFC of the costs of the upgrades to existing WWTPs.) Section 18-36(a) (10) requires all existing waste water treatment plants to be upgraded to meet the requirements of Section 18-36 by May 1, 2002 (five years from the effective date of the regulations). The regulatory upgrades are listed in Section 18-36 and, in part, in Section 141 of the MOA. In addition to mandatory effluent limitations, the regulatory upgrades include the following: phosphorus removal, sand filtration, disinfection, microfiltration or an equivalent technology, stand-by power, power alarm, automatic start-up capability, disinfection back-up, back-up sand filtration, recording flow meters, and alarm telemetering. Under DEC regulations, the more equipment, the greater the staffing requirements. Also, under the Watershed Regulations, DEP must review and approve of the design of each new or modified wastewater treatment plant. The cost to design and construct an upgrade to the existing wastewater treatment plant within the Watershed to meet the City Watershed Regulations for the existing facilities is shown on Exhibit A. The cost for a typical household range from a low of approximately \$10,000 per residential unit (for a large development with over 300

units) to approximately \$125,000 per residential unit (for a small development with approximately 20 units). The operating cost after the upgrade typically increase between 100% to 500%. The cost for small commercial operations (i.e., restaurants, small hotels, small resorts, not-for-profit organizations) is generally much worse. An upgrade for a typical restaurant or small hotel would generally cost in excess of one million dollars. Moreover, under the upgrade program, it has taken, on average, over seven years to design, permit and construct an upgrade for a typical facility.

While Section 141 of the MOA requires the City to fund the cost of the upgrade for facilities that existed in 1997, according to the City, it does not require the City to fund the upgrade (either capital or operating cost) for any modifications, expansions or alterations to an existing private facility or for a new private facility. For example, if an existing facility were to increase its permitted flow, DEP takes the position that the facility has to pay the upgrade portion of the cost associated with the increase in flow including any incremental operating cost.

The net effect of the Watershed Regulations is that small or medium-sized commercial development can take place only where there is an existing publicly owned wastewater treatment plant that has adequate capacity to accept its waste. In the Watershed, there are a few publicly owned wastewater treatment plants (i.e., Pine Hill, Tannersville, Grand Gorge, Margaretville, Village of Hobart (\$2,897,407), Village of Stamford (\$4,322,699), Village of Delhi (\$6,918,000), and Village of Walton (\$8,785,996)). The first four are City-owned plants and the City maintains that it decides who may connect to those plants. The last four plants are in Delaware County and, according to Exhibit A, the upgrade costs for those facilities ranged from a low of \$2,897,407 to a high of \$8,785,996. While the MOA provides funding for the construction of some new wastewater treatment plants in existing hamlets/villages, those wastewater treatment plants are designed to

handle only the existing flow plus 10% and are specifically not funded to address future development. In order to have a development outside an area that is served by an existing publicly owned wastewater plant, the size of the development needs to be on the order of the size of this project in order to overcome the cost to construct and operate a wastewater treatment system that conforms with the Watershed Regulations.

So why do the Watershed Communities believe that the positions taken by DEP, if adopted by Commissioner Crotty in this proceeding, could be the beginning of the end for their communities? First, the City maintains that a project of this size is inconsistent with the community character and the project size should be reduced on that basis. During the issue conference, the experts disagreed on whether the project needs to be of this size in order to be economically feasible and attract a sufficient number of visitors. CPC's expert testified that the communities could survive with small hotels depending on passive tourism (i.e., tourist that come up to the mountains to hike, fish and hunt). The past 30 years of experience suggest that passive tourism is not enough. Moreover, such hotels are not possible unless they are sited in a hamlet served by an existing publicly owned wastewater treatment plant. Very few sites remain to be developed within the hamlet areas. Moreover, visitors to the Catskills want views of the mountains – not Main Street. Second, in this proceeding, the City is demanding a level of analysis for storm water that is cost prohibitive, unprecedented and not necessary to make the requisite regulatory determinations. By demanding this extreme level of analysis, the City is conveying the message to other potential project developers not to come to the Watershed (i.e., the uncertainties about the cost, the approvals and delay will make similar project either cost prohibitive or infeasible). In this proceeding, the positions taken by the DEP with respect to storm water and project alternatives/community character demonstrate that the DEP is not an objective, independent regulatory agency, but rather DEP is an interested party

opposed to the project with the intent of stopping the project in order to protect and enhance the value of its resource (i.e., the water supply). Inconsistent with being an opponent of the project, DEP is also an approving agency/regulator that must issue two approvals for the project including an approval over the storm water pollution prevention plan. In either case, the City is depriving the local communities the opportunity to make their own decision whether a destination resort of this size is consistent with the community character, local zoning and in the best interest of the long-term survival of these communities.

C. Neither the MOA Nor the Watershed Regulations Prohibited Development on Steep Slopes and/or Large Tracts of Undeveloped Land

The Watershed Communities wish to reiterate the point made in their initial Petition for Party Status regarding DEP's comment that in the 1997 MOA:

Development was to be encouraged in town centers with supporting infrastructure. Growth was not envisioned as appropriate on steep slopes or at locations outside of population centers on large tracts of undeveloped land with mature forests.

DEP DEIS Comments, p.4

As stated in the Petition for Party Status, there is no factual or legal basis for that position. The Watershed Communities understand that DEP has not pressed that position in the Issues Conference nor presented it as an issue for adjudication. Nevertheless it provides the underlying basis for much of DEP's arguments. The Watershed Communities feel very strongly that such a position must be clearly rejected as unfounded and ask for such a ruling from the ALJ in the context of the ruling on issues for adjudication.

The Watershed Communities' position is thoroughly presented in the Petition for Party Status and will not be repeated here. It is sufficient to note that nowhere in the MOA, its attachments, the Watershed Rules and Regulation or the Water Supply Permit can any reference be found which either explicitly or implicitly supports DEP's position. The Watershed Regulations do provide exemptions from the general prohibition of impervious surfaces within 100' of a watercourse for villages and hamlets. 15 RCNY §18-39(a)(3). However, that exemption is a recognition of the existing patterns of development in villages and hamlets which immediately border rivers and streams would, without an exemption, be severely limited.

There are no regulatory restrictions on steep slopes or forested areas. DEP's regulatory authority regarding impervious surfaces and stormwater pollution prevention plans makes absolutely no distinction for the location of the project or the nature of the terrain other than creating thresholds for DEP's jurisdiction. 15 RCNY §18-39. Once DEP's jurisdiction is determined, the standards for approval are not altered by the nature of the project, only by the nature of the watershed basin and whether it is phosphorus or coliform restricted or within the basin of a terminal reservoir. 15 RCNY §18-39(c).

The fact that the MOA and its associated regulations and programs are silent on the issue presented by DEP, is not a mistake. The Watershed Communities were adamant that DEP's authority was limited to water quality protection and could not be used as stealth means of land use controls. Had the intention of the parties been otherwise, there would have been specific statements and provisions to that effect. There are not. Instead all projects, regardless of location are required to meet the same standards for water quality protection, regardless of location on steep slopes or mature forests. Those conditions are accounted for in the design of the stormwater pollution prevention

plans - there are no additional requirements or presumptions presented by the character of the property.

The Watershed Communities respectfully request that the ALJ and the Commissioner soundly reject DEP's attempt to infer an additional regulatory presumption which is contrary to the MOA.

IV. Burden on City/CPC to Meet the Threshold for an Adjudicatory Hearing

The City/CPC (collectively "the Interveners") are seeking an adjudicatory hearing on, among other issues, stormwater and community character impacts. The Interveners are asserting that there is insufficient information in the record for DEC to make findings required by Section 8-0109 of the ECL.

Subdivision 1 of ECL Section 8-0109 provides that:

Agencies shall act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects

Subdivision 8 provides that

When an agency decides to carry out or approve an action which has been subject to an environmental impact statement, it shall make an explicit finding that the requirements of this section have been met and that consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided.

The role of SEQRA in a Part 624 adjudicatory hearing is described in the Interim Decision issued by DEC Commissioner Flack in In re Wilmorite, Inc., Rotterdam Square, 1981 WL 142250 (N.Y. Dept. Env. Conserv.). In that decision, the Commissioner stated as follows:

In accordance with ECL §70-0119 and [SAPA] Articles 3 and 4, DEC must conduct an adjudicatory hearing on permit applications where issues have been raised by the Department staff or the public, which if resolved, may result in permit denial or the imposition of significant permit conditions. The prospect of permit denial or imposition of significant permit conditions primarily affects the Applicant for a permit. A fair reading of these statutes leads to the conclusion that the opportunity for an adjudicatory public hearing is principally designed to give an Applicant a measure of statutory due process in the consideration of its applications by the Department. It is not intended for a forum for the adjudication of rights between the Applicant and intervening parties.

The scope of the adjudicatory hearing should be limited to the resolution of only contested issues. Where the Department's staff or other parties to the proceeding do not affirmatively raise substantive and significant issues concerning the permit applications, including, where applicable, the [DEIS], there is no need for formal adjudication of the remaining contents of the application.

Where the Department is lead agency under the [SEQRA], it must also, in addition to deciding on issuance of permits, seek comments on the DEIS, and insure that responses to those comments are contained in its [FEIS] regarding the project. Nothing in ECL Article 8 or the SEQR regulations . . . requires the Department [or any other agency] to utilize the adjudicatory hearing forum for purposes of resolving or responding to comments on the DEIS. In fact, at both the State agency and local government levels, most SEQRA hearings are legislative in form.

However, because SEQR is also a substantive statute requiring the Department to make the findings required by ECL §8-0109.8 and 6 NYCRR 617.9 [now 617.11], issues arising under SEQR which may lead to permit denial or the imposition of significant conditions must be subject to actual adjudication if SAPA's due process requirements are to be met . . .

As stated above, SEQRA is integrated into the Part 624 Adjudicatory hearing only to the extent that mitigation conditions may be imposed (or the permit denied) as part of the findings required by ECL §8-0109.8. Under 6 NYCRR §624.4(b), issues to be adjudicated are limited to those identified as “substantive and significant.” Section 624.4(c)(6)(i) provides that

In determining issues to be adjudicated, the sufficiency of the DEIS and the DEC’s commensurate ability to make findings required by §617.11 are appropriate subjects for the adjudicatory hearing. In situations where the Department staff has reviewed an application and find that a component of the applicant’s project, as proposed or as conditioned by the draft permit conforms to all applicable requirements of the statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant.

An issue is substantive “if there is sufficient doubt about the Applicant’s ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ.” See 624.4(c)(2). To determine whether an issue is significant, the Intervener must demonstrate that the issue in dispute “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.”

As a result, the issue in this proceeding is whether, in light of the Application and related documents, the draft permit, the petitions for party status, the issue conference record and any subsequent written arguments authorized by ALJ Wissler, the DEC Commissioner has sufficient

information to make the required findings, if any, that the significant adverse impacts to community character and/or that significant adverse impacts from stormwater have been mitigated to the extent practicable consistent with social, economic and other essential considerations

In making this determination, there are a number of Black Letter Principles that define the DEC's obligation with regard to mitigation findings. The Black Letter Principles can be found in the treatise: Environmental Impact Review in New York, Gerrard, Ruzow, Weinberg, Chapter 6.

1. The adjudicatory hearing is a due process right to protect the Applicant's and Intervener's rights under SAPA. The adjudicatory hearing process should not be used as a means by project opponents to stop a project by causing undue delay and expense.
2. SEQRA does not change the existing jurisdiction of agencies nor the jurisdiction between or among State and local agencies (6 NYCRR §617.3(d)).
3. SEQRA requires that any conditions that mitigate adverse environmental impacts to the extent practicable consistent with social, economic and other essential consideration must also be "practicable and reasonably related to the impacts identified in the EIS." (6 NYCRR §617.3(b)).
4. Only significant impacts need to be considered in an EIS and thus only significant impacts are subject to mitigation. Merson v. McNally, 90 N.Y.2d 742, 751 (1997) ("the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project"; West Village Comm. Inc. v. Zagata, 242 A.D.2d 91 (3d Dep't), lv. to

appeal denied, 92 N.Y.2d 802 (1998) (the purpose of an EIS is to examine the identified potentially significant environmental impacts which may result from a project, not every conceivable impact”).

5. Courts will give great deference to an agencies exercise and discretion in determining the need for and the appropriate mitigation measures. Lucas v. Planning Bd. of Town of LaGrange, 7 F.Supp.2d 310, 322 (S.D.N.Y. 1998) (agencies have “considerable latitude in the exercise or discretion for substantive environmental decisions”); Town of Henrietta v. Department of Env'tl. Conservation, 76 A.D.2d 215, 222 (4th Dep't 1980) (“thus, a general substantive policy of the act is a flexible one. It leaves room for responsible exercise of discretion . . .”).
6. Mitigation measures must relate to the particular project under consideration. (City of Rye v. Planning Comm'n, Village of Port Chester, N.Y.L.J., Dec. 6, 2000 at p.36, col. 3 (Sup. Ct. Westchester County).
7. It is up to the lead agency to decide, subject to the rule of reason, which mitigation measures to impose. The agency must employ a rule of reason, taking a hard look at and consider potential mitigation measures. Jackson v. New York State Urban Dev't Corp., 67 N.Y.2d 400, 422 (1986) (the agency must, “employing a rule of reason, take a hard look at and consider potential mitigation measures”); West Branch Conservation Ass'n, Inc. v. Planning Bd. of Town of Clarkstown, 207 A.D.2d 837 (2d Dep't 1994), lv. to appeal dismissed, 84 N.Y.2d 1019 (1995) (Town Planning Board “studies the EIS, hears the public commentary and works with the developer and the community to determine which method would most

successfully mitigation each environmental impact in question”); Save the Pine Bush, Inc. v. Planning Bd. of City of Albany, 298 A.D.2d 806, 808 (3d Dep’t 2002).

8. Not every conceivable mitigation measure must be identified and addressed before an FEIS will satisfy the substantive requirements of SEQRA. Aldrich Pattison, 107 A.D.2d 258, 266 (2d Dep’t 1985); Fornial v. Town of New Hartford, No. 97-2634, slip op. at 9 (Sup. Ct. Oneida County Jan. 7, 1998) (“there is nothing in SEQRA which mandates perfect mitigation . . .”).
9. With respect to mitigation, SEQRA does not compel particular outcomes. Fornial, No. 97-2634, slip op. at 7 (upholding zoning changes in EIS for commercial development as against claims that traffic and other mitigation measures were inadequate).
10. Dissatisfaction with an agencies proposed mitigation measures is not redressable by the courts so long as those measures have a rationale basis in the record.” Jackson v. New York State Urban Dev’t Corp., 67 N.Y.2d at 421; Space v. Hurley, No. 6549/00, slip op. at 4 (Sup. Ct. Rockland Co. Nov. 17, 2000) (“although the Rockland County drainage agency would have preferred to see final plans before the respondents determination [permitting a golf course], the court finds sufficient basis for the negative declaration in respondents plan to use retention basins and to use buffers around existing ponds in order to minimize erosion and siltation”).
11. “It is not the role of the courts to weigh the desirability of any action or chose among alternatives. Dissatisfaction with an agencies choice is not redressable by the courts, where

... those choices have a rationale basis in the record.” Residents for a More Beautiful Port Washington v. Town of North Hempstead, N.Y.L.J. Sept. 1, 1988, at p.21, col. 4 (Sup. Ct. Nassau Co), aff’d, 149 A.D.2d 266 (2d Dep’t 1989) (citations omitted).

12. Whether an action comports for local zoning law is not an issue to be resolved under SEQRA review. SEQRA states that its provisions do not change jurisdiction between and among state agencies and public corporations. In re Dutchess Sanitation Service, Inc., 1980 WL 103092 at 1 (N.Y. Dept. Env. Conserv.); Town of Poughkeepsie v. Flacke, 84 A.D.2d 1, 5 (2d Dep’t 1981), appeal denied, 57 N.Y.2d 602 (1982) (“SEQRA was not intended to and did not pre-empt nor in any way interfere with the zoning ordinance”).

13. DEC has consistently expressed the view that its “policy is not to interfere with local land use decisions. [I]n the context of a DEC hearing including SEQRA issues, it is the responsibility of local government officials to see the record is developed which adequately reflects zoning policies and practices in the effected locality.” In re Pyramid Crossgates Co., 1980 WL 103087 at 1 (N.Y. Dept. Env. Conserv.).

V. **DEP/CPC Have Not Met Their Burden of Persuasion with Respect to the Issue of Stormwater.**

CPC and DEP both assert that adverse impacts from stormwater are significant and have not been adequately mitigated by the draft permit and the mitigation measures proposed by the Applicant. In order for stormwater impacts to become an adjudicable issue, CPC and DEP must present sufficient evidence to raise a disputed factual issue as to whether the record, as supplemented during the issue conference, fails to contain sufficient information for the DEC Commissioner to

issue a finding that the project, as proposed by the applicant and restricted by the draft permit prepared by the Department's staff, mitigates any significant adverse impact from stormwater, to the extent practicable, consistent with social, economic and other essential considerations and, as a result, additional significant and substantive conditions (or permit denial) may have to be added to the draft permit.

There are two types of stormwater impacts regulated by the Department: (1) Stormwater impacts during construction; and (2) stormwater impacts post construction. The Department now has a comprehensive and established regulatory structure for regulating both types of stormwater impacts. Currently, stormwater is regulated by the department under General Permit 02 01 (hereinafter referred to as "Phase II General Permit"). (App. Ex.40.)

Stormwater impacts during construction are regulated by requiring that the Applicant and/or the Applicant's engineer prepares an erosion control plan to prevent stormwater containing soil to impact surface water during the construction process. The erosion control plan must be developed in accordance with the guidance documents incorporated in to the Phase II General Permit. (App. Ex.37). The guidance document sets forth the best management measures that can be implemented during construction to minimize stormwater runoff containing soil. Different engineers will select different control measures; no one control measure is required. Under Phase II General Permit, the Applicant is required to certify to the Department that the Applicant has an erosion control plan developed in accordance with the applicable guidance. The Department reviews the submission to determine whether the plan was developed in accordance with the applicable guidance. If the Department is not satisfied with the information submitted, the Department may require additional

information and/or may subject the project to an individual SPDES permit. In the overwhelming majority of projects, the Department relies on the professional judgment on the Applicant engineer.

Stormwater impacts post construction are regulated under Phase II General Permit by the requirement of a storm water pollution prevention plan (hereinafter referred to as "SPPP"). The objective of the SPPP is to mitigate the post construction of stormwater consistent with generally accepted best management practices. The best management practices are intended to reduce the phosphorus loading in the stormwater by 40% and to reduce the TSS concentration by 80%. The SPPP also contains measures to ensure that the stormwater from a severe storm does not pose a threat to surface waters or downgradient facilities. The SPPP must be prepared in accordance with the referenced guidance documents. The guidance documents identify the available control measures and provide the details for the design and sizing of those measures. Different engineers will select different control measures; no one control measure is required or specified. Under Phase II General Permit, the Applicant is required to certify to the department that the Applicant has an SPPP developed in accordance with the applicable guidance. The Department reviews the submission to determine whether the plan was developed in accordance with the applicable guidance. If the Department is not satisfied with the information submitted, the Department may require additional information and/or may subject the project to an individual SPDES permit. In the overwhelming majority of projects, the Department relies on the professional judgment on the Applicant engineer.

Under the Phase II General Permit, the Applicant submits a notification with details regarding its SPPP and erosion control plan. The Applicant must wait a specified time period (ranging from 5 to 60 business days) before commencement of construction. If by the end of the waiting period, the Applicant does not receive notification from the Department that additional information is

required, the Applicant may proceed with the project. If the project does not require any other Department permit, the Applicant's participation under the Phase II General Permit is considered the Type II Action under SEQRA and does not require any SEQRA review.

Under Phase II General Permit, there are generally no monitoring requirements or post construction testing requirements to confirm the adequacy of the measures. Under Phase II General Permit, the Applicant's obligation is to implement the SPPP in accordance with its terms and conditions and not to cause a contravention of the water quality.

In this proceeding, the Department staff elected not to allow the Applicant to proceed under Phase II General Permit and required the Applicant to obtain an individual SPDES permit for both projects. The draft individual permit regulates all aspects of the storm water management. It requires a best management practice plan to prevent the spill and/or release of any chemical to groundwater or surface water. It specifically requires the highest standards for the application of pesticides and fertilizers. It requires monitoring the water quality in the stormwater detention ponds for pesticides on a regular basis. It requires monitoring of water quality in the groundwater and monitoring of surface water quality both upgradient and downgradient on a regular basis. It regulates the types of pesticides that may be used on the golf course. It also regulates the types of chemicals that may be used to enhance the settlement in the detention ponds. In addition, it requires effluent toxicity test on the water from the stormwater detention basins three times each year within two weeks of the seasonal application of pesticides. It specifies a maximum annual phosphorus load from stormwater and requires sampling to confirm that the limit is not exceeded. It requires the Applicant to prepare and submit to the Department for approval at the appropriate time the SPPP. It regulates the

Applicant use of the effluent from the wastewater treatment plant as irrigation water for the golf course.

CPC and DEP offered the testimony of several experts on the stormwater issues. In general, their objections and/or comments can be summarized as follows: (i) the Applicant has not properly evaluated the potential stormwater impacts; (ii) nor has the Applicant proposed appropriate stormwater pollution control measures; (iii) the Applicant has underestimated the pollutant loading; (iv) the Applicant has used the incorrect models to evaluate stormwater impacts; (v) the Applicant must demonstrate that there will be no net increase of phosphorus between preconstruction conditions and post construction conditions; (vi) the Applicant must provide detailed plans of the stormwater pollution control measures at this stage in the process in order to make the requisite findings under SEQRA; (vii) the potential erosion impacts of this project are catastrophic; and (viii) the stormwater retention basins are undersized. As indicated below, none of these positions meet the evidentiary threshold for triggering an adjudicatory issue. Below, this memorandum addresses each of the comments identified above and explains why the comment fails to meet the threshold trigger adjudication.

CPC and DEP's position: **The Applicant has not properly evaluated the potential stormwater impacts.** SEQRA does not require perfection in quantifying the stormwater impacts. Rather, SEQRA requires that the stormwater impacts be identified sufficient to make a determination whether there are significant adverse impacts and, if so, to make a reasoned determination of the appropriate mitigation measures. Additional evaluation of potential stormwater impacts is not necessary to select the appropriate mitigation measures.

CPC and DEP's position: **The Applicant has not proposed appropriate stormwater pollution control measures.** SEQRA does not mandate the selection on specified mitigation measures and SEQRA allows the Department to use its discretion in selecting an appropriate mitigation measure. A court will sustain a selected mitigation measure provided there is a rational basis for the selection. While different engineers may select different control measures, SEQRA does not require academic debate regarding which measure will be more effective.

CPC and DEP's position: **The Applicant has underestimated the pollutant loading.** The Applicant and DEP have provided numerous estimates as to the pollutant loading. Regardless of the estimates selected, the pollutant loading from this project is not significant and the mitigation measures selected to mitigate the pollutant loading would not be altered. An estimate of the pollutant loading is necessary for the department to modify the TMDL for phosphorus for both the Ashokan and in Pepacton Reservoirs. The draft permit requires the applicant to conduct sampling in the receiving stream to confirm that the pollutant loading has not been exceeded. If the Applicant has underestimated the pollutant loading and that underestimation is incorporated in to the draft SPDES permit, the Applicant is at risk of exceeding the mass loading limitation in the draft SPDES permit. As a result, the Applicant took a very conservative approach to the estimates for phosphorus loadings. DEC staff was satisfied with the accuracy of the estimates for purposes of this proceeding.

CPC and DEP's position: **The Applicant has used the incorrect models to evaluate stormwater impacts.** At the present time, the hearing record is complete with numerous evaluations and modeling of the stormwater impacts. Modeling was performed both by or on behalf of DEP and the Applicant. Regardless of which modeling results are used, the draft permit conditions remain unaffected.

CPC and DEP's position: **The Applicant must demonstrate that there will be no net increase of phosphorus between preconstruction conditions and post construction conditions.**

DEP admits that this is not a requirement of the Phase II General Permit. DEP asserts that this is a requirement of their own regulations because their regulations incorporate DEC Phase I General Permit. Neither EPA nor DEC take the position that this is a requirement of Phase I General Permit. In fact, DEC made it absolutely clear that the "no net increase" is not a requirement of the Phase I General Permit (Trans. 4643). Neither CPC and DEP have provided any evidence that "no net increase" is either practical or necessary.

CPC and DEP's position: **The Applicant must provide detailed plans of the stormwater pollution control measures at this stage in the process in order to make the requisite findings under SEQRA.** The SEQRA statute and the SEQRA regulations make clear that compliance with SEQRA is to be done at the earliest possible time in the application process. SEQRA compliance is the critical first step in the permitting process. Once SEQRA is addressed, the Applicant and the involved agency can proceed with the local permit approvals. During the local permit approvals, the application may be denied or significantly modified. To the extent that the project is modified based upon local requirements imposed by the Town Board and/or Planning Board of Middletown and/or Shandaken, the details on the SPPP may change. As result, a conceptual plan for the SPPP measures is necessary at this stage to ensure that the SPPP is feasible; the final actual design details must wait until the local approvals have been obtained. DEC staff has testified that there is sufficient information now to confirm that the project can meet applicable standards and that detailed design documents can wait to later in the permit process.

CPC and DEP's position: **The potential erosion impacts of this project are catastrophic.**

The draft permit contains a variety of requirements to reduce the potential for a catastrophic failure. Neither CPC nor DEP have identified additional reasonable and practical measures consistent with social, economic and other essential considerations that could be implemented to reduce the potential for a catastrophic failure.

CPC and DEP's position: **The stormwater retention basins are undersized.** The department staff now has access to all the information relating to whether the stormwater retention basin is properly sized. The Department staff has made an informed decision that it has sufficient information at this point in time to evaluate the sizing of the detention basin sufficient for SEQRA purposes. In other words, there is sufficient information to know that stormwater detention basins can be designed and be of adequate size to manage the stormwater from this project.

In making a determination whether to identify stormwater as an adjudicable issue, the Watershed Communities requests that the Department consider the following:

- A. Upon information and belief, the level of stormwater protection required under the draft permit exceeds the level required for any other golf course or hotel establishment in New York State. Scott Clark of Burton F. Clark, Inc., the contractor that will be installing the golf course, testified that the cost of the stormwater controls on this project exceeds the cost for constructing an entirely new golf course elsewhere. (Trans. 1735-1736)

- B. Obtaining approval to operate under Phase II General Permit, by itself, is not considered a discretionary approval under SEQRA.

- C. Under the Phase II General Permit, DEC does not require approval over each individual SPPP, rather Applicants submit notification with a description to its plan and the Department reviews the submittal with the option of requiring more information or a site specific approval. In the overwhelming majority of cases, DEC does not provide comments to the submissions.

- D. DEP requires under the Watershed Regulation, a separate stormwater pollution prevention plan drafted in accordance with GP-93-06. DEP retains individual site specific approval over the SPPP as part of its permit process. DEP is free, as part of its permit process, to require significant additional measures to mitigate stormwater impacts; the applicant should, however, qualify for future stormwater funding from CWC for any measures required by DEP that were not otherwise required under state law.

- E. Neither the Pepacton nor the Ashokan exceed a TMDL for phosphorus. In both cases, the TMDL analysis performed by DEP for DEC and approved by EPA indicates that there is adequate expansion capacity for phosphorus (Ashokan 8,000 kg) and (Pepacton 33,000 kg) (Watershed Communities Ex. 4 and 5, Trans. 3263). Nonetheless, both these watersheds have a TMDL for phosphorus even though they are not impaired for phosphorus. In the draft permit, DEC has provided a specific limit for phosphorus loading from stormwater and will require the Applicant to

conduct periodic surface water monitoring upstream and downstream of the project to ensure that the allocation is not exceeded.

- F. The permit specifically restricts the pesticides that can be used, requires monitoring for pesticides in the stormwater basins and groundwater and requires a BMP for pesticides, herbicides, fungicides and fertilizers that incorporates industry practices such as Integrated Turf Management Plan and Fertilizer and Pesticide Risk Assessment (FPRA), both as Appendices 14 and 15, respectively, of the DEIS, accepted by the Department on November 26, 2003, chemical application rates and methods, use of non-synthetic or "organic" fertilizers and pesticides, employee training, inspections and records, preventative maintenance, good housekeeping, materials compatibility and security, and structural measures such as storm water retention ponds, constructed wetlands, and erosion/sediment control devices and practices, where appropriate. The permittee shall make every attempt to meet the substantive operational requirements of the Gold Signature Certification Program under the Audubon Cooperative Sanctuary Program for Golf Courses (ACSP, administered by The Audubon Society of New York State, Inc.)
- G. The draft permit requires effluent toxicity testing requirements in the stormwater detention ponds three times per calendar year, with each sampling occurring within two weeks of the application periods.
- H. The turbidity and phosphorus loadings from this project are minuscule in comparison to a typical dairy farm (six healthy cows (Trans.3260)) and the turbidity and

phosphorus load to the Ashokan from the City's Shandaken Tunnel. (Watershed Community Ex. 17 and 18.) Dean Frazier testified that DCAP anticipates a 7,000kg/yr. reduction in phosphorus loadings from two programs being initiated by Delaware County to reduce phosphorus from cow manure. (Watershed Communities Exh. 8, 9, Trans. 3241-3265.) The draft permit for the Shandaken Tunnel will allow DEP to add 10,400 kg/yr of phosphorus to the Ashokan. Yet DEP has to date, refused to install an intake in the Schoharie Reservoir that would substantially reduce the phosphorus loading.

- I. The MOA provides a comprehensive plan for water quality protection in the West-of-Hudson Watershed sufficient to demonstrate to EPA that the unfiltered water supply will meet applicable drinking water standards for filtered water. Nothing in the MOA prohibited this project or projects of this type. Nothing in the MOA or DEC regulations requires existing golf courses (that are not being modified) to implement the stormwater mitigation measures for pesticides, herbicides and fertilizer.

VI. The MOA, Article 11 of the Public Health Law and this Proceeding.

At the issue conference on June 25, 2004, the Watershed Communities' attorney Kevin Young explained the history of Public Health Law Article 11 and its relationship to this proceeding. (Trans. pg 2427-2439.) Administrative Law Judge Richard Wissler requested that Mr. Young supplement his offer of proof with a written summary providing documentary support for his oral testimony. That written summary is provided below.

Article 11 of the Public Health Law is an city's statutory authority for its Watershed Regulations. Article 11 allows the City to promulgate *extraterritorial* regulations to protect its water supply provided those regulations are promulgated in accordance with certain procedures and approved by the New York State Department of Health.

As consideration for that *extraterritorial* authority, Public Health Law §1105 (1) provides, in relevant part, as follows:

[A]ll persons whose rights of property are *injuriously affected* by the enforcement of any ... rule or regulation [of NYCDEP made under the provisions of Article 11 of the Public Health Law], shall have a cause of action against the municipality or corporation ...for *all damages* occasioned or sustained by such ... enforcement, including *all injuries caused to the legitimate use or operation of such property*.

When the Legislature granted the City the power to exercise *extraterritorial* authority over the Watershed (PHL §1100), it did so on the condition that the City pay for any injury caused to property rights (PHL §§1104 - 1105). See, e.g., Loft Corp. v. City of New York, 218 N.Y.L.J. 22 (Putnam County Sup Ct.), rev'd on other grounds, 260 A.D 2d 549 (2d Dep't), lv. to appeal denied, 94 N.Y.2d 757 (1999). In fact, "[t]he obligation to compensate for all damage or injury has historically always been a part of the Watershed enabling acts." Id. at p.8 (and legislative history summarized therein). The New York Court of Appeals long ago held that the City cannot ignore its obligation to pay for damages to affected property in the Watershed, because the City's exercise of power over the watershed was specifically conditioned on this Legislatively imposed duty to pay. See Burhans v. City of New York, 198 N.Y. 439, 446 (1910).

The Legislature's determination to expose the City to damage payment obligations was well-founded. More specifically, PHL §1105 serves as an intended and important check on the exercise

of the City's power over the watershed, which lies outside its territorial limits. Absent full enforcement of PHL §1105, the City has no reason to take genuine account of private property interests in its enforcement of the Watershed Regulations, particularly since most, if not all, of those property interests are held by non-residents of the City and to whom the City has no accountability.

Because PHL §1105(1) gives holders of property rights a remedy for injury caused by the City's extraterritorial enforcement of the 1953 and 1997 Watershed Regulations, a remedy that goes beyond what was available at common law or under the U.S. Constitution, it is a remedial statute. See, e.g., McKinney's Cons. Laws of N.Y., Book 1, Statutes §§35 and 321. See also In re Commitment of Marino S., 293 A.D.2d 223 (1st Dep't 2002), lv. to appeal granted, 99 N.Y.2d 505, aff'd, 100 N.Y.2d 361, cert. denied, 540 U.S. 1059 (2003) (holding that a statute is remedial if it provides a new remedy); and Mendler v. Federal Ins. Co., 159 Misc.2d 1099 (New York County Sup. Ct. 1993) ("Remedial statutes are designed to correct imperfections in prior law, give relief to aggrieved parties and to promote justice").

As a remedial statute, PHL §1105(1) must be "liberally construed, to spread [its] beneficial result as widely as possible" and "to promote justice." McKinney's Cons. Laws of N.Y., Book 1, Statutes §321, p. 490 (quoted with approval in Weingarten v. Board of Educ. of the City School Dist. of the City of New York, 3 Misc.3d 418, 426 (2004)). Such a liberal construction "is one which is in the interest of those whose rights are to be protected" McKinney's Statutes §321, p. 491.

In order to bring a claim under PHL §1105(1), therefore, a claimant need only show that (1) they are persons with "rights of property," (2) that those property rights were "injuriously affected," and (3) that this injury was caused by the City's enforcement of rules or regulations promulgated

under Article 11 of the Public Health Law. Once a claimant satisfies these three factors, they are entitled to recover “all damages occasioned or sustained by such... enforcement.” PHL §1105(1). Such damages may include, but are not limited to, “all injuries caused to the legitimate use or operation of such property.” PHL §1105(1). To understand Section 1105, one needs to know its legislative history. The statutory history is attached in a separately bound Appendix.

In 1885, the New York State Legislature adopted Chapter 543, the predecessor to what eventually became PHL §§1100-1105. Chapter 543 was “AN ACT to confer upon the state board of health power to protect from contamination, by suitable regulations, the water supplies of the state and their sources.” Appendix A.

By this original enactment, the State Board of Health was “empowered to make rules and regulations for protecting from contamination any and all public supplies of potable waters and their sources within this state.” (Sec. 1) Provision was also made for a determination of violations and the imposition of penalties (Sec. 4-6). Most notably, however, Section 7 of the Act provided that whenever execution of the regulations of the State Board of Health “required the providing of some public means of removal or purification of sewage, the municipality or corporation owning the water-works benefitted thereby” was required to “construct or maintain such works or means for sewage disposal.” This is the genesis of PHL §1104 as it currently exists today.

Five years later, in 1890, Section 7 of Chapter 543 was amended to expand its scope; these amendments provided, in relevant part, that whenever execution of the regulations of the state board of health (1) required or made necessary “the construction or maintenance of any system of sewerage, or a change thereof” the municipality or corporation owning the water-works benefitted

thereby had to incur the expense of constructing and maintaining such system of sewerage; or (2) occasioned or required the removal of any buildings, the municipality or corporation owning the water-works benefitted thereby had to pay for such removal and also had to “pay to the owner thereof all damages occasioned by such removal”; or (3) “will injuriously affect any manufacturing or industrial enterprise which is not a public nuisance,” the municipality or corporation “shall pay all damages occasioned by the enforcement thereof.” Appendix B.

The 1890 Amendments contained an additional provision, however, that extended the relief available to all parties injuriously affected by any of the regulations adopted thereunder. That provision was appropriately subtitled: Right of Action for Damages. More specifically, the 1890 Amendments added the following provision:

And the owner or owners of any building, the removal of which is occasioned or required or has been removed by *any rule or regulation of the state board of health made under the provisions of this act, and all persons whose rights of property are injuriously affected by the enforcement of any such rule or regulation*, shall have a right of action against the municipality or corporation owning the water-works benefitted by the enforcement of such rule or regulation, for *all damages occasioned or sustained by such removal and enforcement of the said rule or regulation or either* . . .

(emphasis added).

The 1890 statute specifically provided for the recovery of damages occasioned by *either* the removal of a building *or* enforcement of a rule or regulation made under the provisions of the act. The Act was amended yet again in 1893, at which time it was broken down into Sections 70-74 of the PHL. (Appendix C). The new Section 72 essentially contained the Right of Action for Damages provision quoted above with one notable exception. The damages provision was amended to provide for the recovery of “all damages occasioned or sustained by such removal *or* enforcement” rather than for the recovery of “all damages occasioned or sustained by such removal *and* enforcement of

the said rule or regulation *or either*.” This change, therefore, made it clearer that damages occasioned by enforcement of a rule or regulation were recoverable based solely on enforcement.

The next amendment to §72 came in 1904, but simply changed “state board of health” to “state department of health.” (Appendix D). Then, in 1906, §72 was amended to omit the language referring to the payment of damages whenever enforcement of the regulations “will injuriously affect any manufacturing or industrial enterprise which is not a public nuisance” and substituted in its place language requiring the payment of “just and adequate compensation” for property “taken or injured” if the execution of the state’s rules or regulations requiring construction or maintenance of a sewerage system “injuriously affect any property.” (Appendix E at p. 1524). Section 72 continued to contain the Right of Action for Damages provision – that provision was not altered in 1906.

In 1909, Section 72 became Section 73 of the PHL but otherwise its language remained the same. (Appendix F at p. 3044). Then, in 1911, the PHL was amended yet again, this time to empower the City – for the first time - to “make such rules and regulations subject to the approval of the state department of health for the protection from contamination of any or all public supplies of potable waters and their sources within the state where the same constitute a part of the source of the public water supply of said city.” (Appendix G (Section 70)). This amendment necessitated that Section 73 also be amended to make reference to the execution of the City’s rules and regulations and the recovery of damages in connection therewith. Although other changes were made to the statutory language, most notable is the Legislature’s expansion of recoverable damages under the Right of Action for Damages provision to specifically include “all injuries caused to the legitimate use or operation of such property.” (Appendix G at p. 1831).

The next major amendment occurred in 1953, when the Legislature finally separated Section 73 into two sections, PHL §§1104 and 1105. Section 1104 was drafted to address the consequences and ramifications from “orders or regulations the execution of which will require or make necessary the construction and maintenance of any system of sewerage, or a change thereof” or “which will require the providing of some public means of removal or purification of sewage.” (Appendix H). Section 1105, on the other hand, encompassed the Right of Action for Damages provision and provided a claim for injuries arising from the enforcement of “any rule or regulation of the department, or the commissioner of water supply, gas and electricity of the city of New York, or the board of water supply of the city of New York, *made under the provisions of this article.*”

In the negotiations of the MOA, the Coalition attempted to require the City to comply with its obligations under Public Health Law Sections 1104 and 1105. In a September 27, 1993 Declaratory Ruling issued in response from a petition from the Coalition, the New York State Department of Health issued a declaratory ruling interpreting Public Health Law Section 1104 to include as part of the City’s payment obligation any and all costs incurred by a public entity to comply with the city’s regulations relating to sewage. That Declaratory Ruling was upheld by the Albany County Supreme Court in City of New York v. New York State Dep’t of Health, 164 Misc.2d 247 (Albany County Sup. Ct. 1995). The 1993 Declaratory Ruling was incorporated into the MOA as Exhibit UUU and pursuant to section 172 of the MOA, City agreed not to pursue any further appeals with respect to the 1993 Declaratory Ruling. Under the MOA, the City of New York provided CWC (the Catskill Watershed Corporation) with funds to reimburse property owners for the cost of compliance with the stormwater regulations (section 128 and 145), the restrictions for sand and salt storage facilities (section 126), septic systems (section 124), alternative designs septic systems (Section 129) and wastewater treatment plant upgrades (sections 141, 142, 143). In order

to be eligible for stormwater funds or wastewater treatment of grant funds, a property owner must demonstrate that the additional requirements were due solely to the Watershed Regulations and were not otherwise required under state and federal law.

How does all this relate to this proceeding? In this proceeding, through its comments and positions on the stormwater impacts from this project, the City is attempting to establish an impossible standard for stormwater management under State law - not the Watershed Regulations. To the extent that these repetitive stormwater investigation and measures are required under state law, the Applicant will not be eligible for funding under Section 128 of the MOA ("West of Hudson Future Stormwater Controls Fund") nor will the Applicant be eligible for funding under Section 1105 of the Public Health Law. In this proceeding, under the mantra "the drinking water supply for 9 million people," the City is demanding cost prohibitive and unnecessary level of the stormwater investigation and mitigation (or complete denial) under the vague authority of SEQRA and, thus avoiding the legislative purpose of Article 11 of the Public Health Law (i.e., extraterritorial regulatory protections can only be done through a rule making under Section 1101 and with the compensation required under Sections 1104 and 1105). This is not the first time that the City has attempted to use State law as a basis to escape its obligation to pay for treatment.

In 1924, the City, Town of Hunter and Village of Tannersville entered into an agreement for the construction and operation of sewer lines and sewage treatment plant to serve the Village of Tannersville and parts of the Town of Hunter. In the 1970s, a dispute arose over the duration of the agreement and the City's obligation to continue to operate the plant. The City argued that it no longer had an obligation to operate the plant because, at that time (in comparison to 1924), state law

prohibited the disposal of raw sewage into the stream. In its papers to the Court of Appeals, City's Corporate Counsel for the City W. Bernard Richard argued as follows:

In 1924, the City, acting through the Commissioner of the Board of Water Supply,¹ signed the instant agreement with the Town and the Village. The purpose of the agreement was 'to provide for the sanitary protection of the water supply system of the City of New York' (preamble to the enabling legislation, Laws of 1923, C. 630). The agreement was necessary to effect this purpose because it was executed at a time when there was no enforceable restraints on polluters of state waters. This situation has been altered by state statutes and regulations which now require polluters of state waters to assure (and pay for) water purity (see p.9, supra). Thus, if the City now were to cease its operation of the sewage system, the Town and the Village would have to assume the responsibility of assuring that their sewage does not reach Gooseberry Creek. For this reason, as well as because the initial system is now insufficient to meet Town and Village sewage treatment needs, the City seeks to abandon the sewage system. It is the City's contention that the agreement permits such abandonment.

(A copy of the City's Memorandum of Law to the Court of Appeals is attached to the Appendix at I.). The Court of Appeals disagreed with the City's interpretation of the agreement and held that the City had an obligation to operate the plant as long as the City was withdrawing water from the Schoharie Reservoir. Haines v. Town of Hunter, City of New York, 41 N.Y.2d 769, 773 (1977). The Coalition has intervened in this proceeding to prevent the City from escaping its responsibility to pay the incremental costs arising from the implementation of its stormwater regulations.

VII. Community Impacts

In the definition of the term environment, SEQRA includes "existing patters of population concentration, distribution or growth, and existing community or neighborhood character." ECL §8-

¹ The Board of Water Supply was established pursuant to Chapter 724 of the Laws of 1905

0105(6). In Section 8-0103(7), the statute identifies as an part of the intent of SEQRA the "protection and enhancement of the environment, human and community resources shall be given appropriate weight with social and economic considerations in public policy. Social, economic and environmental factors shall be considered together in reaching decisions of proposed activities."

In determining whether there is a significant impact on community character, Sections 617.7(c)(1)(iv) and (v) identifies the significance criteria as: (1) the creation of material conflict with the communities current plans [and goals] as officially approved or adopted;" and (2) "the impairment of the character or the quality of . . . existing community or neighborhood character." In other words, in order for there to be a significant impact on community character, it must either be a material conflict with an existing community plan or the proposed project must impair the character or quality of the community character. Only significant adverse impacts must be mitigated under SEQRA.

In making decisions on community character, DEC gives deference to local land use plans. In re St. Lawrence Cement Company, LLC (DEC Comm'r Decision, Sept. 8, 2004); In In re Miracle Mile Associates, 1979 WL 33483 at 3 (N.Y. Dept. Env. Conserv.), the Commissioner stated: The Department will not intrude its judgment . . . in matters which have been properly been the subject of definitive local government determinations of pattern of land use through comprehensive planning and resulting in implementation of local development goals." See also In re Onondaga Valley Farms, Inc., 1982 WL 25862 at 2 (N.Y. Dept. Env. Conserv.); In re Palumbo Block Co., 2001 WL 651613 (N.Y. Dept. Env. Conserv.) (identifying community character as an issue for adjudication in connection with a permit for a proposed sand and gravel mine, the Commissioner stated "as local entities are most impacted by physical changes in land use, this Department must necessarily give

great weight to their adopted plans when performing SEQRA as required balancing tests particularly in the absence of state-wide concerns or interests.”

As was determined by the Commissioner as most recently in the St. Lawrence Cement case, community character should not be a separately adjudicable issue, but should be considered in the context of other issues which may be adjudicated (i.e., visual, open space and the impacts to the forest preserve). Clearly DEP’s limited jurisdiction regarding water quality protection does not confer standing to adjudicate community character. While CPC may have standing to raise the issue, it is not amenable to separate adjudication and will be considered by DEC in the final determination after giving due deference to Middletown and Shandaken’s local land use plans.

Dated: December 23, 2004
Albany, New York

Respectfully submitted,

YOUNG, SOMMER, WARD, RITZENBERG,
BAKER & MOORE, LLC
5 Palisades Drive
Albany, NY 12205
(518) 438-9907

By:


Jeffrey S. Baker, Esq.

By:

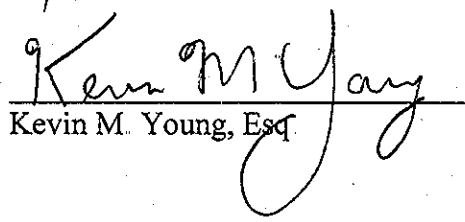
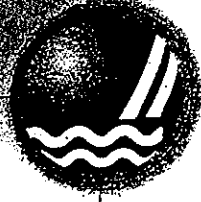

Kevin M. Young, Esq.

Exhibit A

W1724

New York State
ENVIRONMENTAL FACILITIES CORPORATION

Thomas J Kelly, President



September 10, 2004

Kevin Young, Esq.
Young, Sommer, LLC
Counselors At Law
Executive Woods
Five Palisades Drive
Albany, NY 12207-2997

RECEIVED
SEP 13 2004
YOUNG, SOMMER...LLC

Dear Mr. Young:

In response to receipt of your check for \$1.50 received on September 9, 2004, enclosed please find copies of records responsive to your FOIL request dated June 4, 2004 and modified on August 4, 2004.

The New York State Environmental Facilities Corporation expressly reserves all its rights and remedies under FOIL.

Sincerely,

Susan Mayer
Records Access Officer

SM:PER

[handwritten notes on the attached report are from Kevin Young]

Capital and O&M Cost Estimates

Facility Name	Cost Category	Estimated Cost	Year
Bedford Hills Correctional Facility	O&M INCREM	\$217,994	2003
Bedford Hills Correctional Facility	REG CONSTR	\$3,008,106	2001
Bedford Lake Apartments	O&M INCREM	\$39,430	2001
Bedford Lake Apartments	REG CONSTR	\$767,492	2001
Bedford Park Apartments	O&M INCREM	no estimate	
Bedford Park Apartments	REG CONSTR	no estimate	
Blackberry Hill Sanitary Sewer District STP	O&M INCREM	\$77,000	2004
Blackberry Hill Sanitary Sewer District STP	REG CONSTR	\$2,151,885	2004
Brewster Central Schools	O&M INCREM	\$119,760	2000
Brewster Central Schools	REG CONSTR	\$2,793,027	2003, 2004
Brewster Heights Sewer District #1	O&M INCREM	\$293,457	2003
Brewster Heights Sewer District #1	REG CONSTR	\$2,951,400	2003
Camp Edward Isaacs	O&M INCREM	\$89,620	2001
Camp Edward Isaacs	REG CONSTR	\$2,180,000	2001
Camp L'man Achai	O&M INCREM	\$34,854	2004
Camp L'man Achai	REG CONSTR	\$918,297	2004
Camp Loyaltown	SPDES CONSTR	\$47,000	2004
Camp Loyaltown	O&M INCREM	\$5,527	2004
Camp Loyaltown	REG CONSTR	\$179,800	2003
Camp Ludington	SPDES CONSTR	\$190,235	1998
Camp Ludington	O&M INCREM	\$45,990	2003
Camp Nubar	REG CONSTR	\$2,555,814	2003
Camp Nubar	O&M INCREM	\$0	
Camp Nubar	REG CONSTR	\$921,515	2002
Camp Timber Lake	O&M INCREM	\$18,616	2003
Camp Timber Lake	REG CONSTR	\$1,669,944	2003
Carmel Sewer District #2	O&M INCREM	\$139,600	2003
Carmel Sewer District #2	REG CONSTR	\$5,454,600	2004
Carmel Sewer District #4	O&M INCREM	\$105,000	2003
Carmel Sewer District #4	REG CONSTR	\$3,780,400	2004
Carmel Sewer District #7	O&M INCREM	\$115,325	2001
Carmel Sewer District #7	REG CONSTR	\$1,798,235	2002
Clear Pool Camp, Inc.	O&M INCREM	\$98,800	2002
Clear Pool Camp, Inc.	REG CONSTR	\$2,890,163	2004

(interim upgrades; Loyaltown converted to Hunter WSPD)

Clock Tower Commons	O&M INCREM	\$50,050	2001	
Clock Tower Commons	REG CONSTR	\$1,549,500	2004	
Colonel Chair Estates-Block 8	O&M INCREM	\$12,121	2004	
Colonel Chair Estates-Block 8	REG CONSTR	\$194,720	2003	(interim upgrade -- connecting to Hunter's
Cornwall Meadows	O&M INCREM	\$37,655	2001	WOTF)
Cornwall Meadows	REG CONSTR	\$1,116,001	2001	
Delaware-Chenango BOCES	O&M INCREM	\$92,900	2004	
Delaware-Chenango BOCES	REG CONSTR	\$1,614,265	2002	
Delaware-Chenango BOCES	SPDES CONSTR	\$149,983	2002	
Elka Park Association	O&M INCREM	\$206,671	2004	
Elka Park Association	REG CONSTR	\$2,490,311	2003	(20 residential units)
Field Home / Holy Comforter	O&M INCREM	\$0		
Field Home / Holy Comforter	REG CONSTR	\$959,405	2003	
Forester Motor Lodge	O&M INCREM	\$11,188	2004	
Forester Motor Lodge	REG CONSTR	\$175,125	2003	(interim upgrade -- connecting to Hunter
Fox Lane Campus Treatment Center	O&M INCREM	\$114,190	2001	WOTF)
Fox Lane Campus Treatment Center	REG CONSTR	\$2,472,700	2001	
Fox Run Condominiums	O&M INCREM	\$144,400	2001	
Fox Run Condominiums	REG CONSTR	\$3,391,000	2001	
Frangel Realty Company	O&M INCREM	\$88,380	2001	
Frangel Realty Company	REG CONSTR	\$1,357,300	2001	
Fulmar Road Elementary School	O&M INCREM	\$16,372	2001	
Fulmar Road Elementary School	REG CONSTR	\$1,763,600	2001	
George Fischer Middle School	O&M INCREM	\$91,560	2004	
George Fischer Middle School	REG CONSTR	\$2,306,600	2004	
Golden Acres Farm and Ranch	O&M INCREM	\$101,000	2004	
Golden Acres Farm and Ranch	REG CONSTR	\$2,282,000	2004	
Harriman Lodge	O&M INCREM	\$0		
Harriman Lodge	REG CONSTR	\$914,000	2002	
Heritage Hills Pollution Control Plant	O&M INCREM	\$229,110	2001	
Heritage Hills Pollution Control Plant	REG CONSTR	\$7,513,810	2001	
Hill and Dale Country Club Condominiums	O&M INCREM	\$144,000	2001	
Hill and Dale Country Club Condominiums	REG CONSTR	\$1,908,000	2001	
Holly Stream Condominiums	O&M INCREM	\$98,000	2001	
Holly Stream Condominiums	REG CONSTR	\$144,200	2001	
Hunter Highlands	O&M INCREM	\$97,500	2004	
Hunter Highlands	REG CONSTR	\$1,562,953	2004	
Hunter Highlands	SPDES CONSTR	\$1,500	2004	

Corporate Center
 Corporate Center
 Salem Middle School
 North Salem Middle School
 Olive Woods
 Olive Woods
 Onleora Jr.-Sr. High School
 Onleora Jr.-Sr. High School
 Onleora Jr.-Sr. High School
 Patterson Village Condominiums
 Patterson Village Condominiums
 Pepsi-Cola
 Pepsi-Cola
 Putnam Country Club
 Putnam Country Club
 Putnam Nursing and Rehabilitation Center
 Putnam Nursing and Rehabilitation Center
 Ralph Morando Bldg.
 Ralph Morando Bldg.
 Random Farm Homeowners Association
 Random Farm Homeowners Association
 Reed Farm Condominiums
 Reed Farm Condominiums
 Regis Hotel
 Regis Hotel
 Regis Hotel
 Riverwoods/ Fox Hollow
 Riverwoods/ Fox Hollow
 Roxbury Run Village
 Roxbury Run Village
 Roxbury Run Village
 SEVA Institute
 SEVA Institute
 Shop-Rite Plaza
 Shop-Rite Plaza
 Snow Time, Inc.
 Snow Time, Inc.
 Snow Time, Inc.
 Society Hill Condominiums

O&M INCREM \$148,350 2001
 REG CONSTR \$2,980,000 2003
 O&M INCREM \$188,300 2001
 REG CONSTR \$1,830,000 2001
 O&M INCREM \$16,200 2001
 REG CONSTR \$971,800 2001
 O&M INCREM \$29,000 2002
 REG CONSTR \$755,000 2002
 SPDES CONSTR \$251,457 2004
 O&M INCREM \$42,227 2001
 REG CONSTR \$1,502,476 2001
 O&M INCREM \$5,100 2001
 REG CONSTR \$193,993 2001
 O&M INCREM \$110,000 2002
 REG CONSTR \$2,011,000 2002
 O&M INCREM \$89,700 2003
 REG CONSTR \$1,200,000 2003
 O&M INCREM no estimate
 REG CONSTR no estimate
 O&M INCREM no estimate
 REG CONSTR no estimate
 O&M INCREM \$145,572 2004
 REG CONSTR \$1,511,451 2003
 O&M INCREM \$12,500 2004
 REG CONSTR \$76,750 2003
 SPDES CONSTR \$33,750 1999
 O&M INCREM no estimate
 REG CONSTR no estimate
 O&M INCREM \$88,559 2004
 REG CONSTR \$762,173 2003
 SPDES CONSTR \$42,675 2003
 O&M INCREM \$120,000 2004
 REG CONSTR \$1,317,000 2004
 O&M INCREM \$0
 REG CONSTR \$0
 O&M INCREM \$21,000 2004
 REG CONSTR \$105,091 2003
 O&M INCREM \$77,700 2001

(interim upgrade -- connection to Filchen
 court)

(interim upgrade -- connecting to
 Windham court)

Society Hill Condominiums	REG CONSTR	\$928,000	2001
Somers High School	O&M INCREM	\$112,645	2001
Somers High School	REG CONSTR	\$3,000,805	2003
Somers Intermediate School	O&M INCREM	\$97,385	2002
Somers Intermediate School	REG CONSTR	\$1,515,725	2002
Somers Manor Nursing Home	O&M INCREM	\$39,830	2001
Somers Manor Nursing Home	REG CONSTR	\$1,249,280	2001
Somers Office Building Complex	O&M INCREM	\$134,723	2002
Somers Office Building Complex	REG CONSTR	\$2,635,330	2002
South Kortright Center for Boys	O&M INCREM	\$0	
South Kortright Center for Boys	REG CONSTR	\$1,774,608	
St. Mary of the Assumption	O&M INCREM	\$73,237	2001
St. Mary of the Assumption	REG CONSTR	\$2,105,000	2001
Thompson House	O&M INCREM	\$12,000	2004
Thompson House	REG CONSTR	\$91,240	2003
Thunder Ridge Ski Area	O&M INCREM	\$81,218	2001
Thunder Ridge Ski Area	REG CONSTR	\$1,658,000	2001
Towne Centre	O&M INCREM	\$40,680	2001
Towne Centre	REG CONSTR	\$999,676	2001
UJA Camp	O&M INCREM	\$138,675	2001
UJA Camp	REG CONSTR	\$3,053,513	2001
Village of Delhi	O&M INCREM	\$467,910	2002
Village of Delhi	REG CONSTR	\$6,918,002	2001
Village of Hobart	O&M INCREM	\$183,190	2002
Village of Hobart	REG CONSTR	\$2,897,407	2001
Village of Hobart	SPDES CONSTR	\$291,711	2001
Village of Stamford	O&M INCREM	\$400,103	2002
Village of Stamford	REG CONSTR	\$4,322,699	2001
Village of Stamford	SPDES CONSTR	\$1,058,200	2001
Village of Walton	O&M INCREM	\$851,795	2002
Village of Walton	REG CONSTR	\$8,785,996	2001
Village of Walton	SPDES CONSTR	\$1,135,900	2001
Waccabuc Country Club	O&M INCREM	\$54,930	2001
Waccabuc Country Club	REG CONSTR	\$4,088,090	2001
Walter Panas High School	O&M INCREM	\$250,200	2004
Walter Panas High School	REG CONSTR	\$2,319,360	2004
Watchtower Educational Center	O&M INCREM	\$66,294	2002
Watchtower Educational Center	REG CONSTR	\$2,003,923	2001

(interim upgrade -- connected to Windham WWTp)

Waterview Hills Nursing Center, Inc.
 Waterview Hills Nursing Center, Inc.
 Whistle Tree
 Whistle Tree
 Wild Oaks Utilities
 Wild Oaks Utilities
 Williamsburg Ridge Homeowners Association, Inc.
 Williamsburg Ridge Homeowners Association, Inc.
 Worcester Creameries, Corp.
 Worcester Creameries, Corp.
 Yeshiva Kehilath Yakov
 Yeshiva Kehilath Yakov
 Yorktown Heights S.D.
 Yorktown Heights S.D.

O&M INCREM	\$71,216	2004
REG CONSTR	\$3,536,400	2004
O&M INCREM		
REG CONSTR		
O&M INCREM	\$58,200	2004
REG CONSTR	\$3,243,600	2004
O&M INCREM	\$62,856	2003
REG CONSTR	\$1,132,112	2003
O&M INCREM	\$386,878	2004
REG CONSTR	\$3,759,190	2004
O&M INCREM	\$74,925	2003
REG CONSTR	\$1,266,300	2003
O&M INCREM	\$109,753	2000
REG CONSTR	\$16,752,846	2000

(connecting to Hunter water)