

State of New York  
Department of Environmental Conservation  
625 Broadway  
Albany, New York 12233-1010

In the Matter

- of -

the Applications for Permits to Construct and Operate  
a Proposed Development to be Known as the Belleayre  
Resort at Catskill Park, Located in the Town of  
Shandaken in Ulster County, New York, and the Town of  
Middletown in Delaware County, New York, Pursuant to Environmental Conservation Law  
Article 15, Titles 5 and  
15, and Article 17, Titles 7 and 8, and Parts 601, 608  
and 750 through 758 of Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the State of New York  
("6 NYCRR"), and for a Water Quality Certification Pursuant to Section 401 of the Federal  
Water Pollution Control Act  
and 6 NYCRR Part 608

- by -

**CROSSROADS VENTURES, LLC**  
Applicant.

DEC Project Numbers:  
0-9999-00096/00001  
0-9999-00096/00003  
0-9999-00096/00005  
0-9999-00096/00007  
0-9999-00096/00009  
0-9999-00096/00010

**DECISION AND RULING OF THE COMMISSIONER**

July 10, 2015

## DECISION AND RULING OF THE COMMISSIONER

### I. BACKGROUND AND PROCEEDINGS

Crossroads Ventures, LLC ("Crossroads" or "applicant") filed applications with the Department of Environmental Conservation ("DEC" or "Department") for permits<sup>1</sup> to develop a resort to be known as "The Belleayre Resort at Catskill Park." Applicant proposes to develop a year-round resort on lands near the Belleayre Mountain Ski Center ("BMSC") located in the Town of Shandaken, Ulster County, and the Town of Middletown, Delaware County, within the boundaries of the Catskill Park.

The applications and the 2003 draft environmental impact statement ("2003 DEIS") for the project were the subject of an extensive issues conference completed over 18 days between May 25 and August 26, 2004. Administrative Law Judge ("ALJ") Richard R. Wissler then issued a ruling on issues and party status. Appeals were taken from the issues ruling, and on December 29, 2006, Deputy Commissioner Carl Johnson issued an interim decision that advanced six issues to adjudication (see Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner ["Interim Decision"], Dec. 29, 2006, at 14-94). The six issues included whether the water supply permit application for Big Indian Plateau complied with applicable regulatory requirements (see id. at 18-27), dewatering and impacts on aquatic habitat (see id. 29-31), stormwater related matters (see id. at 34-41), operational noise impacts on wilderness and wild forest areas of the Catskill Forest Preserve in close proximity to the project (see id. at 55-59), visual impacts on Big Indian Plateau during "leaf-off" conditions and light pollution in the vicinity of Big Indian Plateau (see id. at 65-69), and the alternatives analysis (in terms of alternative project design layouts)(see id. at 87-94).

After issuance of the Interim Decision, the parties to the proceeding ("parties") entered into intensive negotiations, resulting in the execution of an agreement in principle ("AIP") in September 2007 (see 2013 Supplemental Draft Environmental Impact Study, Appendix 1). The AIP was signed by many, although not all, of the issues conference parties (see id. ¶ 1 [naming the signatories to the AIP]).<sup>2</sup>

Under the terms of the AIP, the proposed project was modified by eliminating development on certain lands that had presented the most significant environmental concerns, and increasing the development on other lands owned by applicant (2013 Supplemental Draft Environmental Impact Study, Appendix 1 ¶¶ 13-23 [AIP description of the "modified project/lower impact alternative" (capitalization omitted)]). Applicant prepared a Supplemental

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<sup>1</sup> See staff, Whitehead Affidavit, Sept. 8, 2014, ¶ 26; Applicant Memorandum of Law, Nov. 17, 2014, at 9. Note: to avoid confusion, citations to affidavits and certain other documents will include the name of the party or petitioner that filed the document, the affiant or author's name, and the date of the document. Affirmation and affidavit will be referenced as "Aff".

<sup>2</sup> For additional background and procedural history, see Matter of Crossroads Ventures, LLC, Issues Ruling ("Issues Ruling"), Sept. 7, 2005, at 3-9; 2013 Supplemental Draft Environmental Impact Statement at i to iii.

Draft Environmental Impact Study that was accepted by Department staff in 2013 (“2013 SDEIS”). Department staff prepared a draft State Pollutant Discharge Elimination System (“SPDES”) permit for stormwater discharges from construction activities associated with the modified project and a draft protection of waters permit for proposed crossings of regulated streams on the property.

Public comments on the 2013 SDEIS, draft permits, and related documents were solicited and received through July 24, 2013 (see Environmental Notice Bulletin ["ENB"], April 17, 2013; ENB, May 22, 2013). Department staff conducted a public comment hearing in two sessions on May 29, 2013 to receive comments on the applications for the modified project and the 2013 SDEIS.<sup>3</sup>

This decision and ruling addresses a motion filed by Department staff under cover letter dated September 10, 2014. By its motion, Department staff requests cancellation of the adjudicatory proceeding on the project. In addition, Department staff requests denial of the outstanding motion for reconsideration of the ruling in the Interim Decision that denied adjudication of the issue of community character. Further, staff requests that the matter be remanded to staff to complete the State Environmental Quality Review Act ("SEQRA") process and finalize the draft permits. Accompanying its motion, Department staff filed a memorandum of law, an affidavit of DEC Region 3 Regional Permit Administrator Daniel Whitehead in support of staff's motion, the draft final environmental impact statement for the modified Belleayre Resort at Catskill Park, the cumulative impact analysis for the Belleayre Mountain Ski Center Unit Management Plan and the modified project, draft SPDES and stream crossing permits for the modified project, and applicant's proposed supplementary conditions.

Following receipt of Department staff's motion, by letter dated September 18, 2014, the Assistant Commissioner for Hearings and Mediation Services, at my direction, solicited input from the parties to the administrative proceeding to schedule a response date to the motion. Following receipt of comments and again based on my direction, the Assistant Commissioner, by memorandum dated September 29, 2014, advised the parties that responses to staff's motion were to be filed on or before November 17, 2014, and further advised that staff was authorized to file a reply to the responses on or before December 8, 2014. The memorandum also provided guidance on the scope of the responsive filings and directed the parties to provide support for their respective positions on whether the motion should be granted. Additionally, the memorandum noted that changes to the proposed project may have raised new issues for adjudication and directed that the proponent of any newly proposed issue present an offer of proof in support of its position.

A number of parties filed responses to staff's motion. Some of the responses also included cross motions. In addition, three new entities submitted petitions for party status. This

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<sup>3</sup> For the ENB notices (DEC Region 3), see [www.dec.ny.gov/enb/20130417\\_not3.html](http://www.dec.ny.gov/enb/20130417_not3.html) (April 17, 2013) and [www.dec.ny.gov/enb/20130522\\_not3.html](http://www.dec.ny.gov/enb/20130522_not3.html) (May 22, 2013). ENB notices were published under the heading of DEC Region 4 on those same two dates. The draft permits for the modified project, the cumulative impact analysis, the Agreement in Principle, and a link to the 2013 SDEIS for the proposed project appear on the DEC website at [www.dec.ny.gov/permits/54704.html](http://www.dec.ny.gov/permits/54704.html).

decision and ruling addresses staff's motion to cancel the adjudicatory proceeding and to deny the motion for reconsideration, as well as the other motions and requests, including the petitions for party status, which parties and petitioners have filed.<sup>4</sup>

For the reasons discussed below, I grant Department staff's motion to cancel the adjudicatory hearing and to deny the motion for reconsideration, I deny the motions seeking to reconvene the issues conference or otherwise continue this administrative proceeding, and I remand the matter to staff to complete the SEQRA process and issue permits for the modified project consistent with the draft permits prepared by staff and this decision and ruling.

## **II. PROJECT DESCRIPTION**

The proposed project currently before the Department has undergone substantial revision since the initial SEQRA documentation and permit application were submitted to the Town of Shandaken in 1999 (see applicant, Ruzow Aff, Nov. 17, 2014, ¶¶ 1, 8). This section provides a brief summary of the proposal's progression and closes with a more detailed description of the project as currently proposed.

### **A. Project Proposed in 2003 DEIS**

At one time, in addition to hotels and other lodgings, applicant considered including three 18-hole golf courses, one 9-hole par three course, and up to 100,000 square feet of retail space (see 2003 DEIS at xx-xxi). By the time of the issues conference in 2004, however, two golf courses were planned and the retail space had been reduced to 13,000 square feet (see id.). Set forth below are the major components of the proposed project that were under consideration at the time of the issues conference. The proposal then before the Department included development on Big Indian Plateau to the east of the BMSC and Wildacres Resort to the west of the BMSC.

#### **1. Big Indian Plateau**

The Big Indian Plateau development was to include Big Indian Country Club, Big Indian Resort and Spa, and the Belleayre Highlands. Among their amenities, Big Indian Country Club included one 18-hole golf course, a clubhouse and 95 detached lodging units; Big Indian Resort and Spa included a 150 room luxury hotel with two restaurants, a ballroom and a spa; and Belleayre Highlands included 88 detached lodging units, a social/activities center, a swimming pool and tennis courts (see 2003 DEIS at 2-1 to 2-2).

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<sup>4</sup> Appendix I to this decision and ruling lists parties and other participants in this proceeding. Appendix I designates, by column, those entities that have been granted party status, those that were signatories to the AIP, and those that submitted filings on Department staff's motion. Also attached as Appendix II to this decision and ruling is a list of the principal submissions and correspondence relating to Department staff's motion and the modified project.

## 2. Wildacres

The Wildacres development was to include Wildacres Resort, Highmount Estates and the Wilderness Activity Center. Among their amenities, Wildacres Resort included one 18-hole golf course and clubhouse, a 250 room hotel, up to 13,000 square feet of retail space, three restaurants, a conference center, a ballroom, a spa and 168 detached lodging units with a separate clubhouse; Highmount Estates was to include a 21 lot subdivision for single-family homes; and the Wilderness Activity Center was planned as a four season facility, primarily utilizing existing buildings at the former Highmount Ski Area, to offer a variety of recreational activities and outdoor oriented retail space (see 2003 DEIS at 2-2 to 2-3).

### **B. The 2007 Agreement in Principle (“AIP”)**

As noted, after issuance of the Interim Decision in December 2006, the parties to the proceeding negotiated modifications to the project that were memorialized in the AIP. The State of New York and nine of the issues conference parties signed the AIP.<sup>5</sup> The AIP sets forth the parameters for a modified project described as a "lower impact alternative" to the proposal that was set forth in the 2003 DEIS (2013 SDEIS, Appendix A ¶ 10). As stated in the AIP, the signatories "negotiated in good faith to resolve their outstanding issues related to the originally proposed project for the Belleayre Resort at Catskill Park [and] reached agreement that this lower impact alternative is preferable" (id.).

The most significant modification of the proposed project under the AIP was the complete elimination of development on Big Indian Plateau (see Draft Final Environmental Impact Statement ["draft FEIS"] at i). Much of the discussion at the 2004 issues conference focused on that parcel. It was contended that development of Big Indian Plateau posed substantive and significant environmental issues, and several of the issues that advanced to adjudication concerned development of that parcel (for example, the water supply application, stormwater management, and noise and visual impacts). In that regard, concerns were expressed about the topography and steep terrain of Big Indian Plateau, and that the terrain was steeper than Wildacres (see Issues Ruling at 71 [noting potential implications of steep slopes and soil type at Big Indian Plateau]).<sup>6</sup> The AIP provided for the eventual acquisition by the State of New

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<sup>5</sup> As set forth in the AIP, the nine issues conference parties that signed the AIP were: Catskill Center for Conservation and Development; City of New York, Department of Environmental Protection; applicant Crossroads Ventures, LLC; Natural Resources Defense Council; New York Public Interest Research Group; Riverkeeper, Inc.; Theodore Gordon Flyfishers, Inc.; Trout Unlimited; and Zen Environmental Studies Institute (see 2013 SDEIS, Appendix 1 ¶ 1 and unnumbered signature pages). For a listing of all the issues conference parties, see Section III. A below.

<sup>6</sup> As stated in the Department’s 2010 Stormwater Management Design Manual (“2010 Design Manual”), “[p]reserving steep slopes and building on flatter areas helps to prevent soil erosion and minimizes stormwater runoff” (2010 Design Manual at 5-11; see also 2015 Design Manual update at 5-10 [stating same principle]). Stormwater flow from Big Indian Plateau through tributaries to the Esopus Creek, which is within the Ashokan Reservoir Watershed Basin, was also raised as a concern. Both the Esopus Creek and the Ashokan Reservoir are listed as impaired waters pursuant to section 303(d) of the Federal Clean Water Act (see DEC, Final New York State 2014 Section 303[d] List of Impaired Waters Requiring a TMDL/Other Strategy, Sept. 2014 ["2014 List of Impaired Waters"] at 8 [Sept. 2014]; Issues

York of the Big Indian Plateau property where applicant had proposed development (see 2013 SDEIS at 1-3; see also applicant, Ruzow Aff, Nov. 17, 2014, at ¶ 21).

Pursuant to the terms of the AIP, the eastern portion of Wildacres was to be reconfigured "to minimize land disturbance and steep slope disturbance to the extent practicable" (AIP ¶ 15, at 3). The 21-lot residential subdivision proposed in the western portion of Wildacres was eliminated although other development was proposed for that area (see id. at 3-4). The AIP also addressed green building design, management of the golf course at Wildacres as organic, stormwater protocols, and an independent stormwater monitor, among other matters.

### **C. Project Proposed in 2013 SDEIS**

As noted, the proposed project has undergone substantial revisions since it was originally proposed in 1999. For clarity, the proposed project that is currently before the Department will be referred to as the "modified project" or the "Modified Belleayre Resort at Catskill Park." The modified project is set forth in great detail in the 2013 SDEIS (see e.g. 2013 SDEIS, Section 2). Its most significant elements are discussed below. The modified project would be located on lands to the west and north of the BMSC. The modified project includes (1) Wildacres Resort, located on approximately 254 acres on the eastern side of the project site; and (2) Highmount Spa Resort, located on approximately 237 acres on the western side of the project site (2013 SDEIS at 1 to 4; draft FEIS at iv-viii).

Wildacres Resort will include a 250 unit hotel with up to 13,000 square feet of retail space, two restaurants, a conference center, ballrooms, and a full service spa. Highmount Golf Club, an 18-hole championship golf course and clubhouse (connected to the hotel), will be located in the Wildacres development. This area will also include 163 detached lodging units in multi-unit buildings with a separate clubhouse. Wildacres will include the Wilderness Activity Center, a four season facility, primarily utilizing existing buildings at the former Highmount Ski Area, which would offer a variety of recreational activities and outdoor oriented retail space (2013 SDEIS at 2-4 to 2-7; see also 2013 SDEIS, Drawings 2-1 and 2-11).

Highmount Spa Resort, the smaller of the two developments in the modified project, will include a 120 unit hotel with spa facilities, 53 fractional ownership units located within the hotel facility, a multi-level lodge with 27 fractional share units, and 16 detached lodgings (located within eight buildings). Additionally, a conference center or clubhouse facility will be developed using existing buildings from a former farm complex, and a ski lift will be installed to transport guests from the lodging facilities to the top of the old Highmount Ski Area (2013 SDEIS at 2-2 to 2-4; see also 2013 SDEIS, Drawings 2-1 and 2-2).

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Ruling at 71 [noting that Esopus Creek "is on the New York State Section 303(d) List of Impaired Waters"]). In contrast, Wildacres is almost entirely within the Pepacton Reservoir Watershed (only about 12 acres are within the Ashokan Reservoir Watershed Basin) and its stormwater will generally flow to Emory Brook (see 2013 SDEIS at 2-33 to 2-34, Drawing 2-34). The Pepacton Reservoir is not considered impaired for construction related pollutants (see Ferracane Aff, Nov. 20, 2014, ¶ 16).

The 2013 SDEIS and the draft FEIS both provide a tabular summary of some significant differences between the modified project and the project as proposed under the 2003 DEIS. For example, impervious surfaces, a contributor to stormwater runoff, have been reduced from 85 acres under the 2003 DEIS plan to 21 acres<sup>7</sup> under the modified project. The number of acres to be developed has been reduced from 573 to 218. New road construction has been decreased from 8.2 miles to 1.5 miles, and the miles of roads on steep slopes (i.e., slopes of >20%) have been reduced from 5.1 miles to 0.1 (one-tenth of a mile) (2013 SDEIS at 5-5; draft FEIS at ii). The tabular summary in the 2013 SDEIS also illustrates further reductions that were made from what was proposed in the AIP (2013 SDEIS at 5-5 [for example, reductions in acreage to be developed]).

The 2013 SDEIS also highlights some of the "qualitative improvements" of the modified project (2013 SDEIS at 5-3 to 5-4). These improvements include: eliminating nearly all stormwater discharges to the Ashokan Reservoir and Watershed (as previously noted, this watershed includes waters that are listed as impaired pursuant to section 303[d] of the Federal Clean Water Act); committing to green building design, and to obtaining Silver certification or higher under the U.S. Green Building Council LEED (Leadership in Energy and Environmental Design) program, for the Wildacres Hotel, Highmount Hotel, and Highmount Lodge; committing to organic golf course management for the golf course; and designing stormwater controls at Wildacres to maximize use of stormwater runoff for golf course irrigation (*id.*).

### **III. POSITIONS OF THE PARTIES AND PETITIONERS**

Several parties and non-parties submitted filings in response to Department staff's motion to cancel the adjudicatory hearing. This section identifies the participants in the proceeding and summarizes the principal arguments advanced by each.

#### **A. Parties**

Applicant and Department staff are mandatory parties to this proceeding (*see* 6 NYCRR 624.5[a]). As set forth in the Issues Ruling, the ALJ granted full party status to: the Catskill Preservation Coalition<sup>8</sup> and the Sierra Club (Issues Ruling at 15); the City of New York (*id.* at 16); the Watershed Communities (consisting of the Coalition of Watershed Towns, Delaware County, the Town of Middletown, and the Town of Shandaken) (*id.* at 19); and the Planning

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<sup>7</sup> This number is also reported as 27 acres in the 2013 SDEIS (*see e.g.* table 5-1). The higher number appears to reflect the impervious acres that would have been created under the AIP rather than those that would be created under the modified project (*see id.* table 5-2; *see also id.* at 2-23 to 2-26 [calculation and narrative description of impervious acres indicating 18 impervious acres at Wildacres and 3 at Highmount, for a total of 21 acres]). It is reported as 21 acres in the draft FEIS.

<sup>8</sup> The Catskill Preservation Coalition was comprised of "Trout Unlimited; the Natural Resources Defense Council, Inc. ["NRDC"]; Riverkeeper, Inc. ["Riverkeeper"]; the Catskill Center for Conservation and Development ["CCCD"]; Friends of Catskill Park; the Zen Environmental Studies Institute ["Zen Environmental"]; the Pine Hill Water District Coalition; the Catskill Heritage Alliance; the Theodore Gordon Flyfishers, Inc.; [and] the New York Public Interest Research Group ["NYPIRG"]" (Issues Ruling at 10).

Board of the Town of Shandaken (id. at 20). The ALJ granted amicus status to the New York City Watershed Inspector General (id. at 24-25). These determinations were not disturbed by the Interim Decision (Interim Decision at 95).

The Catskill Preservation Coalition which, together with the Sierra Club, was denominated as "CPC" in the Issues Ruling, subsequently disbanded. The Issues Ruling expressly stated, however, that "each of the constituent groups comprising CPC has established its own requisite environmental interest in this proceeding in accordance with the requirements of 6 NYCRR 624.5(b)(1)(ii) and 624.5(d)(1)(iii)" (see Issues Ruling at 14-15). In addition, the CPC had raised substantive and significant issues with an adequate offer of proof. Accordingly, on the record before me, each member of CPC (together with the Sierra Club) has its own independent party status and, notwithstanding the dissolution of the coalition, its members remain parties to this proceeding.

Of the twenty parties (the two mandatory parties and counting each other party that was granted party status separately, including each of those that petitioned as part of the Catskill Preservation Coalition), twelve filed papers in response to staff's motion to cancel the adjudicatory hearing.<sup>9</sup>

Applicant filed papers in support of Department staff's motion. The City of New York supports Department staff's motion, stating that the modified project minimizes or avoids the potential for significant adverse environmental impacts "identified by the City during the earlier proceedings in this matter" (City of New York Letter, Nov. 17, 2014, at 1).

The Watershed Inspector General of the Office of the Attorney General stated that it did not object to cancellation of the pending adjudicatory hearing (see Watershed Inspector General Letter, Nov. 17, 2014, at 2). The Watershed Inspector General notes that it has reached agreement with applicant to address concerns regarding potential adverse stormwater impacts from the project and that "applicant has satisfactorily resolved the [Watershed Inspector General's] concerns to date" (see id. at 1).

By letter dated November 17, 2014, the Chairman of the Delaware County Board of Supervisors communicated Delaware County's position in support of Department staff's motion.

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<sup>9</sup> As noted previously, by memorandum dated September 29, 2014, the Assistant Commissioner for Hearings and Mediation Services provided guidance on filing responsive papers and directed that responses be filed on or before November 17, 2014. Responses were submitted by applicant (Crossroads Ventures, LLC), CCCD, Catskill Heritage Alliance, Coalition of Watershed Towns, Delaware County, Friends of Catskill Park, NRDC, City of New York, New York City Watershed Inspector General, Riverkeeper, Town of Middletown, and the Town of Shandaken Planning Board. Responses were not received from NYPIRG, PHWDC, Theodore Gordon Flyfishers, Inc., or Zen Environmental. Trout Unlimited and Sierra Club, although not filing any response following the September 29, 2014 memorandum, did submit comments on scheduling and procedures prior to the September 29, 2014 memorandum (see Sierra Club letter dated September 22, 2014 and Trout Unlimited letter dated September 25, 2014). A separate response was not received from the Town of Shandaken but, as noted, responses were received from the Town of Shandaken Planning Board and the Coalition of Watershed Towns.



The Coalition of Watershed Towns also supports Department staff's motion and expressed its belief that no further adjudicatory hearings are warranted (Coalition of Watershed Towns Letter, Nov. 17, 2014). The Town of Middletown, by letter dated November 14, 2014, and the Town of Shandaken Planning Board, by letter dated November 13, 2014, state that the environmental record was sufficient for their respective environmental reviews.

By letter dated November 17, 2014, Riverkeeper stated that "it has reached agreements with and received commitments from [applicant] and DEC Staff that address Riverkeeper's remaining concerns regarding adverse stormwater impacts" (Riverkeeper Letter, Nov. 17, 2014). Attached to Riverkeeper's letter are an e-mail exchange with applicant that included revisions to pages 87-89 of the draft FEIS to address Riverkeeper's concerns and an e-mail from Department staff indicating that the revisions were acceptable to Department staff. The revisions are to be included in the FEIS.

NRDC and CCCD filed papers noting concerns over specific aspects of the modified project or seeking further assurances in relation to commitments already made by applicant under the AIP. NRDC submitted a letter in which it states that "NRDC recommends that [certain concerns] be addressed prior to cancellation of the administrative proceeding and to issuance of all applicable final permits" (NRDC Letter, Nov. 17, 2014 [Conclusion]). NRDC, at the same time, reiterates that it stood by the AIP (see id.). The concerns that NRDC raised primarily relate to ensuring that applicant abides by the commitments in the AIP regarding future development and use of the project area. Applicant, as noted (see footnote 5 of this decision and ruling), is a signatory to the AIP and is governed by its terms and conditions. Specifically, NRDC objects to cancellation of the administrative proceeding until:

--final deed restriction language that forecloses the option of casino gambling on the site and final arrangements for adding such language to the deeds have been agreed to by the developers and the parties;

--final deed restriction language on density limitations and final arrangements for adding such language to the deeds have been agreed to by the developers and the parties; and

--applicant reaffirms its commitment to manage the golf course as organic and until requirements to manage the golf course as organic and to establish a technical review committee are incorporated into the applicable SPDES permit (NRDC Letter, Nov. 17, 2014, at [unnumbered] pages 2-4).

Although NRDC offers comments on the Unit Management Plan/Draft Environmental Impact Statement for the Belleayre Mountain Ski Center (id. at [unnumbered pages 4-5]), the Unit Management Plan is not subject to this proceeding.

CCCD, in its letter dated November 17, 2014, acknowledges that a number of issues (for example, issues relating to the Rosenthal Wells and Big Indian Plateau, noise impacts on wilderness and wild forest, and visual impacts to the Big Indian Plateau) are moot. CCCD, however, reiterated its concerns regarding stormwater impacts. CCCD indicated that it did not have sufficient engineering expertise to review and comment on the practices and procedures

detailed in the project's stormwater pollution prevention plan. It alleges a discrepancy between the draft SPDES permit and the language in the AIP concerning the independent storm water monitor, differences between inspection requirements in the AIP and the draft SPDES permit, and differences between the definition of a qualified inspector in Appendix A of the SPDES permit with the definition of the independent storm water monitor in the AIP (CCCD Letter, Nov. 17, 2014, at 1-2). CCCD states that the "independent Storm Water Monitor called for in the AIP was absolutely essential" to ensure that the SWPPP is correctly implemented (*id.* at 1). CCCD also comments on the scale of the project and called for an "independent, comprehensive study of the future lodging needs of the Catskill Mountains and the integration of new investments with the existing resources of the area" (*id.* at 2). It also indicates its opposition to Department staff's motion until the deed restrictions relating to Class III gaming facilities and density restrictions are placed on the resort parcels (*see id.*). Although referencing community character, CCCD indicated that "there [had] not been sufficient analysis for [CCCD] to take a position on this issue" (*id.* at 3).

Neither NRDC nor CCCD, however, states that any of the issues previously advanced to adjudication under the Interim Decision remained adjudicable, nor did either file any affidavits, expert opinions, or other documentation in support of advancing a new issue for adjudication.

Two parties filed papers in opposition to staff's motion: Catskill Heritage Alliance ("CHA") filed an attorney affidavit and supporting documents, and Friends of Catskill Park ("FCP") filed a memorandum of law and supporting documents. Department staff filed its reply on December 8, 2014.

## **B. Petitioners**

In addition to the parties named under the Issues Ruling, three non-parties filed petitions for party status after Department staff filed its September 10, 2014 motion. The petitions were filed by the Gould Family on November 17, 2014;<sup>10</sup> PUA Associates, LLC ("PUA") on November 17, 2014; and Beverly Becher Rainone ("Rainone") on December 30, 2014 (collectively, the "petitioners"). The petitioners are all landowners in the vicinity of the modified project.<sup>11</sup>

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<sup>10</sup> The Gould Family's petition for party status identifies the petitioner as a collective unit (*see* Gould Family Petition at 1 [referring to the Gould Family in the singular, as the "Petitioner"], 4-7 [setting forth the "Environmental Interests of the Gould Family" without differentiating between individuals]). The petition identifies the participating family members as "Kingdon Gould, Jr., Mary Gould, Kingdon Gould, III, Throne Gould, Lydia Barbieri, Frank Gould, Candida Lancaster, Annunziata Gould, Thalia Pryor, Melissa Gould, and Caleb Gould" (*see id.* at 1).

<sup>11</sup> By letter dated September 25, 2014, Trout Unlimited requested that the Ashokan Pepacton Watershed Chapter TU (APWCTU) be given party status. By letter dated October 4, 2014 (which was also circulated to the parties and non-parties on the proceeding's service list), the Assistant Commissioner for Hearings and Mediation Services, advised that APCTWU could not be added as a party unless it filed a petition for party status pursuant to 6 NYCRR part 624 and that petition were granted. By letter dated November 12, 2014, the Town of Hardenburgh requested party status in this proceeding. By email dated November 18, 2014, the Assistant Commissioner for Hearings and Mediation Services advised the Town

### **C. Summary of Positions**

Department staff maintains that no issues remain for adjudication and, therefore, the "hearing should be cancelled and the entire matter should be remanded to DEC staff for acceptance of the Final Environmental Impact Statement, issuance of findings, and permit issuance" (staff Memorandum of Law, Sept. 10, 2014, at 2). Staff contends that the modified project renders all of the issues ("adjudicable issues") that had been identified for adjudication under the 2006 Interim Decision as either moot or no longer substantive and significant. Therefore, staff argues, none of those issues remains adjudicable. Staff reiterated its position in its December 8, 2014 reply papers and, with regard to any newly proposed issues ("proposed issues") that parties or petitioners raised concerning the modifications to the project, staff argues that none of the proposed issues are substantive and significant" (see staff Memorandum of Law, Dec. 8, 2014, at 5).

Only two parties, FCP and CHA, filed papers in opposition to staff's motion. Each of the petitioners (the Gould Family, PUA, and Rainone) raised proposed issues for adjudication and opposed staff's motion to cancel the hearing.

FCP argues that the Commissioner lacks authority to cancel the adjudicatory hearing and, therefore, staff's motion must be denied. FCP also argues that the motion to cancel the hearing was improper because it was addressed to the Commissioner rather than to the assigned administrative law judge. In addition, FCP contends that the issues conference must be reconvened to consider new information relating to the proposed project modifications and to determine whether new adjudicable issues have been raised. FCP submitted three affidavits that it alleges "show that either issues already set for adjudication are substantive and significant and/or that new substantive and significant issues exist as a result of the changes made in the project" (FCP, Feller Aff, Nov. 17, 2014, ¶ 12).

CHA opposes staff's motion to cancel the adjudicatory hearing on both procedural and substantive grounds. Procedurally, CHA argues that, once issues have been approved for adjudication, no authority exists to resolve adjudicable issues by motion of a party solely as a result of modifications to the application. CHA contends that most of the adjudicable issues remain viable and must be advanced to hearing. CHA also maintains that the issues conference must be reconvened in order to consider newly proposed issues that arise from the proposed modifications to the project. CHA identifies several issues it proposes for adjudication (see CHA, Caffry Aff, Nov. 17, 2014, ¶¶ 62-68).

The three petitioners raise several proposed issues. The Gould Family argues that the modified project includes significant stormwater impacts that have not been addressed or mitigated (see Gould Petition for Party Status, Nov. 17, 2014, at 11-15). The Gould Family also argues that applicant has failed to properly consider the alternative of developing the project without the Highmount component (see id. at 15-19). PUA argues that visual and noise impacts from the proposed Highmount development, particularly in relation to the Galli-Curci Mansion, have not been properly considered (see PUA Petition for Party Status, Nov. 17, 2014, ¶ 15).

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of Hardenburgh of the requirements under 6 NYCRR part 624. Neither APWCTU nor the Town of Hardenburgh filed a petition for party status in this proceeding.

Rainone argues that applicant's stormwater analysis is flawed and that runoff from the project site will present a significant health and safety risk to petitioner's person and property (see Rainone Petition for Party Status, Dec. 30, 2014, at ¶ 5 [listing 5 grounds for opposition relative to a storm water permit]).

The positions and arguments advanced by the parties and petitioners are more fully discussed in the sections below which detail the adjudicable issues and proposed issues.

#### **IV. DISCUSSION**

##### **A. Authority to Decide Staff's Motion**

As an initial matter, some of the filings in response to Department staff's motion to cancel the adjudicatory hearing question whether the motion is properly before me (see e.g. FCP Memorandum of Law, Nov. 17, 2014, at 12 [stating that "[u]nder no circumstances should pending motions be determined by anyone other than the assigned ALJ"]; CHA, Caffry Aff, Nov. 17, 2014, ¶ 73 [arguing that "[b]ecause ALJ Wissler has been assigned to the case, . . . the pending motions and cross-motions (other than the motion to reconsider) must be decided by ALJ Wissler"]). Generally, these filings question whether I am authorized, as the Commissioner of Environmental Conservation, to determine the instant motion. For the reasons stated below, I hold that staff's motion was properly directed to my attention and, accordingly, I will consider the merits of the motion.

Under the provisions of the Environmental Conservation Law ("ECL"), the Commissioner of Environmental Conservation has broad authority to administer the environmental laws and policies of the State (see e.g. ECL 3-0301[1][b] [granting the Commissioner the power to "[p]romote and coordinate management of water, land, fish, wildlife and air resources to assure their protection . . . and balanced utilization consistent with the environmental policy of the state . . . in making any determination in connection with any license, order, permit, certification or other similar action"]). With regard to hearings in particular, the Office of Hearings and Mediation Services ("OHMS") conducts hearings under my authority (see ECL 3-0301[2][h] [authorizing the Department "by and through" the Commissioner to "[c]onduct investigations and hold hearings"]). Further, as expressly set forth in the delegation of authority by which ALJs are designated, all determinations made by ALJs are "subject to modification by the Commissioner and nothing contained [in this delegation of authority] shall limit [the Commissioner's] authority to convene or conduct hearings or to make or render determinations or decisions" (Delegation of Authority 14-02, dated July 15, 2014 [a copy of which is enclosed with this decision and ruling]).

Staff's motion essentially seeks reconsideration of the 2006 Interim Decision of the Deputy Commissioner in light of the subsequent negotiations of the parties and the significant modifications to the project (see e.g. Matter of Department of Env'tl Protection of City of New York, Ruling of the Commissioner on Motion for Clarification and Partial Reconsideration, Sept. 2, 2010, at 2-3 [Commissioner has inherent authority to reconsider prior decisions]). Thus, it is appropriate for staff's motion to be addressed to and decided by the Commissioner in the first

instance. Nothing in Part 624 requires such a motion for reconsideration of a prior Commissioner interim decision to be decided in the first instance by an ALJ.

To the extent assertions are made that the regulations require submission of staff's motion to an ALJ, the hearings regulations themselves expressly provide that "[t]o avoid prejudice to any party . . . any . . . rule may be modified by the commissioner upon recommendation of the ALJ or upon the commissioner's initiative" (6 NYCRR 624.6[g]). It is, of course, prejudicial to require an applicant to bear the expense and delay of an adjudicatory hearing if all proposed issues have been satisfactorily addressed in the record (see e.g. Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2 [holding that, where an offer of proof is rebutted by the record, "it would be a disservice to the applicant and the public at large to proceed any further with time consuming and costly litigation"]). Moreover, to remand the proceeding to an ALJ at this stage for further interim review that may only return to my office on administrative appellate review would add little, if anything, to the process and would add unnecessary delay and expense.

As discussed in sections I and II of this decision and ruling, this project has been the subject of extensive review by the Department and the public. A number of parties that had opposed earlier iterations of the project have now withdrawn their objections to the modified project set forth in the 2013 SDEIS. Department staff has also withdrawn its prior objections to the project and, as its motion to cancel the adjudicatory hearing reflects, staff now supports issuance of the permits necessary for the modified project. Notably, OHMS has not been involved in this matter since 2007, when the assigned ALJ granted applicant's motion to suspend the adjudicatory hearing (see Matter of Crossroads Ventures, LLC, ALJ Ruling, Oct. 19, 2007).<sup>12</sup> Under the unique circumstances of this proceeding, I am satisfied that Department staff's motion to cancel the hearing is properly before me and I will address the motion on its merits.

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<sup>12</sup> Subsequent to the October 19, 2007 ruling, Friends of Catskill Park, Catskill Heritage Alliance and the Pine Hill Water Coalition moved, by notice of motion dated December 7, 2007, for a determination that the ALJ and OHMS exclusively had the authority to make SEQRA determinations on behalf of the DEC in this proceeding, subject to appeal to the Office of the Commissioner. By motion dated December 21, 2007, the same three parties moved for a determination that the project in the September 2007 AIP must be reviewed as a new project and not as a mere modification of the project. The ALJ denied both motions. With respect to the first motion, the ALJ noted that the Agreement in Principle and the preparation of any supplemental draft environmental impact statement thereto was not before him (see Matter of Crossroads Ventures, LLC, ALJ Ruling on Motions Addressing Post-Referral SEQRA Determinations and SEQRA Status of Agreement in Principle, March 3, 2008, at 5). The ALJ also denied the second motion on the ground that no jurisdiction existed for him to entertain the motion (see id.). By motion dated March 28, 2008, Friends of Catskill Park, Catskill Heritage Alliance and the Pine Hill Water Coalition sought an order disqualifying Commissioner Alexander B. Grannis from taking part in this or any further proceeding regarding the September 2007 AIP and directing that any ex parte communications between the Commissioner or his office and any party to the proceeding be disclosed. The motion was denied on the grounds that the movants failed to identify any ground for the Commissioner's disqualification in this proceeding, nor did any such ground exist (see Matter of Crossroads Ventures, LLC, Ruling of the Commissioner, April 29, 2009, at 5), and that no ex parte communications had occurred (see id. at 8).

In this decision and ruling, I will consider (i) whether issues that were identified for adjudication under the Interim Decision remain adjudicable, and (ii) whether newly proposed issues arising from modifications to the project are adjudicable. Issues falling within the first category will be evaluated on the basis of whether the issue under consideration continues to meet the criteria for adjudication under 6 NYCRR 624.4(c). Issues falling within the second category will be evaluated both on the basis of (i) whether they are timely (i.e., whether, despite the changes to the project, the proposed issue was addressed and resolved by the Interim Decision or should have been raised in the proceeding leading to the Interim Decision), and (ii) whether the proposed issue is substantive and significant.

## **B. Standards for Adjudicable Issues**

### **1. Issues Determined to be Adjudicable under the Interim Decision**

Where issues have been advanced to adjudication pursuant to an interim decision, it is preferable that these issues be removed from the hearing process through a stipulation executed by all parties (see 6 NYCRR 624.13[d]). In the absence of such a stipulation, the Department has been cautious in modifying determinations regarding adjudicable issues made pursuant to an interim decision (see Matter of Westchester County [NYC Water Rate], Second Interim Decision of the Commissioner, Dec. 14, 1994, at 1 [holding that additional comments from the parties provided "no basis to modify the Interim Decision"]; see also Matter of Southern Dutchess Sand & Gravel, Inc., Interim Decision of the Deputy Commissioner, March 9, 2006, at 29-30 [stating "(m)y consideration of the Tributary Assessment Report at this stage, without affording an opportunity for the other parties to be heard, would deprive Department staff and the other parties of an opportunity to participate and comment in any review. In this instance, the adjudicatory hearing is the proper forum to consider the report"]. Nevertheless, where circumstances warrant the cancellation of an adjudicatory hearing, the Department will do so even in the absence of a stipulation (see e.g. Matter of County Line Field, Decision of the Assistant Commissioner, Aug. 24, 2005, at 2-3 [cancelling the adjudicatory hearing where issues advanced to adjudication under an interim decision were rendered moot by changes to the western boundary of a natural gas field]).

Here, the reduction in anticipated environmental impacts arising from the substantial changes to the project (as a result, in part, of the AIP) and the considerable additional environmental analysis that applicant undertook warrant reassessment of the issues that the Interim Decision advanced to adjudication. These changes, as reflected in the 2013 SDEIS and the draft FEIS, were subject to public comment and review. Importantly, on the basis of the changes to the project, Department staff has revised its position and now supports issuance of the permits necessary for the modified project.

I also note that, subsequent to the filing of Department staff's motion, parties to the proceeding have been afforded a full opportunity to respond to the motion and I have given careful consideration to the submissions received. In addition, I have given careful consideration to the new petitions for party status received in November and December of 2014 (as noted, a listing of the submissions received is attached to this decision and ruling as Appendix II).

For those issues that were determined to be adjudicable under the Interim Decision and as all parties have not stipulated to the modified project, I deem it appropriate to place the burden of proof on Department staff, which is the party seeking to eliminate those issues from adjudication (see also 6 NYCRR 624.9[b][4] [providing that "[t]he burden of proof to sustain a motion will be on the party making the motion"]).

I note that CHA argues that a hearing may not be cancelled on the motion of one party "solely as a result of modifications to the application" (CHA, Caffry Aff, Nov. 17, 2014, ¶ 5). This is incorrect. Where modifications to a proposed project eliminate entirely a component of a project, issues pertaining to that component are moot (see e.g. Matter of Jointa Galusha, LLC, Interim Decision of the Commissioner, May 7, 2002, at 7 [dismissing an issue from adjudication because "the Intervenors' concerns [were] rendered moot" by modification of the applicant's proposed project]). Clearly, if the elimination of part of a project, or other modification of the project, rendered some or all adjudicable issues moot, it would serve no legitimate purpose to proceed to adjudication on those issues.

Where, as here, no dispute exists between Department staff and the applicant, an issue proposed for adjudication must be both substantive and significant (see 6 NYCRR 624.4[c][1][iii]). Staff's determination not to adjudicate an issue will be upheld, and "a substantive and significant issue will not be found," if staff's determination is "reasonable and supported by the record" (Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, Oct. 26, 2012, at 4-5 [internal quotation marks and citations omitted]).

An issue is substantive "if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry" (6 NYCRR 624.4[c][2]). In determining whether sufficient doubt exists, the decision maker must consider the permit application and related documents, the draft permit, the content of petitions for party status, the record of the issues conference, and any authorized written arguments (see id.). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (see 6 NYCRR 624.4[c][3]).

Although Department staff has the burden with respect to its motion, a party that seeks to challenge staff's determination that an issue is no longer adjudicable must do so by an appropriate offer of proof. With respect to the sufficiency of an offer of proof,

"[s]peculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration at this stage. Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, the analysis of Department staff, or the record of the issues conference, among other relevant materials and submissions. In areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue"

(Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, Oct. 26, 2012, at 4 [citations omitted]). In short, "offer[s] of proof are not made in a vacuum" and may be rebutted by the application, its supporting documents, the analysis of Department staff, and responses provided by applicant" (Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2).

With regard to SEQRA issues (e.g., noise and visual impacts), the Department must "identify 'the relevant areas of environmental concern,' . . . take a 'hard look' at them and . . . make a 'reasoned elaboration' of the basis for its determination" (Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany, 13 NY3d 297, 306-307 [2009] [quoting Jackson v New York State Urban Development Corp., 67 NY2d 400, 417 (1986)]). SEQRA does not require an adjudicatory hearing to be convened to address comments on a DEIS.

In this proceeding, the Department is the lead agency under SEQRA and has required applicant to prepare a DEIS. Accordingly, pursuant to 6 NYCRR 624.4(c)(6)(i), the determination of whether to adjudicate issues relating to the sufficiency of a draft environmental impact statement or the ability of the Department to make SEQRA findings is made in accordance with the same standards that apply to the identification of issues generally (see 6 NYCRR 624.4[c][6][i][b]).

## 2. Newly Proposed Issues for Adjudication<sup>13</sup>

New issues were proposed by parties that previously had been granted party status as well as by the three new petitioners seeking party status. These new issues are evaluated by the standards set forth below.

Consistent with 6 NYCRR 624.5(b)(5), parties granted party status under the 2006 Interim Decision were afforded the opportunity to supplement their petitions for party status to seek to raise new issues concerning the modified project (see Memorandum from Louis A. Alexander, Asst. Commissioner, to Service List, Sept. 29, 2014, at 2). To raise such a new issue, the proponent must establish that the issue is both substantive and significant and support the issue with an adequate offer of proof (see 6 NYCRR 624.5[b][2]). Moreover, the burden of persuasion on new issues is on the party proposing the issue (see 6 NYCRR 624.4[c][4]).

Pursuant to Part 624, entities seeking party status in this proceeding, PUA, Rainone and the Gould Family, are required to file a petition for party status. As all three entities are seeking full party status, their petitions must satisfy the requirements of 6 NYCRR 624.5, including proposing an issue that is substantive and significant, and presenting an offer of proof specifying the witness, the nature of the evidence the person expects to present and the grounds upon which

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<sup>13</sup> A newly proposed issue must arise from changes in the project as reflected in the 2013 SDEIS or must relate to information that was not reasonably available during the issues conference (see 6 NYCRR 624.4[b][1]). Issues that could have been raised at the time of the issues conference are untimely and need not be considered.



the assertion is made with respect to that issue.<sup>14</sup> The three petitions adequately demonstrate petitioners' environmental interest in the proceeding (see 6 NYCRR 624.5[b][1][ii]). With respect to the issues raised by the existing parties and the issues that were raised by petitioners I have evaluated them in accordance with the standards set forth in Part 624, and, as discussed below, determined that no adjudicable issues have been raised.<sup>15</sup>

I note that both applicant and Department staff reference provisions in Part 621 in their papers. Section 621.8 of 6 NYCRR serves as a basis for Department staff to determine whether newly proposed issues that were presented during the public comment period on the 2013 SDEIS and the draft permits for the modified project warrant referral to OHMS for adjudication. The 2013 SDEIS and draft permits were publicly noticed and made available for comment in April 2013 (see ENB, Apr. 17, 2013; see also ENB, May 22, 2013). The ENB notice advised that a legislative public hearing to receive comments on the application and the 2013 SDEIS was to be held "[i]n accordance with the provisions of 6 NYCRR Parts 617 and 621" (id.). Where, as here, the legislative hearing is held pursuant to 6 NYCRR part 621, a primary purpose of the hearing is to gather public comments so that Department staff may determine whether substantive and significant issues exist that warrant referral of the matter to OHMS (see 6 NYCRR 621.8[b], [d]). To be deemed substantive and significant, comments in "opposition to an application must explain the basis of that opposition and identify the specific grounds which could lead the department to deny or impose significant conditions on the permit" (6 NYCRR 621.8[d]). Further, "[m]ere expressions of general opposition to a project are insufficient grounds for holding an adjudicatory public hearing" (id.).

Department staff evaluated comments on the modified project that were received during the comment period on the 2013 SDEIS and draft permits. Each of the entities that are now raising proposed new issues had the opportunity to express their concerns during the Part 621 comment period. Based on its review of the project and the public comments received, Department staff's position in its motion was that no new issues were raised that merited adjudication (see staff Memorandum of Law, Dec. 8, 2014, at 11 n 3; staff, Whitehead Aff, Sept. 8, 2014, ¶¶ 57-58). Staff's determination regarding whether a given issue is, or is not, adjudicable is subject to my review, and I retain discretion to overturn staff's determination (see Matter of Monroe County, Interim Decision of the Commissioner, July 2, 1991, at 2; Matter of Town of Smithtown, Decision of the Commissioner, Sept. 21, 1989, at 6). As noted, based on my review in accordance with the substantive and significant standards of 6 NYCRR part 624, this record does not support the identification of any new issues for adjudication.

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<sup>14</sup> New entities that expressed interest in becoming parties were directed to file petitions for party status (see e.g. e-mail dated Nov. 18, 2014 from Louis A. Alexander, Asst. Commissioner, to Town of Hardenburgh, and copied to the Service List on that same date).

<sup>15</sup> Because I have determined that no issues are adjudicable, I do not have to reach the issue of whether the newly filed petitions satisfy the additional criteria for late-filed petitions (see 6 NYCRR 624.5[c]).

### **C. Rulings on Issues Advanced to Adjudication by the Interim Decision**

#### 1. Issues #6 and #8: Water Supply Permit Issues and Aquatic Habitat Impacts

Adjudicable issues #6 and #8 relate to the withdrawal of water from the Rosenthal Wells that were to supply water to the Big Indian Plateau development. Specifically, under Issue #6, the issue for adjudication was “whether applicant’s water supply permit application for Big Indian Plateau satisfied . . . regulatory requirements” (Interim Decision at 21). Under Issue #8, the issue to be adjudicated was whether, at the pumping rates proposed in the draft water supply permit for Big Indian Plateau, the risk exists that dewatering would occur to the detriment of aquatic habitats” (see Interim Decision at 30-31).

As noted, development of Big Indian Plateau has been eliminated from the project (2013 SDEIS at iii; see also 2013 SDEIS at 1-26 [Rosenthal Wells are not part of the modified project]; applicant, Franke Aff, Nov. 17, 2014, ¶ 25). Accordingly, issues relating to the development of Big Indian Plateau and the previously proposed water supply application relating to it are moot (see e.g. staff, Whitehead Aff, Sept.8, 2014, ¶ 36).

#### 2. Issue #9: Stormwater Issues

The Interim Decision advanced five stormwater related subissues to adjudication. Referring to the list of stormwater subissues as enumerated by the ALJ, the Interim Decision states that stormwater subissues "numbered '1,' '2,' '4,' '8' and '9' shall be adjudicated" (Interim Decision at 41). These subissues are described in the Issues Ruling as follows:

"(1) the adequacy of the HydroCAD model [a computer simulation model used to estimate stormwater runoff], its assumed inputs and design points, (2) stormwater flow paths on the project sites, . . . (4) the level of pre and post-development stormwater flows, . . . (8) a permit condition delineating special conditions to be included in all waivers from the five acre exposure limit during construction and (9) the adequacy of the Big Indian SWPPP [Stormwater Pollution Prevention Plan] and the design of its various stormwater management controls"

(Issues Ruling at 73-74).

As discussed in the Issues Ruling, Big Indian Plateau presented the greatest concern with regard to the potential stormwater impacts of the proposed project (see e.g. Issues Ruling at 71 [noting "the topography of Big Indian with its steep slopes and humic soil"], 71-72 [noting that Big Indian Plateau is within the watershed of impaired waters that are already impacted by "silt and sedimentation due to streambank erosion"], 73 [noting concerns over the project's SWPPP "particularly the Big Indian Plateau portion"]; see also staff, Ferracane Aff, Nov. 20, 2014, ¶¶ 14-16 [attesting that the Big Indian Plateau development presented the greatest stormwater impact concern because it "was proposed to be built on relatively steep slopes and stormwater runoff from Big Indian would drain into water bodies that are listed as 'impaired'" while the modified project is almost entirely within "[t]he Pepacton watershed [which] is not considered impaired for construction related pollutants (e.g., phosphorous and sediment)"]).

The elimination of development that had been proposed for Big Indian Plateau also eliminates the stormwater concerns associated with that component of the project. In that regard, stormwater subissue "9" reflected the concern with the potential stormwater impacts caused by development of Big Indian Plateau. By its express terms, stormwater subissue "9" is limited to the adequacy of the SWPPP for Big Indian Plateau, and the adequacy of the SWPPP for other components of the project was not deemed adjudicable under the Interim Decision. Accordingly, with the elimination of development on Big Indian Plateau, stormwater subissue "9" is eliminated in its entirety.

The principal arguments in opposition to cancelling adjudication of the stormwater subissues are raised by CHA. As an initial matter, I note that Department staff argues that CHA's expert does not appear to have expertise in stormwater management and "[a]rguably, [the expert's] affidavit should be completely disregarded because he lacks the requisite training and experience" (staff Reply Memorandum of Law, Dec. 8, 2014, at 15 n 7). An expert's qualifications within the relevant field may be considered when weighing the merits of the arguments, opinions and factual assertions made by the parties (see Matter of Seneca Meadows, Inc., Interim Decision of the Commissioner, Oct. 26, 2012, at 4 [holding that "[t]he qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration"]; Matter of Erie Boulevard Hydropower L.P., Decision of the Deputy Commissioner, Oct. 6, 2006, at 20 [holding that an offer of proof was insufficient, in part because the expert witness was "only minimally qualified to testify concerning the impact the [stream] flows . . . will have on aquatic habitat"]).

Here, CHA proffers the affidavit of a professional engineer whose resume states that he has experience in "a wide range of engineering projects in the fields of solid and hazardous waste management, site development, water and wastewater facilities, and environmental permitting" (CHA, Millspaugh Aff, Nov. 12, 2014,<sup>16</sup> attached resume at 1). The expert's affidavit and resume indicate that he has some stormwater related experience, but that it is limited almost exclusively to solid or hazardous waste sites (id. at 1-3).

In contrast, staff proffers the affidavits of two stormwater experts with extensive stormwater-specific experience (see staff, Ferracane Aff, Nov. 20, 2014, ¶¶ 2-7 [notes expert has 22 years of experience in erosion, sediment and stormwater control, including reviewing numerous construction SWPPPs and teaching courses on erosion and sediment for contractors and design engineers]; staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶¶ 1, 3, attached resume [noting expert has over a decade of stormwater specific experience and, since 2010, has been the DEC Section Chief for the stormwater permits section of the DEC's Division of Water]).

While it is not clear that CHA's expert has significant relevant experience, I decline to "disregard" his affidavit as suggested by Department staff. The expert's resume indicates that he has been exposed to stormwater management issues, at least in the context of solid and hazardous waste sites. Accordingly, notwithstanding the issues raised by staff with regard to the expert's experience, I shall consider the affidavit of CHA's expert for the purposes of this proceeding.

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<sup>16</sup> The parties and petitioners that oppose staff's motion filed a total of five affidavits of Mr. Millspaugh (some of which were duplicates).

Turning to the remaining stormwater subissues (nos. "1," "2," "4," and "8"), Department staff argues that these are either moot or no longer substantive and significant (staff Memorandum of Law, Sept. 10, 2014, at 6-7). To the extent that these subissues involved Big Indian Plateau, those aspects of the subissues are now moot. Staff argues that stormwater subissues "1," "2," and "4" are no longer adjudicable issues because the protocol developed in the AIP by applicant and other parties addresses these issues. Staff states that the protocol has been "carried over" into applicant's SWPPP, which meets all permitting standards, and applicant will be required to adhere to the SWPPP under the terms of its individual SPDES permit (*id.* at 6; *see also* staff, Whitehead Aff, Sept. 8, 2014, ¶¶ 40, 42; Draft SPDES Discharge Permit [No. NY-027 0679], Parts I.A, II.B.1). Staff argues that subissue "8" is no longer adjudicable because applicant has agreed to enhanced stormwater management requirements (which staff has determined are acceptable) and must comply with these enhanced measures under the provisions of the draft SPDES permit (*id.* at 6-7; *see also* staff, Whitehead Aff, Sept. 8, 2014, ¶¶ 41-42; Ferracane Aff, Nov. 20, 2014, ¶ 24; applicant, Franke Aff, Nov. 17, 2014, ¶ 39).<sup>17</sup>

CHA argues that applicant's proposal "does not comply with the applicable regulations . . . and will have significant unmitigated impacts on stormwater runoff, water quality, and erosion, such that DEC will not be able to make the requisite findings under SEQR" (CHA, Caffry Aff, Nov. 17, 2014, ¶ 63 at 37). CHA's expert asserts that "the requirements of the General Stormwater Permit for Construction Activity do not appear to be satisfied [and] it is not clear how DEC can satisfy the hard look threshold under SEQRA" (CHA, Millspaugh Aff, Nov. 12, 2014, ¶ 22).

Several of the objections raised by CHA's expert fall within subissues "1" (the adequacy of the HydroCAD model, its assumed inputs and design points) and "4" (the level of pre- and post-development stormwater flows). The expert asserts that applicant failed to properly evaluate the "substantial increase in total runoff volume caused by the proposed project," particularly with regard to construction "on the higher slopes of Highmount" (CHA, Millspaugh Aff, Nov. 12, 2014, ¶ 14). According to CHA's expert, "direct observations" of current site conditions indicate that applicant used inaccurate assumptions regarding the capacity of the ditch along a portion of County Route 49A ("CR 49A") and that the road is already overtopped in that area by stormwater flows under certain conditions (*id.* ¶¶ 16-17). This expert also asserts that applicant's calculations indicate that stormwater runoff volumes for the project will exceed pre-development levels at several locations, including one location on CR 49A where runoff from the Highmount area will increase by 125% (*id.* ¶ 19).

The record before me establishes that Department staff has met its burden to demonstrate that none of the stormwater subissues continues to warrant adjudication. First, as noted earlier (*see* section II. C of this decision and ruling), applicant has agreed to implement a number of design features intended to mitigate impacts from stormwater runoff. Among these are applicant's commitment to green building design, including extensive use of green roofs; the near elimination of roads and detached lodging units on slopes of greater than 20%; the use of organic

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<sup>17</sup> The 2013 SDEIS provides a detailed review of applicant's proposed stormwater management, including a review of potential impacts and mitigation measures (*see e.g.* 2013 SDEIS at 3-5 to 3-18; Appendix 18 [Stormwater Management Design Report] and Appendix 19 [Draft Stormwater Pollution Plan]; *see also* applicant, Franke Aff, Nov. 17, 2014, ¶ 43).

golf course management techniques, including the use of stormwater controls to maximize collection of stormwater runoff for golf course irrigation; and the use of more traditional stormwater controls, such as retention ponds. As discussed below, through these and other stormwater management measures, applicant has developed a plan that will result in no increase in stormwater discharge rates from the project. Ms. Lamb-LaFay, in her affidavit, provides a detailed and substantive response that persuasively rebuts the assertions of CHA's consultant.

Both of Department staff's stormwater experts attest that the stormwater management system developed for the modified project will result in post-development stormwater leaving the site at a rate that is at or below the rate of discharge under pre-development conditions (staff, Ferracane Aff, Nov. 20, 2014, ¶ 27; Lamb-LaFay Aff, Dec. 8, 2014, ¶¶ 5-6, 12). This is true for both smaller storms and for the "100 year 24 hour storm event" (staff, Ferracane Aff, Nov. 20, 2014, ¶ 27; see also 2010 Design Manual at 4-11 [stating that the "*100 Year Control* requires storage to attenuate the post development 100-year, 24-hour peak discharge rate . . . to predevelopment rates"]).

CHA's assertions that applicant used erroneous assumptions relative to existing stormwater flows along a portion of CR 49A are not supported by the record. For example, CHA's expert contends that applicant used inaccurate measurements for a ditch along CR 49A. Staff, however, notes that the existing ditches and culverts along CR 49A were re-verified in the field (staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶ 11). Applicant's stormwater model predicted that, consistent with CHA's direct observations, runoff would overtop CR 49A under existing conditions during certain storm events (*id.* ¶ 8). The stormwater model included in the 2013 SDEIS (Appendix 18) was supplemented to include a further analysis of conditions along CR 49A (see draft FEIS, Responses to Comments at 94-96). The response noted that "[w]hen modeling the existing condition using field measured ditch dimensions and the weir overflow approach, if the capacity of the reach/ditch is exceeded . . . in order to get the most accurate results of peak flows at downstream design points, the size of the ditch must be increased until it has adequate capacity" (see id. at 95). Ms. Lamb-LaFay indicated that, in light of model predictions, in the existing condition of runoff during the 10-year storm event "the project was modified to include improvements to the conveyance channel along Route CR-49A. These improvements . . . will act as a flow splitter to distribute flow from the smaller storm events through the culverts and allow larger flows to continue in the channel without overtopping the road during the 25 year event. The predicted flow rates at each culvert are predicted to be at or below the existing flow rates for each event analyzed" (staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶ 8; see also draft FEIS, Responses to Comments at 95-96).

Department staff has determined that the proposed stormwater management system is compliant with the 2010 Design Manual and is "designed to attenuate the post-development peak rate of runoff for the ten and 100 year storm events to pre-development rates thereby ensuring that impacts to waterbodies will be no greater than they are under the existing conditions" (staff, Ferracane Aff, Nov. 20, 2014, ¶ 27). Although not required to address preexisting stormwater capacity issues along CR 49A, applicant has agreed to undertake reconstruction of the relevant stretch of CR 49A to correct existing stormwater capacity issues (see id. ¶ 28; draft FEIS, Responses to Comments at 111; see also draft FEIS, Errata § 2.12 [Figures – Updated CR 49A Improvement Plans]).

Department staff does not dispute CHA's assertion that, at three of the fifteen design points designated in applicant's Stormwater Management Design Report ("stormwater report"), "post-development [stormwater] volume will exceed pre-development (existing) conditions" (CHA, Millspaugh Aff, Nov. 12, 2014, ¶ 19). Staff notes, however, that for each of the three design points, "the peak rate of discharge (the key indicator for downstream flooding) is decreased for all storm events" (staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶ 12 [providing a detailed discussion of each of the three design points referenced by CHA's consultant], see also id. ¶¶ 5-6). Staff's position is further supported by the analysis contained in the stormwater report (see draft FEIS, Errata § 2.2, Appendix C, table 7 [depicting pre- and post-development stormwater rates and volumes for each design point under the 1, 10, 25 and 100 year design storm]). In addition, staff provides details which demonstrate that the modified project will satisfy all runoff reduction, channel protection, and green infrastructure requirements set forth under the 2010 Design Manual in relation to the three design points identified by CHA (staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶¶ 12-13).

Department staff has met its burden to demonstrate that none of the stormwater subissues that had been advanced to adjudication under the Interim Decision remain substantive and significant. These subissues do not raise a sufficient doubt about the applicant's ability to meet relevant statutory or regulatory criteria and do not have the potential to result in a major modification of the proposed project or the imposition of a significant new permit condition (see 6 NYCRR 624.4[c][2], [3]).

### 3. Issue #12: Operational Noise Issues

With regard to potential construction or operational noise issues, the Interim Decision determined that "only the issue of operational noise impacts on users of wilderness and wild forest areas of the Catskill Forest Preserve (in close proximity to the project) arising from onsite activities shall be adjudicated" (Interim Decision at 59). To address this adjudicable issue, applicant was directed to "undertake a noise study that would take into account the onsite noise-generating activities" at Wildacres Resort and Big Indian Plateau (id. at 57). As noted, with the elimination of the development of Big Indian Plateau that portion of Issue #12 is now moot.

CHA argues that operational noise impacts on the Forest Preserve "have not been resolved by changes to the project or the SEIS, so this continues to be a substantive and significant issue for adjudication" (CHA, Caffry Aff, Nov. 17, 2014, at 8-9). CHA provides little elaboration or factual support for its position, but does reference its comment letter on the 2013 SDEIS (id. ¶ 67, at 44-45). In that letter, CHA asserts that the noise analysis failed to assess impacts on the "BMSC Intensive Use Area" and that noise impacts "should be recalculated at the edge of the active ski area" (id., Exhibit ["Exh"] M at 24). As noted above, however, the adjudicable issue identified under the Interim Decision was limited to operational noise impacts on wilderness and wild forest areas. Accordingly, the issue of impacts on "intensive use areas" as referenced by CHA was not advanced to adjudication.<sup>18</sup>

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<sup>18</sup> For the reasons set forth in the draft FEIS, I conclude that other noise related issues raised in the CHA comment letter, such as purported deviations from the Department's noise impact policy and the possible effect of seasonal changes, are lacking in merit and, therefore, not adjudicable (see e.g. draft FEIS at 178-79, 184-185 [addressing these concerns]).

With regard to the adjudicable issue of the potential operational noise impacts on users of wilderness and wild forest areas from onsite activities, applicant completed a noise assessment that determined that no such impacts would occur (see 2013 SDEIS, Appendix 20). Specifically, applicant's noise assessment determined that no change in ambient noise levels on wilderness or wild forest lands would occur (see id. at 15-16 [concluding that no increase in daytime or nighttime ambient sound levels will occur at the nearest Forest Preserve lands classified as wilderness], tables 5-2 to 5-4 [indicating no increase in the ambient sound level at the State Forest Preserve from estimated nighttime continuous sound levels from project operation, and no increases in average ambient sound levels arising from daytime sound levels and nighttime (continuous and non-continuous project operations sound levels)]; draft FEIS, Responses to Comments at 184 [stating that the noise assessment for "the nearest point of wilderness, located in the Big Indian Wilderness area, approximately 1 mile from the Highmount hotel location [determined that] [n]o noise impacts were predicted to occur at this location" and further stating that "[t]he nearest Wild Forest location . . . is located approximately 3 miles away and effects of noise will be even less at this location"]]).

Department staff, based on the studies and assessments that were conducted, and which are set forth in the 2013 SDEIS and draft FEIS (see e.g. 2013 SDEIS §§ 3.7, 4.5 and Appendix 20 [Construction and Operations Noise Study]; draft FEIS, Responses to Comments at 178-79), concludes that the noise issue is moot (see staff Reply Memorandum of Law, Dec. 8, 2014, at 22).

Based on the record, Department staff has met its burden to demonstrate that the noise issue that had been advanced to adjudication under the Interim Decision is no longer substantive and significant. Accordingly this issue will not be adjudicated.

#### 4. Issue #14: Visual Impact Issues

The Interim Decision advanced two visual impact issues to adjudication. The first adjudicable issue was the extent of "visual impacts caused by Big Indian Plateau in wintertime conditions" (Interim Decision at 68-69). With the removal of the Big Indian Plateau development from the project, this issue is moot.

As to the second adjudicable issue relating to visual impacts, the Interim Decision held that the "issue of light pollution is a substantive and significant issue that shall be adjudicated" (Interim Decision at 69). The Interim Decision and the Issues Ruling indicate that light pollution impacts from Big Indian Plateau were the more significant concern (see Interim Decision at 69 [stating that "[t]he extent to which the area in the vicinity of Big Indian Plateau would be impacted by visible lights . . . is uncertain"]; Issues Ruling at 115 [stating that "[t]he problem of light pollution and sky glow could be particularly severe at the Big Indian Resort"]). Nevertheless, the issue as advanced to adjudication was not expressly limited to Big Indian Plateau and has not been rendered entirely moot by the elimination of development on Big Indian Plateau.

As set forth in the Issues Ruling, the specific issue advanced to adjudication was "the failure to evaluate the impacts of light pollution" (Issues Ruling at 116; see also Interim Decision

at 69 [concurring that the issue should be adjudicated]). With regard to the modified project, including the increased density of development in the Highmount area, the record shows that the potential impacts of light pollution have now been fully evaluated by applicant (see 2013 SDEIS Appendix 25, Part 2 [Belleayre Resort: Assessment of Proposed Outdoor Lighting ("lighting assessment")]).

The lighting assessment, undertaken by the Lighting Research Center of Rensselaer Polytechnic Institute, concludes that the "roadways and parking lots at the Belleayre resort will perform well in terms of light pollution, if implemented as designed" (lighting assessment at 3). The only element of the modified project that was found to emit "much greater than recommended" light was an outdoor tennis court complex (*id.* at 18). The lighting assessment notes that the tennis courts "will contribute nearly 40% of the lumens produced by all the outdoor luminaires at the whole Resort" (*id.* at 21). The assessment suggested various possible lighting controls, including the use of foliage or high-opacity windscreen material to contain the light within the tennis court areas (see *id.* at 22-24).

Applicant has committed to minimizing outdoor lighting at the resort "to the maximum extent practicable consistent with security, safety and operational considerations" (AIP ¶ 46) and this commitment is reflected in the 2013 SDEIS (see e.g. 2013 SDEIS at 2-44 [setting forth the lighting plan for the modified project and stating that the lighting plan's goal "is to create a cohesive and uniform lit environment throughout the Resort which focuses on safety, minimizing unwanted glare and light trespass to protect the night sky"]). Guidelines for lighting are set forth for road corridors, resort activity areas, and residential areas (see *id.* at 2-44 to 2-45). A description is provided regarding the lighting at the tennis courts, and mitigation measures for that lighting, including an automatic shutoff system that will turn the tennis court lighting off one hour after sunset (see 2013 SDEIS at 2-45).

Given the elimination of the Big Indian Plateau development, the results of the lighting assessment, and applicant's commitment to minimizing light pollution that may emanate from the resort, I conclude that neither of the adjudicable issues set forth under Issue #14 remains substantive and significant. Accordingly, the issues identified in the Interim Decision under Issue #14 will not be adjudicated.

#### 5. Issue #18: Issues Concerning Alternatives Analysis

Pursuant to 6 NYCRR 617.9(b)(5)(v), a DEIS must contain "a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor." Applicant provided an alternatives analysis as part of the 2003 DEIS and the Interim Decision held that "the descriptions of alternatives were, at least in part, reasonable and sufficiently detailed to permit comparative assessment" (Interim Decision at 89).

With regard to alternatives issues that were identified as adjudicable by the ALJ, the Interim Decision modified the Issues Ruling "to limit the adjudication to alternative layouts on Wildacres Resort and Big Indian Plateau" and held that "the primary focus of the adjudicatory hearing on this issue should be the environmental impacts associated with the alternative layouts



rather than the economic feasibility of the alternatives" (Interim Decision at 94). As noted by applicant (applicant Memorandum of Law, Nov. 17, 2014, at 25-27), this approach is consistent with relevant case law (see *id.* at 25, citing, among other cases, Coalition Against Lincoln West, Inc. v City of New York, 208 AD2d 472, 473 (1<sup>st</sup> Dept 1994), affd 86 NY2d 123 (1995)). As stated in Matter of Kirquel Dev., Ltd. v Planning Bd. of Town of Cortlandt, 96 AD3d 754, 755 [2d Dept 2012], lv denied 19 NY3d 813 [2012]), although SEQRA requires "a hard look at the environmental impacts of the proposed project . . . SEQRA does not require a lead agency to take a 'hard look' at the economic feasibility of a project" (96 AD3d at 755).

The Interim Decision specified that applicant was "to include an environmental evaluation of impacts with respect to the two alternatives already referenced in the DEIS (the one golf course and one hotel complex alternative and the east resort [Big Indian Plateau only]/west resort [Wildacres only] alternative) and such additional smaller scale alternatives that would ensure that a reasonable range is considered" (Interim Decision at 93).

As noted, the proposed development on Big Indian Plateau has been abandoned, thereby eliminating the project's impacts on this area. This change renders moot the Interim Decision's directive to consider alternative layouts for Big Indian Plateau. In addition, applicant asserts that this change addresses the directive under the Interim Decision "for consideration of a 'western alternative,' a single golf course alternative, and a smaller-scale project alternative, since all of these alternatives became features of the Modified Project" (applicant, Ruzow Aff, Nov.17, 2014, ¶ 52).

While the elimination of development on Big Indian Plateau clearly renders moot the need to consider certain alternatives, the Interim Decision still requires applicant to consider alternative layouts for the various components of the project and also alternatives that would further reduce the scale of the project. As presented in the 2013 SDEIS and draft FEIS, applicant has fulfilled these requirements (see 2013 SDEIS, Section 5 [Alternatives]; draft FEIS, Executive Summary at xiii-xv; applicant, Ruzow Aff, Nov. 17, 2014, ¶¶ 51-58).

The 2013 SDEIS presents a comprehensive alternatives analysis comparing the 2003 DEIS plan and the modified project. This comparison underscores the significant reduction in the overall size and scope of the proposed project and identifies several environmental impacts that have been eliminated or mitigated.

The modified project alternative is also compared to the proposed plan under the AIP. The major difference between these two alternatives is that the AIP included 24 lodging structures in the upper part of Highmount. The modified project transfers the lodging capacity of the 24 Highmount lodging structures to Wildacres by adding another level to structures already planned for Wildacres. This eliminates the impacts of constructing the 24 units on the upper slopes of Highmount while minimizing the potential increase in impacts of this relocation at Wildacres. The environmental benefits of this change include eliminating the construction of 1.1 miles of road, the majority of which would be on slopes of greater than 20%, and reducing the number of acres of impervious surfaces for the entire project from 27 to 21 acres, among other environmental benefits (see 2013 SDEIS at 5-4 to 5-5).

Another alternative considered in the 2013 SDEIS is the complete elimination of the development at Highmount (see 2013 SDEIS at 5-5 to 5-8). Applicant asserts that "without Highmount, the entire project would not be [economically] viable; nor would the project achieve the applicant's objectives of covering a wide range of the market and avoiding market segmentation" (applicant, Ruzow Aff, Nov. 17, 2014, ¶ 56). The modified project alternative eliminates development on the environmentally sensitive slopes above the proposed Highmount Hotel which would have been developed under the AIP (draft FEIS at xiv). The use of green building design, including green roofs and underground parking reduces the number of impervious acres (see 2013 SDEIS at 2-25). The alternatives analysis shows that, while the number of acres to be disturbed by elimination of development on Highmount would be reduced by 42 acres, the number of impervious acres would only be reduced by "approximately 3 acres"<sup>19</sup> (draft FEIS at xiv).

In sum, the analysis of the "no-Highmount" alternative asserts that the environmental benefits would be modest, and that elimination of Highmount would result in the project becoming economically infeasible (see 2013 SDEIS at 5-7 to 5-8; see also id. Appendix 5; draft FEIS, Errata § 2.8 [No Highmount Alternative Additional Analysis, at 2-4 (providing a comparison of environmental impacts based on category – surface waters, groundwater, visual, noise, etc.)]; draft FEIS, Errata § 2.5 [HVS November 2013 Feasibility Study and Sensitivity Analysis (updating the feasibility analysis)]). I have considered CHA's argument for a Wildacres-only alternative (see CHA, Caffry Aff, Nov. 17, 2014, at 44), but the evaluation of alternatives presented in the 2013 SDEIS and draft FEIS does not support CHA's position.<sup>20</sup>

The alternatives analysis also considers alternative layouts for project components (golf course layout, water supply, wastewater disposal, stormwater practices, and construction phasing), as well as the "no-action alternative" (see 2013 SDEIS, Sections 5.3 to 5.9; see also draft FEIS, Responses to Comments at 269-270 [Responses to Comments (3), (4), (5) and (6)]).

Department staff, based on its review of the environmental impact statement, has concluded that applicant's alternatives analysis fully addresses the issues identified for adjudication (see e.g. staff, Whitehead Aff, Sept. 8, 2014, ¶¶ 54-56).

Based on my review of the alternatives analysis and information that is included in the 2013 SDEIS and draft FEIS, applicant has appropriately addressed the issues concerning the alternatives analysis that were advanced to adjudication under the Interim Decision. Accordingly, no reason exists to adjudicate the issue of alternatives.

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<sup>19</sup> On page 5-6 of the 2013 SDEIS this same figure is reported as "approximately 2 acres." This appears to be a rounding error, however, as the 2013 SDEIS calculates that the Highmount development will result in 2.86 acres of impervious surfaces (see id. at 2-25 to 2-26).

<sup>20</sup> The Gould Family, in its petition, criticizes the alternative analysis and argues for further consideration as to the environmental impacts and potential elimination of the Highmount development (see Gould Family Petition at 15-19). Based on my review, the analysis in the 2013 SDEIS and the draft FEIS sufficiently addresses the alternatives issue and no further studies are necessary or required.

#### **D. Rulings on Newly Proposed Issues for Adjudication**

The previous section addressed only issues that were advanced to adjudication under the Interim Decision. Discussed below are issues that were newly proposed for adjudication following submission of Department staff's motion.

##### 1. Stormwater

Newly proposed issues concerning stormwater management were presented by CHA, the Gould Family and Rainone, all of which proffered the same expert witness on this issue. CHA and the Gould Family submitted copies of the same expert affidavit, which is also the affidavit that was discussed above in the context of stormwater issues under the Interim Decision (see supra Section IV. C.2 of this decision and ruling). The affidavit submitted with the Rainone petition is tailored to more specifically address issues affecting the Rainone property.

Many of the stormwater issues raised as newly proposed issues have already been addressed in my rulings above on the issues that were advanced to adjudication by the Interim Decision (see supra Section IV. C.2). CHA, the Gould Family and Rainone each set forth all or some of the stormwater subissues that were advanced to adjudication under the Interim Decision and each argues that the subissues remain adjudicable (see CHA, Caffry Aff, Nov. 17, 2014, ¶ 14 [but acknowledging that stormwater subissue 9 (adequacy of the Big Indian SWPPP) is now moot]; Gould Family, Petition at 11-13 [addressing stormwater subissues identified in the Interim Decision]; Rainone, Petition ¶¶ 5-7 [referencing, in part, alleged inaccuracies in the Hydro Cad Model]). Where a proposed issue has already been addressed in Section IV. C.2. of this decision and ruling, the issue will not be revisited here.

CHA sets forth what it terms an "additional issue" relating to the compliance of the permit applications with applicable regulations and that the application "will have significant unmitigated impacts on stormwater, water quality, and erosion" (CHA, Caffry Aff, Nov. 17, 2014, at 37). CHA's arguments regarding stormwater-related issues and the statements of its expert, Mr. Millspaugh, were addressed previously in Section IV. C.2 of this decision and ruling. In his affidavit for the Gould Family, Mr. Millspaugh faults the Department's stormwater guidance for its purported failure to consider the likelihood of greater storm magnitudes in the future (see e.g. Gould Family, Millspaugh Aff, Nov. 12, 2014, ¶ 9 [stating that the guidance is "not designed for storms of greater intensity, storms of greater magnitude, and storms occurring in close proximity"]; see also Gould Family Petition at 13-15; Rainone, Millspaugh Aff, Dec. 29, 2014, ¶ 17 [lack of analysis during severe storm events]). The expert asserts that this deficiency is reflected in the "models and calculations" used in the draft FEIS (Gould Family, Millspaugh Aff, Nov. 12, 2014, ¶ 10).

Neither CHA nor the Gould Family identify any legal requirement for applicant to conduct such further evaluation. Department staff points out that "[t]here is no regulatory requirement to mitigate for storms that exceed the 100 year storm event" (staff, Ferracane Aff, Nov. 20, 2014, ¶ 30). Applicant notes that the stormwater management plan for the modified project has been designed in accordance with the 2010 New York State Stormwater Management Design Manual and New York City Department of Environmental Protection requirements (see

e.g. applicant, Franke Affidavit, Nov. 17, 2014, at 17-18 [which includes meeting flood and extreme flood performance criteria]). As noted in the environmental impact statement, stormwater runoff rates will not increase as a result of the project (see e.g. draft FEIS, Errata § 2.2 [Updated Stormwater Management Design Report], at 24-27). Based on my review of the record, applicant has satisfied the applicable requirements in its mitigation for storm events. I concur with staff that the issue of potential impacts from storms of greater magnitude than the 100 year storm event here does not present an issue that could lead to denial of the permit or imposition of significant new permit conditions (see 6 NYCRR 624.4[c][3]). Accordingly, this issue will not be adjudicated.

The Rainone petition raises additional proposed issues that concern property owned by Rainone adjacent to the proposed resort (Rainone Petition ¶ 3). The petition states that the Rainone property has "oft been subject to flooding and damage from snowmelt and stormwater runoff coming directly from the Resort property" (*id.*). Rainone's specific objections relate to the purported (i) failure of applicant to consider culverts on the Rainone property that are down gradient from design points 6 and 6A, (ii) increased risk of flooding and damage occasioned by the replacement of culverts at design points 6 and 6A, and (iii) failure to consider the drainage way on the Rainone property under runoff conditions "such as severe storm events, events occurring in close proximity, events occurring when the ground is saturated by prior events or storm events other than Type 2 distribution" (*id.* ¶ 7; Rainone, Millspaugh Aff, Dec. 29, 2014, ¶¶ 14-17). The latter issue is an offshoot of the proposed issue concerning greater storm magnitudes which has been determined not to be substantive and significant.

The proposed issues concerning the culverts on the Rainone property and the risk of flooding in that area both relate to runoff flows after the runoff has left the modified project site. As noted by Department staff, however, the purpose of the stormwater management system is to ensure that stormwater runoff leaves the site at the same rate as it does in the pre-development state (staff, Ferracane Aff, Nov. 20, 2014, ¶ 27 [citing the 2010 Design Manual]). Staff's expert attests that the stormwater management plan for the modified project "has been designed in accordance with [2010 Design Manual] and [New York City Department of Environmental Protection] requirements, including meeting Overbank Flood and Extreme Flood sizing criteria which requires post development peak discharge flow rates to be less than or equal to pre-development rates at agreed upon analysis points prior to reaching downstream properties" (staff, Lamb-LaFay Aff, Dec. 8, 2014, ¶ 14; see also draft FEIS, Responses to Comments at 92 [approval of analysis locations]).

Where an applicant demonstrates that its stormwater management system will achieve runoff rates that are at or below those under existing conditions, the applicant is not required to assess pre-existing downstream stormwater issues, such as those noted by Rainone (see staff, Ferracane Aff, Nov. 20, 2014, ¶¶ 27-28, Lamb-LaFay Aff, Dec. 8, 2014, ¶ 14).

Applicant has evaluated stormwater rates at the existing stormwater flow rates at the existing culvert inlets, and the stormwater model was supplemented to include a more detailed analysis of conditions along CR 49A (see draft FEIS, Responses to Comments at 90-91, 94-96; 92 [approval of analysis locations]). As previously noted, applicant has agreed to undertake reconstruction of a portion of CR 49A to correct existing stormwater capacity issues (see staff,

Ferracane Aff, Nov. 20, 2014, ¶ 28; draft FEIS, Responses to Comments at 94 [noting project plans for reconstruction of the CR 49A corridor as indicated on the General Improvement Plans]).

Although Rainone contends that the stormwater impacts resulting from additional snow melt were not considered (Rainone Petition ¶ 5[e]), this is addressed in the draft FEIS Responses to Comments. The response reviews the amount of snow that is melted or the rate of maximum predicted runoff due to snowmelt during storm events and that such an increase is minimal (see draft FEIS, Responses to Comments at 108).

I have examined the studies and information and conclude that these adequately identify stormwater flows from the modified project and evaluate runoff impacts (see e.g. 2013 SDEIS, Appendix 18 [Stormwater Management Design Report]; see also id. Appendix 19 [Draft Stormwater Pollution Prevention Plan]; draft FEIS Errata/Revisions § 2.2 [Updated Stormwater Management Design Report]). On this record, I conclude that downstream stormwater runoff does not present an issue that could lead to denial of the permit or imposition of significant new permit conditions (see 6 NYCRR 624.4[c][3]). Accordingly, this issue is not substantive and significant, and will not be adjudicated.

Based on my review of the record, none of the newly proposed stormwater-related issues raise a substantive and significant issue.

## 2. Galli-Curci Mansion

Petitioner PUA Associates owns the Galli-Curci Mansion and surrounding property (PUA, Feller Aff, Nov. 17, 2014, ¶¶ 4-5). PUA proposes two issues for adjudication, both of which relate to potential impacts of the modified project on the Galli-Curci property (id. ¶ 15). Specifically, PUA argues that "there are substantive and significant issues with respect to visual and noise impacts to the Galli-Curci Estate that will be caused by construction and/or operation of the [modified] Project" (PUA Memorandum of Law, Nov. 17, 2014, at 7).<sup>21</sup>

### a. Visual Impacts

According to PUA's expert, the visual assessment contained in the 2013 SDEIS and draft FEIS violates the Department's policy for assessing visual impacts by failing to identify the Galli-Curci Mansion as an aesthetic resource, and by failing to assess and mitigate visual impacts on the mansion (PUA, Allen Aff, Nov. 17, 2014, ¶ 89).

With regard to the issue of "the inventory of aesthetic resources," the Interim Decision held that:

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<sup>21</sup> Friends of Catskill Park indicated its concurrence with the visual and noise impact issues raised by PUA and included copies of the respective expert affidavits filed by PUA in relation to these proposed issues (see FCP, Feller Aff, Nov. 17, 2014, ¶¶ 12-13).

"[t]he record indicates that applicant undertook a substantial effort to determine what significant views would be impacted in the various categories (such as State parks, urban cultural parks, State Forest Preserve, etc.) that are set forth in the [Visual Impacts Policy]. Applicant's inventory of aesthetic resources is sufficient and this sub-issue (including [consideration of (1) aesthetic resources of statewide concern to be included in the visual impacts inventory; (2) selection of appropriate control points within those listed resources; (3) the significance of any visual impacts provided by the analysis of these inputs; and (4) mitigation measures]) shall not be adjudicated."

(Interim Decision at 67 [citation omitted]).

Absent a material change to the potential visual impacts on the Galli-Curci Estate that would be substantive and significant, the proposed issues raised by PUA concerning such impacts have previously been determined to be non-adjudicable under the Interim Decision. Accordingly, the first issue to consider is whether the modified project results in changes to the potential visual impacts on the Galli-Curci Mansion that are significant enough to warrant revisiting the determination in the Interim Decision.

The proposed structures of concern to PUA's visual expert are the four duplexes proposed to the south of the Galli-Curci Mansion, and the Leach Farm Conference Center (see PUA, Allen Aff, Nov. 17, 2014, ¶¶ 18-19 [referring to the duplexes as "the nearest proposed structure within the Highmount complex"], 69-73 [discussing the expert's "preliminary" renderings of the Highmount complex from the Galli-Curci property (the renderings, which depict the four duplexes in yellow, are attached to the Allen affidavit as exhibits 7 and 8, and for the Leach Farm Conference Center as exhibit 9)]).

The plan for the Leach Farm Conference Center calls for the structure to be an "adaptive reuse" of some existing buildings as part of the Highmount development (see 2013 SDEIS at 2-3). The plan calls for certain existing buildings to be connected, creating a single building that will be used as the conference center (id.; see also id., figures 2-9, 2-10). There is no indication in the record, however, that the proposed single structure would be significantly more visible from the mansion than the existing structures.

The project as proposed under the 2003 DEIS called for a 21-lot subdivision on the land that is now slated for the Highmount Hotel and detached duplex units. Under the 2003 DEIS plan, the 21 lots were to be developed as sites for single-family homes, with three of the proposed building lots directly bordering the Galli-Curci Mansion property (see 2003 DEIS, Master Plan, Drawing MP-3 [depicting proposed lots 1, 20 and 21 abutting three sides of the Galli-Curci Mansion property]). Notably, the 2003 DEIS plan would have resulted in the construction of single-family homes in and around the area where the four duplexes are to be built under the modified project (see id. [depicting proposed lots 1, 2, 8, 16 to the south of the Galli-Curci Mansion property]; 2013 SDEIS, Project Master Plan L-1.00; Grading and Drainage Plan, Drawing L-4.01 [depicting the four duplexes to the south of the Galli-Curci Mansion property]).

The modified project also includes Highmount Hotel which, although further from the Galli-Curci Mansion than the duplexes, and beyond another stand of trees, may be visible from the mansion during leaf-off conditions. Still, the modified project includes deciduous and evergreen tree plantings along CR 49A, to the north and south of the duplexes, that, in addition to the trees already present, will further screen both the duplexes and the hotel from the mansion (see 2013 SDEIS, Site Layout, Materials and Planting Plan, Drawing L-6.01).

In light of the foregoing, it appears that the visual impacts on the Galli-Curci Mansion under the modified project are no more significant than the visual impacts that would have occurred under the 2003 DEIS plan. Nevertheless, I consider the merits of PUA's argument below.

PUA's expert asserts that the Galli-Curci Estate qualifies as "an aesthetic resource of statewide significance [but] is not identified in the SDEIS as such" (PUA, Allen Aff, Nov. 17, 2014, ¶ 20). The expert states that "the main house at the Galli-Curci Estate[] is just 550 feet from the Leach Conference Center and 600 feet from the nearest proposed structure within the Highmount complex" (id. ¶ 18). The expert asserts that, "[g]iven this close proximity, direct visibility of the proposed development is likely . . . through existing deciduous trees from the entrance court at [the mansion]" (id. ¶ 19). According to this expert, the visual assessment contained in the 2013 SDEIS and draft FEIS "violates the DEC [Program Policy, DEP-00-2, Assessing and Mitigating Visual Impacts ("Visual Impacts Policy"), dated July 31, 2000] and the basic tenets of the SEQRA process with regard to the identification, assessment and mitigation of visual impacts" (PUA, Allen Aff, Nov. 17, 2014, ¶ 89). PUA's expert opines that the modified project "will undoubtedly alter the aesthetic quality and historic integrity of the property" (id. ¶ 88).

Where it appears that a project under review by the Department may affect a property listed, or eligible for listing, on the State or National Register of Historic Places, staff is required to "consult with the commissioner [of the Office of Parks, Recreation and Historic Preservation ("OPRHP")] concerning the impact of the project" (Parks, Recreation and Historic Preservation Law ["PRHPL"] 14.09[1]; see also 6 NYCRR 621.3[a][8][stating that when a determination under PRHPL 14.09 is required, "the application is not complete until [OPRHP] has made a determination whether: (i) any historic, architectural, archeological or cultural resources present in the project impact area are significant (listed on or eligible for listing on the State or National Register of Historic Places); and (ii) the project may have any impacts on such significant resources"]). OPRHP is statutorily mandated to consider potential adverse impacts to historic properties, including the "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" (PRHPL 14.09[1]).

The record here demonstrates that OPRHP (i) was regularly consulted beginning early in the review process, (ii) identified the Galli-Curci Estate as eligible for listing on the State and National Register in or about 2000, and (iii) determined that the project, both as proposed under the 2003 DEIS and as modified, "would have No Adverse Impact on the historic resources that were identified" (draft FEIS, Errata § 2.7; id., Responses to Comments at 38, 177; id., Executive Summary § 3.13; see generally 2013 SDEIS, Appendix 12 [Supplemental Cultural Resources Information]; 2003 DEIS, Appendix 23). OPRHP did not recommend any mitigation measures

(id.). Contrary to the assertions made by PUA, the Galli-Curci Estate was identified early in the process as an aesthetic resource, and impacts on the estate were appropriately considered.

Department staff's expert notes that, consistent with the requirements of section 14.09 of the PRHPL, OPRHP was regularly consulted with regard to potential impacts of the project on historical properties (staff, Whitehead Aff, Dec. 8, 2014, ¶¶ 30-32). Staff's expert asserts that OPRHP was aware in 2000 that the Galli-Curci Estate (which, at that time, was referred to by OPRHP as the "Sutter Estate") was eligible for listing on National Register of Historic Places (id. ¶ 12; see also 2003 DEIS, Appendix 6, OPRHP letter, June 12, 2000 [attached "Resource Evaluation," stating that the Sutter Estate "meet[s] the criteria for inclusion in the State and National Registers of Historic Places"]). Staff notes that OPRHP provided the Department with written no adverse impact determinations in 2003, 2009 and 2013<sup>22</sup> and that the 2013 determination expressly referenced the Galli-Curci Estate (staff, Whitehead Aff, Dec. 8, 2014, ¶¶ 33-37).

Given OPRHP's no adverse impact determination, Department staff was not required to consider mitigation measures under the PRHPL (see e.g. Matter of Cathedral Church of St. John the Divine v Dormitory Auth. of State of N.Y., 224 AD2d 95, 101 [1996], lv denied 89 NY2d 802 [1996] [holding that "[i]nasmuch as the [OPRHP] Commissioner, among others, determined that the project would have no direct impact on [certain historic properties], under the express language of the statute, there was no need to explore reasonable and prudent alternatives to it insofar as these structures are concerned"]; Matter of Citizens for Clean Air v New York State Dep't of Env'tl. Conservation, 135 AD2d 256, 260 [3d Dept 1988], lv dismissed, lv denied 72 NY2d 853 [1988] [holding that "the [DEC] Commissioner's rulings in this area are correct, as was his ultimate determination to adopt the conditions suggested by OPRHP; he thus fulfilled his obligation to explore feasible alternatives and mitigate any adverse impact upon cultural resources identified by OPRHP in their various communications with DEC"]).

In addition to obtaining the no adverse impact determination of OPRHP, Department staff states that the potential visual impacts on the Galli-Curci Mansion and Estate were evaluated in accordance with the Department's Visual Impact Policy and that no further analysis is warranted (staff Reply Memorandum of Law, Dec. 8, 2014, at 21; see also staff, Whitehead Aff, Dec. 8, 2014, ¶¶ 5, 15, 43). For a discussion of the full visual impact assessment that applicant conducted, see 2013 SDEIS § 3.6 and Appendix 25 [Visual Impact Assessment] in which daytime and nighttime conditions were examined and measures to mitigate visual impacts are addressed.

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<sup>22</sup> The 2003 OPRHP no adverse impact determination was premised on the condition that "[a]ll work (interior and exterior) that is proposed for the historic structures on the project site [e.g., buildings on the former Leach Farm site (see 2003 DEIS, Appendix 6, OPRHP letter, June 12, 2000 [attached "Resource Evaluation"])] shall be reviewed by the [State Historic Preservation Office] prior to the initiation of any construction activities" (2013 SDEIS, Appendix 12 [Letter dated January 6, 2003]). This condition remains in place and applicant has committed to comply with it (see 2013 SDEIS at 3-90 to 3-91 [confirming that OPRHP will review all work (interior and exterior) proposed for these structures prior to the start of construction]).



As part of the draft FEIS, applicant undertook additional review of the potential visual impacts on the Galli-Curci Estate. That analysis shows that intervening topography and vegetation will provide a visual screen of the project. Views of the modified project from the Galli-Curci Mansion will be limited under both leaf-on and leaf-off conditions (see e.g. draft FEIS Executive Summary § 3.6 [analyses show that proposed hotel “will not visually impact the Galli Curci Mansion”], Errata § 2.4). Of note is a photograph taken from an open field on the northern portion of the project site, directly across CR 49A from the Galli-Curci Mansion, and looking north toward the mansion. This photograph depicts only trees that are located on the Galli-Curci property and, therefore, none of applicant's activities will remove the trees shown. The photograph shows that existing vegetation on the Galli-Curci property provides a significant visual screen (draft FEIS, Errata § 2.4, Photo #3119; see also PUA, Allen Aff, Nov. 17, 2014, Exh 5 [photograph taken from the Galli-Curci property looking south toward the project site]). Additionally, as noted, the modified project provides for deciduous and evergreen tree plantings along CR 49A that will provide additional visual screening of the project.

I conclude that PUA has failed to raise an adjudicable issue concerning the sufficiency of applicant’s visual analysis or the ability of the Department to make the required SEQRA findings based on that analysis (see 6 NYCRR 624.4[c][6][i][b]). Accordingly, issues concerning the visual impacts on the Galli-Curci property will not be adjudicated.

#### b. Noise Impacts

PUA proposes the issue of excessive noise impacts to the Galli-Curci property (PUA, Feller Aff, Nov. 17, 2014, ¶15).

With regard to operational noise, the Interim Decision held that "only the issue of operational noise impacts on users of wilderness and wild forest areas of the Catskill Forest Preserve (in close proximity to the project) arising from onsite activities shall be adjudicated" (id. at 59). However, the Interim Decision also notes that the assessment of operational noise requires further study (id. at 57 [stating that "applicant should undertake a noise study that would take into account the onsite noise-generating activities that would occur at [the resort]"]). Given this, I deem it appropriate to consider PUA's argument in the context of operational noise impacts.

With regard to construction noise, the issue of construction noise impacts was determined to be non-adjudicable under the Interim Decision. Specifically, the Deputy Commissioner held that, "I concur with the ALJ that applicant’s Community Sound Survey and Construction Noise Impact Assessment is of sufficient scope and detail with respect to construction noise issues" (Interim Decision at 58 [citation omitted]). The Interim Decision concludes that "[a]pplicant has addressed concerns regarding construction noise and has proposed mitigation measures" (id. at 58). Notwithstanding the holding of the Interim Decision, PUA does not attempt to establish that construction noise impacts on the Galli-Curci Mansion will be more significant under the modified project than they would have been under the 2003 DEIS plan. This alone makes its offer of proof insufficient. Nevertheless, I will consider the merits of PUA's argument as to construction noise impacts as well.

PUA's argument focuses, in large part, on whether the mansion was appropriately considered as a noise receptor, without regard to whether the noise is generated by construction or by operations (see PUA, Millspaugh Aff, Nov. 17, 2014, ¶¶ 13-23).

As noted, PUA questions the adequacy of the noise analysis in relation to the Galli-Curci Mansion, but does not provide a basis to conclude that construction noise from the modified project will be materially different from construction noise under the project as proposed under the 2003 DEIS. Both plans require construction of an access road to the south of the mansion on the south side of CR 49A (the intersection of the access road and CR 49A was to be closer to the mansion under the 2003 DEIS plan) and both plans entail construction of structures, either duplexes or single family homes, along the access road (see 2003 DEIS, Master Plan, Drawing MP-3; 2013 SDEIS, Site Layout, Materials and Planting Plan, Drawing L-6.01).

PUA argues that "[t]he noise impacts that have been analyzed in the DEIS do not provide information which is specific to the Galli-Curci Mansion" (PUA Memorandum of Law, Nov. 17, 2014, at 6-7). According to PUA, this raises questions regarding "the adequacy of the DEIS and whether DEC can make the required findings under SEQRA and whether the requirements for mitigation under [PRHPL] have been satisfied" (id. at 6). PUA's expert states that various noise studies undertaken in relation to the modified project "do not provide any specific evaluation of the potential noise impacts to the [Galli-Curci] Mansion" (PUA, Millspaugh Aff, Nov. 17, 2014, ¶ 13).

Contrary to PUA's and its expert's contentions, Department staff notes that the Galli-Curci Mansion was considered as a noise receptor (staff Reply Memorandum of Law, Dec. 8, 2014, at 23). The noise assessment included in the 2003 DEIS expressly addressed noise impacts on the mansion from construction of the "Highmount Estates Lodging Units" (i.e., the 21-lot residential subdivision) and the associated access road (see 2003 DEIS, Appendix 22 at 5-2 to 5-4 [identifying "W-2" (the Galli-Curci Mansion) as the nearest receptor to construction on lots 1, 16 and 20]). Similarly, the noise assessment in the 2013 SDEIS, which "supplements the original Project noise assessment conducted for the [2003] DEIS" (2013 SDEIS, Appendix 20 [Construction and Operations Noise Study] at iii), again shows that noise impacts on the mansion from both construction and operation were considered and analyzed (see id. at 3 [identifying receptor "W-2" and others as "residences on CR 49A"], figure 2-1 [map depicting location of receptors, including receptor W-2 at the location of the mansion], tables [listing W-2 as a receptor and indicating the relevant noise impacts]). The analysis shows that the noise impacts on the mansion will be minimal (see SDEIS, Appendix 20; see also draft FEIS, Responses to Comments at 180-182 [discussing the noise study, referencing in part evaluations as to receptor W-2 (Galli-Curci Mansion)]).

Based on the record before me, PUA has failed to raise an adjudicable issue concerning the sufficiency of applicant's noise assessment or the ability of the Department to make the required SEQRA findings based on that assessment (see 6 NYCRR 624.4[c][6][i][b]). Accordingly, this issue will not be adjudicated.

### 3. Air Quality Impacts

Under the heading "modifications to the project have created additional substantive and significant issues for adjudication," CHA contends that the project will have "unmitigated adverse impacts on air quality, public health, and traffic in the vicinity of the project" (CHA, Caffry Aff, Nov. 17, 2014, ¶ 62 [capitalization of heading deleted]). CHA argues that the 2013 SDEIS "did not properly assess air pollutants such as nitrogen dioxide (NO<sub>2</sub>) from vehicles . . . which could result in violations of ambient air quality standards" (CHA, Caffry Aff, Nov. 17, 2014, at 33). CHA's proffered expert (Zamurs and Associates, Inc. ["Zamurs"]) opines that vehicle emissions from project-related traffic "could result in significant exposure to air pollution, and resulting health effects, to the visitors and employees to the Belleayre Resort and Ski Center" (CHA, Exh D [Zamurs Comment], Nov. 14, 2014, at 2). This expert also opines that such emissions could cause violations of air quality standards.

As reflected in the Issues Ruling, the traffic issues that were the focus of the issues conference concerned the potential for noise impacts and increased traffic volume (see id. at 95-100). Notably, at the time of the issues conference, CHA did not pursue the issue of traffic-related air quality impacts. This is despite the fact that the proposed project under the 2003 DEIS was considerably larger and would have accommodated more visitors and, as a result, more vehicles. Nevertheless, counsel for CHA makes no argument regarding his conclusion that modifications to the project have created this newly proposed issue (see CHA, Caffry Aff, Nov. 17, 2014, at 32-34).

Accordingly, this proposed issue is rejected as untimely.

Even if it were timely raised, CHA's arguments are unpersuasive and do not support identifying this as an adjudicable issue. Department staff's reply papers, which include the affidavit of Michael Sheehan, Chief of the DEC's Mobile Source and Climate Planning Section, fully rebut the comments of CHA's expert.<sup>23</sup>

Department staff sets forth the procedures that were followed in the air quality assessment for the modified project, and the compliance of those procedures with DEC guidance and applicable requirements (see e.g. staff, Sheehan Aff, Dec. 8, 2014, ¶¶ 6-11, 36). Department staff's expert notes that applicant's Air Quality Assessment follows the procedures set forth in the New York State Department of Transportation Air Quality Analysis Procedure: project Environmental Guidelines, as identified in the final scoping document (staff, Sheehan Aff, Dec. 8, 2014, ¶ 6). The studies and analyses on air quality impacts (see e.g. 2013 SDEIS at 3-87 to 3-89; 2013 Appendix 24 [Air Quality Study]) show that applicant has sufficiently evaluated air quality impacts for the modified project.<sup>24</sup>

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<sup>23</sup> For the analysis performed for project-related traffic, see the Air Quality Assessment in the 2013 SDEIS in Appendix 24.

<sup>24</sup> Attached to CHA's December 29, 2014 response to FCP's motion to strike portions of Department staff's December 8, 2014 reply papers was an additional response of Zamurs and Associates, Inc. to the December 8, 2014 affidavit of Department staff witness Michael Sheehan. The additional

I note that CHA's expert suggests that the air quality analysis for the project should be updated to reflect recent changes to air quality standards or modeling procedures. The expert states that the air quality analysis should be redone using "the latest USEPA emission model, MOVES (MOtor Vehicle Emissions Simulator) . . . released [in] 2010" (CHA, Zamurs Comment, Nov. 14, 2014, at 2). The expert also asserts that staff improperly declined to update the air quality analysis included in the 2013 SDEIS, in part, on the basis that fewer than three years would pass between the date of the 2013 SDEIS and issuance of the FEIS (id. at 2). Although the expert acknowledges that the three year "shelf-life" for air analyses is used by the Federal Highway Administration, he quotes from an abstract contained in the New York State Department of Transportation Environmental Procedures Manual ("DOT Manual") to argue that because the project's air quality assessment was completed in February 2011, it must be redone (id. at 3).

CHA's arguments with respect to the modeling and the timing of the analysis are rejected. The expert relies upon language contained in the 2001 abstract for the air quality chapter of the DOT Manual, both of which were written in January 2001<sup>25</sup> (DOT Manual, Chapter 1.1 at 6). The 2001 abstract states that the new procedures contained in the chapter supersede what had previously been contained in "all previous air quality Project Environmental Guidelines (PEGs), Interim Project Development Guidelines (IPDGs), guidance memos, etc." (id.). The 2001 abstract does not state that MOVES, an air emissions model that was released nearly a decade after the abstract was written, must be used.

Furthermore, the expert's comment omits part of the quoted text from the abstract. Using the abstract for authority, the expert states that "more than three years has elapsed [since the air quality assessment for the project was completed] and a re-analysis is required" (CHA, Zamurs Comment, Nov. 14, 2014, at 3). The abstract, however, states that re-analysis is required only "for projects in carbon monoxide nonattainment and maintenance areas" that lack a "conformity determination" (DOT Manual, Chapter 1.1 at 6). The modified project, however, is not located in a carbon monoxide nonattainment area (2013 SDEIS, Appendix 24 [Air Quality Assessment] at 1). As staff points out, the main text of the air quality chapter states that use of the MOVES model is required only for "quantitative project level microscale/hot-spot analyses in carbon monoxide [CO] and particulate matter [PM] nonattainment and maintenance areas beginning on or after December 20, 2012" (staff, Sheehan Aff, Dec. 8, 2014, ¶ 6; see also draft FEIS at 155-56; DOT Manual, Chapter 1.1 at 1.1-17).

As noted, Department staff have indicated that the modeling used for the modified project was appropriate and in compliance with the DOT Manual (see e.g. staff, Sheehan Aff, Dec. 8, 2014, ¶¶ 10-11; see also draft FEIS at 155-56 [noting that use of the MOVES model is not required where, as here, certain conditions set forth in the DOT Manual are met]). As noted in

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response was beyond the scope of the motion to strike, and is rejected. Even if considered, the additional response would not alter my determination that CHA has failed to raise an adjudicable issue.

<sup>25</sup> Note that, although the chapter on air quality in the DOT Manual was written in 2001, section 8 of the chapter, entitled "Air Quality Models," was updated in December 2012.

the draft FEIS, the air quality analysis, contrary to CHA expert's comments, remains timely (see draft FEIS at 156).

CHA's expert also speculates that, "if a thorough and technically sound air quality analysis were to be performed . . . the project would likely demonstrate a violation or exacerbation of a violation of one or more ambient air quality standards" (CHA, Zamurs Comment, Nov. 14, 2014, at 4). Given the complexity and variables of the MOVES model, Department staff's expert questions "how the commentator could make these conclusions without first completing a full analysis of the project using the MOVES model" (staff, Sheehan Aff, Dec. 8, 2014, ¶13; see also id., ¶¶ 14-16). Department staff provides further evaluation that supports the determination that the modified project would not violate or exacerbate a violation of ambient air quality standards (see e.g. staff, Sheehan Aff, Dec. 8, 2014, ¶¶ 17-18, 30, 32-35). The speculative or conclusory statements of CHA's expert would be insufficient to raise an adjudicable issue, even if timely raised.<sup>26</sup>

#### 4. Impacts on Water Quality and Quantity and Fish Populations

CHA argues that the water demands of the modified project will "result in significant adverse impacts on ground and surface water quality . . . and cause substantial interference with the movement of several species of trout" (CHA, Caffry Aff, Nov. 17, 2014, at 40).<sup>27</sup> Attached as Exhibit H to CHA's filing are comments on water resources proffered by CHA's expert Dr. Andrew Michalski, a hydrogeologist.<sup>28</sup> CHA's experts comments are based on his review of "water-resources related portions" of the environmental impact statement documents (see CHA, Exh H [Michalski Comment], Nov. 2014). He raises concerns about the well tests undertaken for the resort's potable water and irrigation wells, impacts on baseflow and trout in the Emory Brook Watershed, water supply impacts, wetland impacts, and road salting impacts on groundwater and streams (id.).

I have considered CHA's comments and find that none raise a substantive and significant issue. As Department staff points out, the comments of CHA's expert "have already been addressed by staff in the FEIS Responses to Comments" (staff Reply Memorandum of Law, Dec. 8, 2014, at 20). Section 3.2 of the draft FEIS Responses to Comments provides a detailed review of groundwater and surface water input to local streams, including Emory Brook (see draft FEIS, Responses to Comments at 128-29). A water budget analysis (see 2013 SDEIS Appendix 22

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<sup>26</sup> Certain of the comments of CHA's expert relate to the Belleayre Mountain Ski Center Unit Management Plan which, as previously noted, is not part of this proceeding.

<sup>27</sup> CHA specifically defines its issue as follows – "[w]hether the application for permits and a water quality certification should be denied because the application does not conform to the applicable standards; and whether they should be denied because project will cause significant unmitigated adverse impacts on ground and surface water quality and quantity, and a substantial interference with the movement of fish populations" (see CHA, Caffry Aff, Nov. 17, 2014, ¶ 65).

<sup>28</sup> Dr. Michalski indicates that his review was at the request of CHA and the Ashokan-Pepacton Watershed Chapter of Trout Unlimited ("APWCTU"). I note that the APWCTU is not a party to this proceeding and has not filed a petition for party status.

[Water Budget Analysis]) has been conducted for the modified project to evaluate the change in runoff and recharge on an annualized basis. The analysis indicated a potential for only a “very slight decrease” in aquifer recharge and “a negligible increase” in runoff (see 2013 SDEIS Appendix 22 at 11).

The draft FEIS responses to comments notes that the affected drainage basin, the Bush Kill basin, covers an area of approximately 47 square miles and that the average flow of the Bush Kill at the nearest downstream USGS gaging station (approximately one mile east of Arkville) is 44,838 gpm. Given the foregoing, the responses to comments notes that “[e]ven if it is assumed that 100% of the potential 19 gpm decrease in aquifer recharge [caused by the increase in impervious surfaces] would result in an equivalent and direct loss to local stream flows, the resultant change in stream flow and temperature would be unnoticeable” (draft FEIS, Responses to Comments at 129).

The environmental impact statement addresses issues that were raised in regards to trout and trout habitat, including how the potential for thermal impacts has been addressed (see e.g. 2013 SDEIS at 3-7 [addressing thermal loadings]; id. Appendix 18 [Stormwater Management Design Report] at 15, 23; draft FEIS, Executive Summary at ix; id. Responses to Comments at 70; applicant, Franke Aff, Nov. 17, 2014 ¶ 36). CHA’s comments regarding impacts to fish populations are speculative and conclusory, and fail to raise an adjudicable issue.

CHA's expert asserts that the increase in impermeable surfaces, in combination with other factors including potable water demand, will cause a "reduction in groundwater contribution to stream baseflow due to the proposed Modified Plan development on the order of 300 gpm" (CHA, Michalski Comment, Nov. 2014, at 1). Chief among these other factors, according to the expert, is the loss of an estimated 182 gpm<sup>29</sup> that is to be drawn from on-site wells for the project's potable water supply (id.).

CHA's comments on the potential stream impacts associated with the project's potable water supplies are not supported. The water supply to meet design demand will be provided by two well fields identified as the K and Q well fields (see 2013 SDEIS, Appendix 13 [Water System Preliminary Design Report] at 4). The well pumping tests for the potable water supply wells indicate that the modified project will have little or no impact on surface water flows. During the pumping tests, water levels of streams and brooks in the vicinity of the well sites were measured from one to three times a day before, during, and after each well pumping test. As set forth in the report on the pumping tests, the stream water level data collected during the pumping tests show "no impact" to the streams from pumping (2013 SDEIS, Appendix 13, Appendix E [Well Field Hydrology Report] at 23 [K wells], 45 [Q well], tables 8, 9, 10, 35; see also 2013 SDEIS at 3-18). Moreover, given that the average flow of the Bush Kill downstream

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<sup>29</sup> The estimated withdrawal rate used by CHA's expert is based upon the maximum daily demand, which assumes full build out of the modified project, 100% occupancy, and a "peaking factor" (multiplier) of 1.65, for a maximum demand of 262,000 gallons per day (“gpd”) (see 2013 SDEIS, Appendix 13 at 2). The Water System Preliminary Design Report states that demand on an "average day," using the assumption of 70% occupancy, would be approximately 111,000 gpd, before applying the peaking factor (id.). Applying the peaking factor to the 111,000 gpd estimate and converting the estimate to gpm results in an estimated demand on an average day of under 130 gpm.

from the well sites is 44,838 gpm, significant impacts on the Bush Kill, even at the maximum estimated rate of 182 gpm, have not been shown to occur.

CHA's expert asserts that applicant's well pumping tests were not done in conformance with established Department procedure (CHA, Michalski Comment, Nov. 2014, at 3-4). Contrary to this assertion, however, the well test protocols were thoroughly vetted and approved by both Department staff and the New York State Department of Health ("NYSDOH") (see 2013 SDEIS, Appendix 13, Appendix E at 2, 28 [stating that the pumping tests for the K wells and the Q well were submitted to, and approved by, the Department and NYSDOH]; draft FEIS, Responses to Comments at 58). As reflected in the 2013 SDEIS, and the draft FEIS, Department staff and NYSDOH were integrally involved with the development, implementation, and review of the pumping tests. Therefore, the assertion of CHA's expert is in error.

Regarding the contention of CHA's expert regarding impacts to wetlands, I note that staff has determined that wetlands will continue to respond to seasonal variations in temperature and precipitation with no impact due to pumping of the K or Q wells (see staff Reply Memorandum of Law at 21). Potential wetland impacts were adequately addressed in the environmental impact statement documents, noting, in particular, that nothing demonstrates that the local wetlands would "dry up" and noting that the wetlands on the site "are formed in areas where water emerges onto the surface because clayey soil or the lack of fractures in the rock prevents water from percolating downward" (see e.g. draft FEIS, Responses to Comments at 132).

Finally CHA's arguments regarding road salting impacts are speculative and are insufficient to raise an adjudicable issue.

I conclude that the comments proffered by CHA on groundwater and surface water quality and quantity, and fish populations, do not raise any substantive and significant issue that warrants adjudication.

#### **E. Comments of CCCD and NRDC**

As previously noted, both CCCD and NRDC raised concerns relating to the cancelling of the adjudicatory hearing. These are addressed below.

##### **1. CCCD**

CCCD, in discussing the status of the independent stormwater monitor, referenced an apparent discrepancy between the draft SPDES permit and the language in the AIP regarding the monitor. Applicant has agreed that the language developed in the AIP for the independent stormwater monitor should be included as a special condition to the SPDES permit and has so recommended to the Department (see applicant, Ruzow Aff, Nov. 17, 2014, at ¶ 59; see also letter dated April 5, 2013 from Daniel A. Ruzow, Esq., to DEC Regional Permit Administrator Daniel T. Whitehead). I concur that the provision for an independent stormwater monitor reflecting the commitments made in the AIP should be included either in the SPDES permit for the project or other enforceable DEC instrument and hereby direct Department staff to do so.

However, Department staff must ensure that any reporting times or other related requirements in that provision are consistent with Department legal guidance and procedural requirements.

CCCD requested an independent, comprehensive study of the future lodging needs of the Catskill Mountains and the integration of new investments with the existing resources of the area. CCCD, however, did not identify any statutory or regulatory provision that would require such a study to be undertaken in this matter. I see no legal basis or justification for that request here. As to CCCD's comments regarding the timing of the filing of deed restrictions concerning Class III gaming and density restrictions for the modified project, applicant has expressed its commitment to record such deed restrictions in accordance with the AIP. Applicant proposes to put those deed restrictions in place following issuance of all "final, non-appealable approvals" for the resort (which commitment is also reflected in the draft FEIS [see draft FEIS, Section 2.0, at 41]) (see applicant, Ruzow Aff, Nov. 17, 2014, ¶ 61; staff Reply Memorandum of Law, Dec. 8, 2014, at 5 n 2 [deed restrictions in AIP on gaming not relevant to Department's review]). CCCD's concerns do not raise an adjudicable issue nor do they support denying staff's motion.

## 2. NRDC

As previously mentioned, NRDC objected to the cancelling of the administrative proceeding until final deed restriction language that forecloses the option of casino gambling on the site and final arrangements for adding such language to the deeds have been agreed to by the developers and the parties, and final deed restriction language on density limitations and final arrangements for adding such language to the deeds have been agreed to by the developers and the parties. As discussed above in the context of CCCD's comments, applicant has expressed its commitment to record gaming and density limitation restrictions in accordance with the AIP. Applicant proposes to put those deed restrictions in place following issuance of all "final, non-appealable approvals" for the resort. NRDC's concern does not raise an adjudicable issue and its objection is rejected.

NRDC also objected to the cancelling of the administrative proceeding until applicant reaffirmed its commitment to manage the golf course as organic and to establish a technical review committee are incorporated into the applicable SPDES permit. No adjudicable issue has been raised and based on the following discussion, the objection is rejected. I note that, with respect to the golf course, applicant has developed an organic turfgrass management plan pursuant to Section 19 of the AIP. This plan is contained in the 2013 SDEIS (see 2013 SDEIS at 2-22 and 2013 SDEIS Appendix 15 [Organic Golf Course Management Plan]). Applicant has also submitted golf course mitigation conditions to the Department (see letter dated April 5, 2013 from Daniel A. Ruzow, Esq. to DEC Regional Permit Administrator Daniel T. Whitehead). The AIP, which both applicant and NRDC, among other parties, have signed, provides for the establishment of a Technical Review Committee (which membership includes a representative from DEC, NYC DEP, the golf course superintendent, Crossroads Ventures, LLC, and a non-governmental organization). Applicant has set forth conditions relating to the golf course operation in its April 5, 2013 letter, and I direct staff to include these conditions, as well as to the establishment of the Technical Review Committee, in the SEQRA findings statement and, as appropriate, into any Department permits or other approvals. Furthermore, all updates with



respect to the Organic Golf Course Management Plan are to be provided, in addition to the Technical Committee, to the DEC Regional Directors in Regions 3 and 4.

#### **F. Motion to Deny the 2007 Motion for Reconsideration**

Department staff also requests denial of the outstanding motion for reconsideration of the Interim Decision ruling which denied adjudication of the community character issue. The motion for reconsideration was filed by Catskill Park Coalition on January 29, 2007. By ruling dated November 9, 2007, former Commissioner Alexander B. Grannis granted applicant's motion to suspend proceedings on the motion for reconsideration, which was currently pending before the Commissioner (see Matter of Crossroads Ventures, LLC, Ruling of the Commissioner on the Motion to Suspend Proceedings on the Motion for Reconsideration, Nov. 9, 2007, at 2).

I have considered the arguments raised in support of reversing the Deputy Commissioner's determination on community character (see e.g. CHA, Caffry Affidavit, Nov. 17, 2014, ¶¶ 36-53). Nothing in the record before me indicates that the Deputy Commissioner misapprehended relevant facts or the law concerning community character, and his analysis correctly reflected Department administrative precedent. As noted in the Interim Decision, adopted local land use plans are afforded significant deference by the Department in ascertaining the character of a community. Accordingly, the Department relies "to a large extent" on local land use plans as the standard for community character (Interim Decision at 71-72). Importantly, the Interim Decision held that the record of this proceeding already includes sufficient information on community character for the purposes of the Department's SEQRA review (see id. at 73 n 21 [listing, among other things, three days of discussion of the community character issue during the issues conference]).<sup>30</sup>

I conclude that the determination under the Interim Decision to exclude the issue of community character from adjudication should not be disturbed. The reasons set forth in the Interim Decision for not identifying community character as an adjudicable issue (see Interim Decision at 71-73) remain valid.

#### **F. Other Matters**

To the extent that other issues were raised in the filings on, or related to, Department staff's motion to cancel the adjudicatory proceeding and to deny the outstanding motion for reconsideration, I have considered those issues and found them to be without merit.<sup>31</sup>

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<sup>30</sup> The record has been further supplemented by the submissions that have been filed on Department staff's motion and in the environmental impact statement documents. Under the modified project, it is relevant to note that the scale of the proposal has been significantly reduced (see draft FEIS at iii; 29 [response to comment 1.4(1a)]). Furthermore, zoning for the project site has not changed since the 2003 DEIS (see 2013 SDEIS at 3-69; draft FEIS at 185-186).

<sup>31</sup> By motion dated December 17, 2014, FCP sought to strike portions of Department staff's reply, dated December 8, 2014. Based on my consideration of the motion and the papers submitted on the motion, I hereby deny FCP's motion to strike.

Applicant has provided a list of mitigation conditions to meet its environmental commitments in the AIP (see letter dated April 5, 2013 from Daniel A. Ruzow, Esq., to DEC Regional Permit Administrator Daniel T. Whitehead [letter is posted on DEC website at [www.dec.ny.gov/permits/54704.html](http://www.dec.ny.gov/permits/54704.html) (under Part B, Modified Belleayre Resort at Catskill Park SDEIS)]). These conditions addressed, among other things, stormwater issues, stream disturbance and wetlands, construction blasting, and traffic-related matters,

As stated in the letter, “[i]t was the understanding of the AIP signatories that, where appropriate, several provisions would be incorporated into the final approvals of the Department, if and when issued, upon the conclusion of the SEQRA process” (April 5, 2013 Letter, at 1). Staff, by letter dated September 10, 2014, advised that it would make the conditions “part of the findings” (staff Letter, Sept. 10, 2014, at 2 [item #4]). I have already discussed the independent stormwater monitor and organic golf course conditions. I hereby direct that, as part of the completion of the SEQRA process, Department staff is also to include the other conditions referenced in the April 5, 2013 letter in the SEQRA findings statement and, as appropriate, into any Department permits or other approvals.

## **V. CONCLUSION**

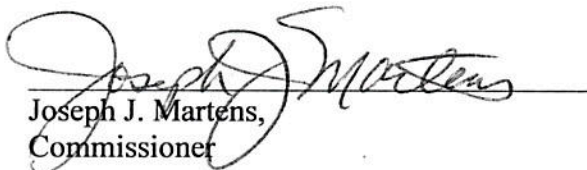
As discussed in this decision and ruling, this project has been the subject of extensive review and evaluation by the Department and the public. A number of parties that had opposed earlier iterations of the project have now withdrawn their objections to the modified project set forth in the 2013 SDEIS. I note that many of the modifications to the project are the result of the extensive negotiations and efforts that culminated in the signing of the AIP in 2007. The 2013 SDEIS and draft FEIS, including further environmental studies contained therein, have provided a thorough and extensive evaluation of the modified project, its environmental setting and considerations, and mitigation measures. As a result of the modifications to the project and the mitigation measures proposed, Department staff has withdrawn its prior objections to the project and, as its motion to cancel the adjudicatory hearing reflects, staff now supports issuance of the permits necessary for the modified project.

Based on the record before me, Department staff has met its burden to demonstrate that none of the issues that were advanced to adjudication under the Interim Decision remain adjudicable. Additionally, the parties to the issues conference and the three petitioners have failed to raise any new issue that is substantive and significant. Accordingly, no issues exist for adjudication.

I hereby grant Department staff's motion to (a) cancel the adjudicatory hearing and (b) deny the outstanding motion to reconsider the issue of community character. The newly-filed petitions for party status and the motions seeking to reconvene the issues conference or otherwise continue the administrative proceeding are denied. The matter is remanded to Department staff who is directed to complete the SEQRA process, including the preparation and issuance of a Findings Statement, and issue to applicant permits for the modified project consistent with the draft permits prepared by staff and this decision and ruling.

NEW YORK STATE DEPARTMENT OF  
ENVIRONMENTAL CONSERVATION

By:

  
Joseph J. Martens,  
Commissioner

Dated: Albany, New York  
July 10, 2015

Appendix I: Parties and Other Participants

Appendix II: Principal Submissions and Correspondence

Attachments: Delegation of Authority 14-02  
Service List

APPENDIX I: PARTIES AND OTHER PARTICIPANTS  
CROSSROADS VENTURES, LLC: THE BELLEAYRE RESORT AT CATSKILL PARK PROJECT

Name	Granted Party Status (Y/No) (9/7/05 Issues Ruling)	Signed AIP (Y/No) (9/5/07)	Filing on 2014 Staff Motion (Y/No)
NYSDEC Staff	Mandatory	No (See Note 1)	NA (See Note 2)
Crossroads Ventures, LLC	Mandatory	Y	Y
Catskill Center for Conservation and Devel.	Y (See Note 3)	Y	Y
Catskill Heritage Alliance	Y (See Note 3)	No	Y
Catskill Preservation Coalition (CPC) (now dissolved)	Y	Several members of CPC signed	Dissolved
Coalition of Watershed Towns	Y (See Note 4)	No	Y
Delaware County	Y (See Note 4)	No	Y
Friends of Catskill Park	Y (See Note 3)	No	Y
Gould Family	See Note 5	See Note 5	Y
NRDC	Y (See Note 3)	Y	Y
New York City	Y	Y	Y
NYPIRG	Y (See Note 3)	Y	No
OAG – Watershed Inspector General	Amicus	No	Y
Pine Hill Water District Coalition	Y (See Note 3)	No	No
PUA Associates, LLC	See Note 5	See Note 5	Y
Beverly Becher Rainone	See Note 5	See Note 5	Y
Riverkeeper, Inc.	Y (See Note 3)	Y	Y
Theodore Gordon Flyfishers, Inc.	Y (See Note 3)	Y	No
Trout Unlimited	Y (See Note 3)	Y	See Note 6
Town of Hardenburgh	No	No	See Note 7
Town of Middletown	Y (See Note 4)	No	Y
Town of Shandaken	Y (See Note 4)	No	See Note 8
Town of Shandaken Planning Board	Y	No	Y
Sierra Club	Y	No	See Note 9
Zen Environmental Studies Institute	Y (See Note 3)	Y	No

Note 1: The Agreement in Principle (AIP) was signed by the Governor’s office on behalf of New York State.

Note 2: Department staff filed its reply to the responses to its motion on December 8, 2014.

Note 3: Granted party status as a member of the now dissolved Catskill Preservation Coalition.

Note 4: The Interim Decision refers to the Coalition of Watershed Towns, Delaware County, Town of Middletown and Town of Shandaken, collectively, as the “Watershed Towns.”

Note 5: Filed a late-filed petition for party status after Department staff moved for cancellation of the proceeding in 2014.

Note 6: Filed a letter on September 25, 2014, but did not file a formal response pursuant to Assistant Commissioner memorandum dated September 29, 2014.

Note 7: Filed an informal request for party status on November 12, 2014, but did not subsequently file a petition.

Note 8: Did not file separately.

Note 9: Filed a letter on September 22, 2014, but did not file a formal response pursuant to Assistant Commissioner memorandum dated September 29, 2014.

**APPENDIX II**

**Principal Submissions and Correspondence  
Crossroads Ventures, LLC (The Belleayre Resort at Catskill Park)  
Department Staff Motion to Cancel the Adjudicatory Hearing and Deny Motion for Reconsideration**

<b>Submission</b>	<b>Dated</b>	<b>Description (See Note 1)</b>
Department Staff, Motion to Cancel Adjudicatory Proceeding and to Dismiss Motion for Reconsideration	9/10/14	<p>Department Staff papers include:</p> <ul style="list-style-type: none"> <li>• Transmittal letter, Sept. 10, 2014, from Attorney Lawrence H. Weintraub.</li> <li>• Notice of Motion, Sept. 10, 2014.</li> <li>• Memorandum of Law, Sept. 10, 2014.</li> <li>• Affidavit of Daniel Whitehead, sworn Sept. 8, 2014.</li> </ul> <p>In addition to staff's motion, staff provided documents to supplement the record, including but not limited to:</p> <ul style="list-style-type: none"> <li>• Draft Final Environmental Impact Statement for the Modified Belleayre Resort at Catskill Park ("modified project").</li> <li>• Cumulative Impact Analysis for the Belleayre Mountain Ski Center ("BMSC") Unit Management Plan and the modified project.</li> <li>• Draft SPDES and stream crossing permits for the modified project.</li> <li>• Applicant's proposed supplementary conditions.</li> </ul>
Catskill Heritage Alliance, Letter	9/17/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling and procedures.</li> </ul>
Riverkeeper/NRDC, Joint Letter	9/17/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling.</li> </ul>
Applicant, Letter	9/18/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling and procedures.</li> </ul>
OAG - Office of Watershed Inspector General, Letter	9/18/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling.</li> </ul>
DEC Assistant Commissioner, Letter	9/18/14	<ul style="list-style-type: none"> <li>• References materials received and provides that any additional comments on scheduling to be received by Sept. 22, 2014.</li> </ul>
Sierra Club Atlantic Chapter, Letter	9/22/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling.</li> </ul>
PUA Associates, LLC (PUA), Letter	9/22/14	<ul style="list-style-type: none"> <li>• Provides comments on procedures.</li> </ul>
Department Staff, Letter	9/22/14	<ul style="list-style-type: none"> <li>• Provides comments on procedures and scheduling.</li> </ul>
Beverly Becher Rainone, Letter	9/22/14	<ul style="list-style-type: none"> <li>• Provides comments on scheduling and procedures.</li> </ul>

<b>Submission</b>	<b>Dated</b>	<b>Description (See Note 1)</b>
Coalition of Watershed Towns, Delaware County, and Town of Middletown, Letter	9/22/14	<ul style="list-style-type: none"> <li>Provides comments on scheduling.</li> </ul>
New York Council Trout Unlimited, Letter	9/25/14	<ul style="list-style-type: none"> <li>Provides comments on scheduling and procedures and requests that APWCTU be included as a party. Assistant Commissioner letter dated Oct. 4, 2014 advised that APWCTU could not be added as an independent or separate party unless it petitioned for party status pursuant to 6 NYCRR part 624 and that petition were granted.</li> </ul>
DEC Assistant Commissioner, Memorandum	9/29/14	<ul style="list-style-type: none"> <li>Sets date (Nov. 17, 2014) for filing of responses to staff's motion.</li> <li>Sets date (Dec. 8, 2014) for Department staff to file a reply to responses.</li> <li>Advises parties that scope of responses should include, among other things, each party's position regarding whether issues identified in the Interim Decision as adjudicable are rendered moot or have been resolved by the modified project, and whether the modified project raises new issues that are substantive and significant. Directs parties to provide support for their positions, including offers of proof for any new issues proposed for adjudication.</li> </ul>
PUA, Letter	10/2/14	<ul style="list-style-type: none"> <li>Provides comments on procedures.</li> </ul>
Town of Hardenburgh, Letter	11/12/14	<ul style="list-style-type: none"> <li>Comments on project and requests party status. By Assistant Commissioner e-mail dated November 18, 2014, the Town of Hardenburgh was advised of the requirements to obtain party status by the filing of a petition in accordance with the Department's regulations at 6 NYCRR part 624. The Town did not file a petition in this proceeding.</li> </ul>
Shandaken Planning Board, Response to Staff Motion	11/13/14	<ul style="list-style-type: none"> <li>Advises that planning board is commencing its review of applicant's special use and site plan applications and that the environmental record is sufficient for the board to render a decision.</li> </ul>
Town of Middletown, Response to Staff Motion	11/14/14	<ul style="list-style-type: none"> <li>Advises that planning board is in the process of reviewing applicant's special permit and site plan applications and has held a public hearing on same. States that the environmental record is sufficient for the board to complete its review.</li> </ul>
Catskill Center for Conservation & Development, Response to Staff Motion	11/17/14	<ul style="list-style-type: none"> <li>Agrees that certain issues are moot, but notes concerns on others.</li> </ul>

Submission	Dated	Description (See Note 1)
Catskill Heritage Alliance, Response to Staff Motion	11/17/14	<p>Opposes staff motion and cross-moves to reconvene the issues conference. Filing provides various documents, including:</p> <ul style="list-style-type: none"> <li>• Affidavit of Attorney John Caffry, sworn Nov. 17, 2014.</li> <li>• Thomas L. Daniels, Ph.D., Report, Nov. 11, 2014, and 2004 testimony.</li> <li>• John Zamurs, Ph.D., Comments, Nov. 14, 2014.</li> <li>• Affidavit of Mark P. Millspaugh, sworn Nov. 12, 2014.</li> <li>• Andrew Michalski, Ph.D., Comments, Nov. 2014.</li> <li>• Michael Siegel, Comments, July 11, 2014.</li> <li>• Catskill Heritage Alliance Comment Letter, July 24, [2013].</li> </ul>
Coalition of Watershed Towns, Response to Staff Motion	11/17/14	States that the Coalition supports staff motion and that there are no outstanding or newly identified issues that warrant continuation of the adjudicatory process.
Applicant, Response to Staff Motion	11/17/14	<p>Supports Department staff motion. Filing includes:</p> <ul style="list-style-type: none"> <li>• Transmittal Letter, Nov. 17, 2014.</li> <li>• Affirmation of Attorney Daniel A. Ruzow, Nov. 17, 2014.</li> <li>• Memorandum of Law, Nov. 17, 2014.</li> <li>• Affidavit of Kevin Franke, Nov. 17, 2014.</li> </ul>
Delaware County Board of Supervisors, Response to Staff Motion	11/17/14	States that the modified project was carefully planned to address all significant environmental issues raised.
Friends of Catskill Park, Response to Staff Motion	11/17/14	<p>Opposes staff motion and cross-moves to reconvene the issues conference. Filing includes:</p> <ul style="list-style-type: none"> <li>• Transmittal Letter, Nov. 17, 2014.</li> <li>• Memorandum of Law, Nov. 17, 2014. Correction to memorandum of law submitted by letter dated Nov. 25, 2014.</li> <li>• Affirmations of Attorney Robert H. Feller, Nov. 17, 2014.</li> <li>• Affidavit of Matthew W. Allen, sworn Nov. 17, 2014.</li> <li>• Affidavit of Mark P. Millspaugh, sworn Nov. 17, 2014.</li> </ul>
Gould Family, Petition for Party Status	11/17/14	<p>Petition argues certain issues identified in the Interim Decision remain adjudicable, and proposes new issues for adjudication. Filing includes:</p> <ul style="list-style-type: none"> <li>• Transmittal Letter, Nov. 17, 2014.</li> <li>• Petition for Party Status, Nov. 17, 2014.</li> <li>• Affidavit of Mark P. Millspaugh, sworn Nov. 12, 2014.</li> </ul>

<b>Submission</b>	<b>Dated</b>	<b>Description (See Note 1)</b>
NRDC, Response to Staff Motion	11/17/14	States that NRDC stands by the AIP, but seeks further assurances regarding certain aspects of the modified project before the hearing is cancelled.
New York City, Response to Staff Motion	11/17/14	States that the City supports staff motion and is satisfied that the modified project is consistent with the terms of the 2007 AIP and minimizes or avoids the potential for significant adverse environmental impacts.
OAG – Watershed Inspector General, Response to Staff Motion.	11/17/14	States, in light of agreements reached with applicant and staff, WIG does not object to cancellation of the adjudicatory hearing.
PUA, Petition for Party Status	11/17/14	Filing includes: <ul style="list-style-type: none"> <li>• Transmittal Letter, Nov. 17, 2014.</li> <li>• Affirmation of Attorney Robert H. Feller, Nov. 17, 2014.</li> <li>• Affidavit of Matthew W. Allen, sworn Nov. 17, 2014.</li> <li>• Affidavit of Mark P. Millspaugh, sworn Nov. 17, 2014.</li> <li>• Memorandum of Law, Nov. 17, 2014.</li> </ul>
Riverkeeper, Response to Staff Motion	11/17/14	<ul style="list-style-type: none"> <li>• States Riverkeeper has reached agreements with and received commitments from applicant and staff that address Riverkeeper’s remaining concerns.</li> </ul>
Beverly Becher Rainone, Letter	11/21/14	<ul style="list-style-type: none"> <li>• Submits inquiry regarding petitions for party status. Assistant Commissioner responded to inquiry by letter dated Nov. 25, 2014.</li> </ul>
Friends of Catskill Park, Letter	12/3/14	<ul style="list-style-type: none"> <li>• Provides comments on procedures.</li> </ul>
Catskill Heritage Alliance, Letter	12/4/14	<ul style="list-style-type: none"> <li>• Provides comments on procedures.</li> </ul>
Department Staff Reply	12/08/14	Reply includes: <ul style="list-style-type: none"> <li>• Transmittal letter, Dec. 8, 2014</li> <li>• Reply Memorandum of Law, Dec. 8, 2014.</li> <li>• Affidavit of Carol Lamb-LaFay, sworn Dec. 8, 2014.</li> <li>• Affidavit of Patrick Ferracane, sworn Nov. 20, 2014.</li> <li>• Affidavit of Daniel Whitehead, sworn Dec. 8, 2014.</li> <li>• Affidavit of Michael Sheehan, sworn Dec. 8, 2014.</li> </ul>
Friends of Catskill Park, Motion to Strike	12/17/14	<ul style="list-style-type: none"> <li>• Motion to strike parts of staff reply. Notice of motion includes request to file reply to responses on the motion. Affirmation of Attorney Robert H. Feller in support of motion to strike, Dec. 17, 2014.</li> </ul>



<b>Submission</b>	<b>Dated</b>	<b>Description (See Note 1)</b>
DEC Assistant Commissioner Memorandum	12/22/14	<ul style="list-style-type: none"> <li>• Advises parties they may respond to Friends of Catskill Park motion to strike on or before Dec. 29, 2014, and prohibits any further motions, or submissions related to motions, without leave by the Commissioner.</li> </ul>
Department Staff, Response to Friends of Catskill Park Motion	12/29/14	<ul style="list-style-type: none"> <li>• Affirmation of Attorney Lawrence H. Weintraub in response to Friends of Catskill Park motion to strike.</li> </ul>
Applicant, Response to Friends of Catskill Park Motion	12/29/14	<ul style="list-style-type: none"> <li>• Affirmation of Attorney Daniel A. Ruzow in response to Friends of Catskill Park motion to strike and affirmation.</li> </ul>
Catskill Heritage Alliance, Response to Friends of Catskill Park Motion	12/29/14	<ul style="list-style-type: none"> <li>• Affidavit in response to Friends of Catskill Park motion to strike. Also requests that parties be allowed to file reply to staff reply (of 12/08/14) if all of Department staff replies are not struck. Request denied (Assistant Commissioner memorandum dated 2/09/15).</li> </ul>
Rainone, Petition for Party Status	12/30/14	<p>Petition for party status. Filing includes:</p> <ul style="list-style-type: none"> <li>• Transmittal Letter, Dec. 30, 2014.</li> <li>• Petition for Party Status, Dec. 30, 2014.</li> <li>• Affidavit of Mark P. Millsbaugh, sworn Dec. 29, 2014.</li> <li>• Copy of 9/22/14 Letter (listed previously in this chart).</li> </ul>
Applicant Request	1/06/15	<ul style="list-style-type: none"> <li>• Requests leave to file response to Friends of Catskill Park 12/17/14 motion to strike and to Catskill Heritage Alliance 12/29/14 filing in response to the motion to strike. Request denied (Assistant Commissioner memorandum dated 2/09/15).</li> </ul>
Department Staff Request	1/15/15	<ul style="list-style-type: none"> <li>• Requests leave to respond to Catskill Heritage Alliance response (of 12/29/14). Request denied (Assistant Commissioner memorandum of 2/09/15).</li> </ul>
Friends of Catskill Park	1/15/15	<ul style="list-style-type: none"> <li>• Suggests that Applicant's 1/6/15 request and Department staff's 1/15/15 request to file sur-replies are premature.</li> </ul>

<b>Submission</b>	<b>Dated</b>	<b>Description (See Note 1)</b>
DEC Assistant Commissioner Memorandum	2/09/15	<ul style="list-style-type: none"> <li>• Grants Friends of Catskill Park request (of 12/17/14) to file a reply to responses to its motion to strike.</li> <li>• Denies (i) Catskill Heritage Alliance request (of 12/29/14), for parties to reply to staff reply (of 12/08/14); (ii) Applicant request (of 1/06/15) to file further response in relation to Friends of Catskill Park motion to strike and to Catskill Heritage Alliance (12/29/14) response thereto; and (iii) Department staff request (of 1/15/15), to reply to Catskill Heritage Alliance response (of 12/29/14).</li> </ul>
Friends of Catskill Park, Reply	2/24/15	<p>Reply, with supporting papers attached, to responses to Friends of Catskill Park motion to strike. Filing includes:</p> <ul style="list-style-type: none"> <li>• Transmittal Letter, Feb. 24, 2015.</li> <li>• Reply Affirmation of Attorney Robert H. Feller, Feb. 24, 2015.</li> <li>• Reply Affirmation of Richard Benas, Feb. 23, 2015.</li> <li>• Reply Affidavit of Benjamin Korman, Feb. 23, 2015. Correction to Korman reply affidavit by letter dated Feb. 25, 2015.</li> </ul>
Staff Request	3/09/15	<ul style="list-style-type: none"> <li>• Requests leave to file reply and affidavit (a) in response to Friends of Catskill Park reply of 2/24/15 (Benas Reply Affidavit), and (b) to correct or clarify staff affirmation dated 12/29/14.</li> </ul>
Friends of Catskill Park, Response to Staff Request	3/11/15	<ul style="list-style-type: none"> <li>• Opposes staff request of 3/09/15.</li> </ul>
DEC Assistant Commissioner Memorandum	4/06/15	<ul style="list-style-type: none"> <li>• Denies staff request of 3/09/15.</li> </ul>

Note 1: The descriptions are for reference purposes only and are not intended to provide a comprehensive account of each submission or listing of all attachments. Documents and written communications with respect to service list revisions, party representation, notices of motions, affidavits of service and various ministerial matters are not listed; however, these are part of the record.