



**OPEN SPACE
INSTITUTE**

June 17, 2019

Mr. John Konior
Chairman, Town of Kingston Planning Board
906 Sawkill Road
Kingston, NY 12401

RE: Comments by the Open Space Institute on the Application by 850 Route 28 LLC

Dear Mr. Konior:

Open Space Institute, Inc. ("OSI") has retained environmental firm CHA Consultants to provide further analysis of the significant environmental impacts that the concrete manufacturing facility proposed by 850 Route 28 LLC ("Applicant") will have on the adjacent Bluestone Wild Forest, as well as the 208-acre property recently acquired by OSI. Please review CHA Consultants' analysis in the attached report dated June 12, 2019. The report describes the potential adverse environmental impacts that have not been fully disclosed to the Planning Board by Applicant.

OSI has also retained attorney John Privitera of McNamee and Lochner P.C., who has prepared the attached letter dated June 17, 2019 outlining legal concerns raised by the Planning Board's issuance of the Negative Declaration in March. Based on the analysis provided both by CHA Consultants and Mr. Privitera, OSI believes the Planning Board must rescind the Negative Declaration and require Applicant to prepare a full environmental impact statement.

Regards,

Christopher J. (Kim) Elliman
President & CEO

Attachments:

Map of Bluestone Wild Forest and OSI Property Trail Improvement Plan
Environmental Analysis Prepared by OSI Consultant CHA Consultants
Legal Analysis Prepared by OSI Consulting Attorney John Privitera of McNamee and Lochner P.C.



- | | | | | |
|--------------------------------|----------------|---------------------------------|------------------------|------------------|
| Proposed Main 'Turnpike' Trail | Existing Trail | OSI Recent Acquisition | DEC Land | DEP Land |
| Proposed Single Track Trail | Road | Proposed Manufacturing Facility | Town of Woodstock Land | Existing Parking |



June 12, 2019

Mr. Tom Gravel
Project Manager
Open Space Institute – New York
1350 Broadway, Suite 201
New York, NY 10018
Via: tgravel@osiny.org

**RE: Project Review
850 Route 28 LLC Project, 850 Route 28, Town of Kingston, New York
CHA Project No. 36233**

Dear Mr. Gravel:

An industrial structural steel and precast concrete manufacturing facility is proposed at 850 Route 28 in the Town of Kingston, Ulster County, New York. The industrial facility will be constructed in a former shale quarry over two phases. During construction, stone will be actively quarried to provide onsite building pads as well as shipped offsite as surplus aggregate. Quarry activities will involve blasting and significant earth-moving equipment. Approximately 150,000 cubic yards of quarry material will be removed from the Site during the first phase, and approximately 50,000 cubic yards will be removed during the second phase. Two 120,000 sq. ft. buildings are slated for the project construction phase with a total land disturbance of approximately 35 acres. Hours of operation during construction will be 6am to 7pm on all days of the week. Operating hours during facility operations will be 24 hrs./day on all days of the week. Except for the immediate corridor along Rt. 28, this use is in sharp contrast to the surrounding land uses.

The Open Space Institute (OSI) has recently purchased property along the northern and northeastern sides of the quarry (Site). OSI's property links existing NYSDEC park land parcels that are part of the Bluestone Wild Forest, which the public uses for a variety of outdoor recreational activities year round. OSI plans to transfer ownership of the property to NYSDEC to connect existing trail systems. OSI is concerned about the adverse impact the proposed project will have on their property and has retained CHA Consulting, Inc. (CHA) to review existing project documentation and provide an opinion on the impact assessment provided by the Applicant as well as the comprehensiveness of the impact findings by the Town of Kingston in the Negative Declaration determination.

CHA conducted a visit to OSI's property and the surrounding area on June 7, 2019, and also reviewed Project documents at the Town of Kingston Town Hall on that day. CHA has prepared this letter report to summarize our findings of this review.

Impacts on Surface Waters and Wetlands

Impacts to surface waters and wetlands were evaluated by a Professional Wetland Biologist (PWS) from CHA. As described in the various documents supplied by the applicant and various commenters on the project, wetlands are located on site, and through nearby adjacent parcels. Wetlands on site have been mapped by a consultant for the Applicant and should be verified by state and federal officials, especially in the area along the access road where encroachment into the State Regulated Wetland associated with Onteora Lake will occur.

The Wetland Report indicates that the onsite wetlands are isolated. However, it does not consider the disturbed nature of the Site. Based on aerial photographs, the Site seems to have significant rock fragments over the surface suggesting significant infiltration rates and potential subsurface hydrologic flow. Therefore, we do not believe the hydrologic connection between these wetlands has been thoroughly analyzed. The connection of these onsite wetlands to offsite wetlands has also not been evaluated and should be.

Due to the amount of cut and fill activity, the potential for increasing runoff and subsequent siltation is of concern. Regular as well as impromptu inspections of the storm water controls will be required during excavation, construction, and daily operation of the facility. Perimeter controls will be required along Pickerel Pond and nearby state-regulated Wetland KW-3 as these are the most susceptible to impacts. An Article 15 and Article 24 wetland permits have been submitted to the NYSDEC and is under review. Additional stormwater comments are presented below.

Vegetated buffers have been discussed by others to mitigate noise and visual impacts. However, there is a strong correlation between the size of vegetated buffers and the ability of the buffer to protect aquatic resources and water quality. Therefore, buffer sizes surrounding the active work areas should be increased due to the multiple beneficial mitigative effects (visual, noise, water quality, aesthetics) that vegetated buffers will impose on the project.

Flora and Fauna

As pointed out in the May 2019 report prepared by Hudsonia for OSI, the prior industrial/mined use of the proposed project area does not reduce the viability of the Site for habitat for a variety of species that potentially carry a conservation status of concern. CHA agrees with Hudsonia that a more in-depth investigation of what species exist at the Site should be conducted. The Habitat Assessment Report prepared by the Applicant's consultant is inadequate as it only addresses "listed" species and does not appear to contain onsite or site-specific information.

The area on Site and surrounding the Site does contain a diverse array of common habitats and some micro habitats and/or uncommon geologic features. These include cliffs, talus and rock outcrops, and others. These features do have the potential to contain localized very site-specific populations of plant and animal species that have not been fully documented. Once disturbed, the opportunity to document these resources is lost. Therefore, CHA recommends additional onsite and offsite studies be conducted to document these resources prior to Project commencement.

Excavation, construction, and operational noise will impact surrounding wildlife species. In general, a growing number of studies indicate that animals, like humans, are stressed by noisy environments



(Shannon et al. 2015). Loud noises make habitat undesirable for species and have been shown to reduce mating and breeding success in bird species. These impacts will most likely affect a decline in resident wildlife species. Specifically, activities such as finding desirable habitat and mates, avoiding predators, protecting young, and establishing territories are all dependent on the acoustical environment. In order to continue with these life function activities, animals are being forced to adapt to increasing noise levels. Shannon et al. (2015) cited studies that indicated terrestrial wildlife responses begin at noise levels of approximately 40 dBA, and 20% of researchers documenting impacts below 50 dBA.

Blasting can also affect people and wildlife as a result of the air blast or over pressure wave and through ground vibration. Compression waves had been suggested to impact the swim bladders in fish in nearby water features. Insufficient information has been provided to address any of these potential impacts.

Some researchers have also indicated that explosive residues have the potential to pollute surface and groundwater supplies. Mahtab (2005) indicates that explosive residues, which are toxic to aquatic life forms, can enter surface water through infiltration with precipitation and washing of aggregate materials. The pollution potential is dependent on the chemical composition of the blasting explosives. Special precautions should be in place to prevent contamination of Pickerel Pond and the state regulated wetland surrounding Onteora Lake.

Emergent wetland areas along the access road are shown to occur near Palm Muck soils that occur in the state regulated wetland. These types of habitats are known to potentially be inhabited by isolated pockets of bog turtles (*Clemmys muhlenbergii*), a state and federally protected species. This species also warrants a larger buffer (300 feet) from occupied habitats which could affect the Site plan. While the Applicant's consultant has concluded that bog turtles are not present onsite, there is no definitive statement regarding habitats in the adjacent State Regulated Wetland. Therefore, we recommend that a second opinion by a certified bog turtle surveyor be provided on this species, as Site operations have the potential to severely degrade this habitat offsite and impact (i.e., water quality runoff, road salts, invasive species) the wetland along the access road.

Stormwater Management

A licensed Professional Engineer familiar with stormwater management from CHA reviewed the Medenbach and Eggers May 14, 2019 Stormwater Pollution Prevention Plan and the January 31, 2019 Site Plan set (for erosion and sediment control features) to ensure that surface water and wetland features were being properly protected by the proposed Project. Our review of the existing documents found the following:

1. The Project is proposing to disturb approximate 37 acres in two phases. Based upon NYSDEC SPDES General Permit for Stormwater Discharges (GP-0-15-002) regulations, the owner or operator of a construction activity shall not disturb greater than five (5) acres of soil at any one time without prior written authorization from NYSDEC. Since the project will disturb approximately 37 acres, the Applicant will either need to create a sequence of multiple construction phases with 5 acres of soil disturbance or submit a request to NYSDEC Regional office for a 5-acre waiver. Current documentation does not mention the intent to obtain a waiver.

2. The amount of existing impervious area and the amount of future impervious area stated in the SWPPP and the NOI do not match. The Notice of Intent (NOI) stated that the nature of this project is “redevelopment with increase in impervious area” on question #2, however, the amount of existing impervious area to be disturbed (26.0 acres) is less than the future impervious area within disturbed area (3.8 acres) on question #4. In addition, the SWPPP listed 37 acres of disturbance with 23.5% of impervious area before construction (8.7 acres) and 28.3% impervious area after construction (10.5 acres), with future impervious cover of 6 acres. The Applicant should confirm the amount of existing impervious area and the amount of future impervious area and make appropriate corrections to documents.
3. According to Figure 6.3 of the NYS Stormwater Management Design Manual, the permanent pool for a wet extended detention pond (P-3) shall be 6 to 8 feet deep. The proposed “Water Quality Basin #1” and “Water Quality Basin #2” are considered as wet extended detention on the NOI on question #29. However, the proposed condition HydroCAD model has defined both these basins to be 12 feet deep. Therefore, both water quality basins are deeper than what is required by the NYS Stormwater Management Design Manual. The Applicant may redesign the water quality basins to meet the approved 6-8-foot depth; this would mean shallower and wider basins to have the same capacity. The applicant may also ask NYSDEC to review the design as a non-standard design; this involves a 60-day review period.
4. Since the proposed “Water Quality Basin #1” will be 12 feet deep with 130,978 cubic-feet of storage and “Water Quality Basin #2” will be 12 feet deep with 96,149 cubic-feet of storage, they may require a Dam Permit from NYSDEC’s Dam Safety Division. No mention of the Applicant’s intent to obtain a Dam Permit was found in the existing documents. The Applicant should ensure that water quality basins are designed to ensure dam safety and follow the Guidelines for Design of Dams.
5. Documentation states that surface water from ponds D and E discharges to a Class C(T) perennial stream. However, this stream is not depicted on the Site Plan set. With the stream supporting trout, proper stormwater management at the Site is essential. NYSDEC stormwater officials should review the applicability of this new discharge to the need for permit requirements.
6. Erosion and sediment controls on large construction sites use silt fences, filter socks, or other engineered methods of control, which have little effect on stormwater quality beyond sediment control. They also fail to capture fine sediment which may pass through, around, or over engineered controls. Because of the sensitive nature of downgradient ecosystems, we recommend that enhanced stormwater controls be employed. These could consist of redundant erosion controls in parallel or use of a vegetated berm or swale to capture fine sediments.

Noise Impacts

A licensed Professional Engineer familiar with noise surveys from CHA reviewed the February 2019 Noise Study by H2H Associates for the Project. We found that noise impacts were not adequately evaluated. Specifically:



- The noise study did not place any receptors in the lands, or at the property lines, to the north of the Site. These areas should be analyzed because of the existing or planned recreational trails in this area.
- The noise study only performed measurements for 6 hours (8:00 AM to 2:30 PM). There is no way to know if this is the peak noise level that may be experienced during the day. We recommend that 24-hour noise measurements be taken.
- Noise surveys should conduct measurements during ambient conditions (no onsite operations), existing conditions (typical onsite operations occurring), and proposed conditions. During the noise study at the Site, “ambient” measurements were taken with a “Liebherr 586 front end loader loading shot rock into a tractor trailer”.
- Table 2 shows Logging Station information was collected, but it does not specify the hours. It is hard to know what ambient levels were recorded under such a sample size. If measurements were obtained, we would know the high and low noise levels to compare against.
- Table 2 shows that for Logging Station #12 and #14 the measurements were done in two separate sessions to replace the batteries. Typically, when performing noise measurements, as the battery life diminishes noise meters will not always record noise levels properly. This may or may not have been the case, but these data points need to be evaluated further.
- The paragraph at the top of page 5 talks in generalities regarding the “average” noise levels at the Site property boundary (38.6 dB) and for the Site as a whole (48.0 dB). This information does not appear to be prudent in evaluating noise and seems irrelevant when looking at noise level increases at receptor locations.
- Projected sound levels were provided with a tremendous amount of undocumented assumptions (i.e. distance, berms, vegetation, topography). It was difficult to determine from the report if these values are correct or have just been manipulated and presented to be in the favor of the Applicant.
- The projected sound levels look at the possible noise levels only from the one operating piece of equipment. Noise emitted from multiple pieces of equipment operating simultaneously with trucks idling and/or transporting materials on and off site should be evaluated. Noise receptors could experience a significantly higher noise level if multiple operations are occurring at once.
- The report does not specify how or why they only projected sound level changes to Receptors R-1 and R-2. This does not seem to fully evaluate the entire project Site and property boundaries.
- Through the projecting of noise levels and as documented in the Findings and Mitigating Measures sections, none of the reported values are shown with cumulative noise effects to model multiple equipment running simultaneously. This does not provide a true representative value of what can be anticipated.
- In Section 5.0, statements are made that a forklift will produce a lower Leq dB than a blast hole drill rig. This statement cannot be substantiated without analysis. Additionally, all equipment that may be operating at one time should be analyzed together because multiple pieces of equipment will logarithmically increase noise reaching receptors.
- Mitigation measures recommended moving the crushing pan farther to the north; this will have a negative effect on users of the existing and planned recreational trails in the lands to the north of the Site. This would also have a negative impact to the serene and natural conditions surrounding the recreational trails.

Visual Assessment

A licensed landscape architect from CHA familiar with visual assessments performed a review of existing documentation from a visual/aesthetic standpoint. Since the Project is located directly adjacent to the Bluestone Wild Forest and in the Catskill Forest Preserve (a.k.a. Catskill State Park) Boundary, CHA reviewed the Unit Management Plan (UMP) for this wild forest. NYSDEC in drafting the UMP noted that “We have reviewed the available application and SEQRA materials as it relates to aesthetic resources and potential visual impacts for consistency and conformance with NYSDEC Policy DEP 00-2, Assessing and Mitigating Visual Impacts”. This document sets out the basic components and criteria that need to be considered and to evaluate visual impacts on aesthetic resources when conducting a review of a project that has the potential to impact aesthetic resources. The process, that is prescribed within this document, to conduct a review of an application is as follows:

- Verify the applicant’s inventory of aesthetic resources.
- Verify the applicant’s visual assessment, using either graphic viewshed and line-of-sight profile analysis as illustrated in Appendix A, or more sophisticated visual simulations and digital viewshed analysis, as needed.
- Determine or verify the applicant’s assessment of the potential significance of the impact.
- Confirm that applicant’s mitigation strategies are reasonable and are likely to be effective or assure mitigation by requiring the applicant to submit a design that includes the required mitigation, or, impose permit conditions consistent with those mitigation requirements.

Based on a review of the available material, it does not appear that the any of these steps were taken or followed, and the Town of Kingston Planning Board did not require the Applicant to provide a visual impact assessment. Since this action is a Type 1 action the omission of this evaluation demonstrates that the Town of Kingston did not take the requisite “hard look” during the environmental review and that only a cursory review of one resource was included. Below are some examples of the lack of basic analysis that the Lead Agency failed to request from the Applicant prior to making the determination of significance:

- **Inventory of aesthetic resources-** The only resource that was identified on the SEQRA documentation was Onteora Lake. Based on our review of the vicinity directly adjacent to the project site, Pickerel Pond, hiking trails within Bluestone Wild Forest (state park) are available as well as trails that are located on OSI property are available and may be impacted the development of the project Site as proposed. Typically, photos from these critical resources are provided to determine what level of visual impact may occur and assist the Lead Agency in determining what level of visual impact assessment the applicant should prepare.
- **Verify the applicant’s visual assessment-** It does not appear that the Lead Agency required a visual impact assessment for this project. As a Type 1 action, not to have even a basic cross-sectional analysis to determine what the visibility of the project might be from critical viewpoints demonstrates a failure by the Lead Agency to take the requisite hard look.
- **Determine the applicant’s assessment of the potential significance of the impact-** The Lead Agency made a finding of “no impact” on the SEQRA form and subsequently made a buffer requirement of 50 feet during their determination. In both cases the determination is without basis of fact and without any qualitative or quantitative analysis. Nothing was submitted to base a determination on: no photos from critical views; no cross-sectional

analysis to determine the projects visibility; and no analysis of the height and density of the existing vegetation to determine if the 50-foot buffer is sufficient mitigation.

- **Determine if the applicant's mitigation strategy is sufficient-** The Lead Agency determined that a 50-foot buffer was sufficient without any basis of fact or analysis to make that determination.

Based on this it is clear that aesthetic impacts from critical resources were not considered in the decision-making process, and the Lead Agency did not follow even the basic and bare minimum analysis as it relates to aesthetic resources. Therefore, the Lead Agency's determination was made without any basis of fact.

Traffic Assessment

Although, a thorough review of the traffic assessment was not completed by CHA, we noted several concerns during our review that could be an impact on traffic from the Project.

- Laden trucks leaving the Site and turning south on Route 28 will be trying to accelerate on an uphill grade.
- If trucks entering or leaving the Site are oversized loads, traffic controls may be impacted.
- The only proposed traffic controls were to improve the access road entrance to meet NYSDOT truck turning distances and to clear roadside brush to the north to improve sight distance.

CHA recommends that the Applicant address the issues of accelerating upgrade and oversized loads.

EAF Form Review

Using existing project documentation and information readily available from a desktop review of pertinent online databases, a permitting specialist from CHA familiar with the SEQR process performed a review of Part 1 and Part 2 of the EAF that was submitted by the Applicant. Overall, we found several key discrepancies which should be brought to the attention of the Planning Board.

On Part 1 of the EAF:

1. There was no mention that the Project was located in the Hudson River National Heritage Area or within the boundaries of the Catskill Forest Preserve/Catskill Park (C.2.b and C.4.d). The New York State Office of Parks, Recreation, and Historic Preservation may want to be a stakeholder for the project. We do not know if this agency is aware of this Project. These are aesthetic and recreational resources that do not appear to have been included in the evaluation.
2. The Applicant stated that stormwater runoff will be directed to existing ponds (D.2.e.iii). Based on site plans, the existing ponds discharge to a perennial stream that supports trout (Class C(t)). The perennial stream was not mentioned and is not shown on the Site plans.
3. The evaluation of air emissions during construction and operation as well as the potential need for air permits from NYSDEC did not appear to be thorough. Mobile emission sources during operations did not include truck and heavy equipment exhaust (D.2.f.i). Stationary sources during operations did not include heating/cooling emissions (D.2.f.iii). Other stationary sources from operations may include manufacturing process emissions and/or backup

- generator emissions. The Applicant should revise what stationary and mobile sources will be present. Based on our review and NYS Air Permitting Regulations 6 NYCRR Part 201, air permitting is needed for manufacturing operations and quarrying/crushing operations (D.2.g) unless all sources are considered exempt or trivial. It is the responsibility of the owner/operator to maintain documentation on exempt or trivial determinations. The Applicant should provide the exempt/trivial determinations for all air contamination sources proposed such as but not limited to crushers, screeners, baghouses, mixers, dryers, silos, forges, welding, cutting etc.
4. Applicant answered that the proposed action will not result in the release of air pollutants from open-air operations and processes such as quarry (D.2.i). Based on our information and knowledge, this answer should be YES; there will be emissions of dust from quarrying and heavy equipment exhaust.
 5. Hours of operation during construction are shown as 6 am to 7 pm on Saturdays and Sundays (D.2.l). We find that excessive given the nearby residential and recreational areas.
 6. Applicant answered that the proposed action would not remove existing natural barriers or screen for noise or light (D.2.m.ii & D.2.n.ii, respectively). However, E.1.b states that 19 acres of forest will be lost.
 7. Applicant answered that there will be no bulk petroleum or chemical storage (D.2.p). We would like information on how the heavy equipment will refueled and serviced during construction. We would also like to know if any chemicals are used during manufacturing and will there be a diesel-powered backup generator as part of the design.
 8. The Applicant stated that there will be no solid waste management or disposal at the site (D.2.r). There will be solid waste generated at the site that must be managed at the site prior to offsite disposal.
 9. Applicant did not list public recreational areas as an adjoining/nearby land use (E.1.a)
 10. No lakes or ponds were listed by the Applicant (E.2.h.iv). Pickerel Pond should be listed as the southern boundary of the pond falls on the Applicant's property.
 11. Applicant listed only Onteora Lake as officially designated and publicly accessible federal, state, or local scenic or aesthetic resources within 5 miles of the Site (E.3.h). There are others, namely Bluestone Forest, Ashokan Reservoir, Catskill Park/Catskill Forest Preserve, other local parks, and the Hudson River National Heritage Area.

Some other minor findings from the review of Part 1 EAF include:

D.2.q The Applicant stated that there will be no use of pesticides or herbicides. We would like additional information on whether there will be any rodent or insect control or weed control practices as part of routine operations at the Site.

D.2.t Additional information is needed to verify that no hazardous waste is generated during the manufacturing or from the maintenance of equipment during construction or operation.

E.1.c Applicant did not list the existing footpath easement across the access road which links public recreational lands on both sides.

E.1.e Applicant did not list any dams. Based on current detention pond design in the SWPPP, dams and dam permits will be required for both detention ponds.

E.1.g If the quarry serviced their own machinery, there may have been hazardous waste (parts cleaner or automotive fluids) generated at the Site.

E.2.b With bedrock at 0 feet below ground, we believe more than 20% of the site has bedrock outcroppings.

E.2.d The Applicant reported not knowing the depth to water. The surface elevation of Pickerel Pond should approximate depth to water.

E.2.g Route 28 is listed as a Unique Geologic Feature. Route 28 is not a geologic feature.

Review of the EAF Part 2 showed:

- Clarifications on Part 1 of the EAF regarding stormwater and management and its relation to the perennial stream may affect 3.h and 3.i.
- Clarifications on Part 1 of the EAF regarding chemical or petroleum bulk storage may affect 4.f. relating to impacts to groundwater.
- Clarifications on Part 1 of the EAF regarding stationary and mobile emission sources may affect the need for air permits (6.a)
- Since 19 acres of trees are slated for removal, 7.h should be a moderate/large impact since it is more than 10 acres of forest.
- We found that "Impact on Aesthetic Resources" should be checked "Yes". The proposed action will be visible from an officially designated federal, state, or local scenic or aesthetic resource. Bluestone Forest is adjacent. The project is within the boundaries of Catskill State Park/Catskill Forest Preserve. The proposed action will be visible from a publicly accessible vantage point (Pickerel Pond). The project will also be visible by travelers on Route 28 (heading south) and from recreational based activities (Bluestone Forest).
- During construction and operations, laden trucks entering Route 28 heading south will be entering a busy highway on an uphill grade. CHA recommends that this should be identified on 13.f as "Other Impact".
- For Impact to Energy, the project may require the installation of an onsite transformer (14.b) and will heat/cool more than 100,000 sq. feet (14.d).
- Noise impacts should be revisited based on our comments on the noise study.

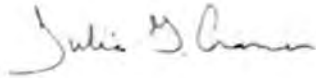
Conclusions

Based on our review of the existing documentation and Site conditions, initiation of the proposed project will alter the site and surrounding area. The most impacted receptors will be the surrounding residences and the physical and aesthetic resources of Pickerel Pond and Onteora Lake. The residential homes will have their neighborhood changed by the quarry/excavation of rock materials and the operation of the facility on a 24-hour basis. The serene character of the parkland will be permanently changed, especially if operational activities are 24 hours a day, seven days a week. Further, water quality degradation and runoff have a high potential to affect the state regulated wetland and Pickerel Pond.

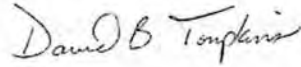
Based on CHA's review, we believe that a more thorough review of nearby resources and potential impacts is required by the Lead and involved agencies to ensure that appropriate inquiry is made on this application. Specifically, noise, visual, stormwater, air emissions, and traffic impacts should be re-evaluated. There are other issues (e.g., petroleum or chemical bulk storage) where we feel additional information on the proposed operations is needed to determine the level of impacts and potential mitigation measures.

If you have any questions, please do not hesitate to contact Dave Tompkins at (845) 764-7515 or Julia at (845) 325-2329 or via email at dtompkins@chacompanies.com or jcraner@chacompanies.com.

Sincerely,



Julia Craner, PG
Project Manager



David B. Tompkins, PWS CWB
Principal Sr. Scientist

REFERENCES

Shannon, G. et al. 2015. A synthesis of two decades of research documenting the effects of noise on wildlife. <https://doi.org/10.1111/brv.12207>

Mahtab, M. et al. 2005. Environmental impacts of blasting for Stone Quarries in Percy et al. 2005.

NYSDEC. 2015. New York State Stormwater Management Design Manual.

NYSDEC. 2000. DEP-00-2. Assessing and Mitigating Visual Impacts.

NYSDEC Air Permitting Regulations : 6 NYCRR Part 201



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McNAMEE LOCHNER P.C.

ATTORNEYS AT LAW

June 17, 2019

John Konior
Chairman
Town of Kingston Planning Board
906 Sawkill Road
Kingston, New York 12401

Re: Public Hearing on 850 Route 28 LLC

Dear Mr. Chairman:

Please accept this letter in my capacity as counsel to the Open Space Institute Land Trust, Inc. ("OSI") in this matter. OSI protects scenic, natural and historic landscapes to provide public enjoyment, conserve habitat and sustain communities across the eastern seaboard.

The applicant's proposed project is directly adjacent to the Bluestone Wild Forest, which forms the easterly border of the Catskill Forest Reserve, public lands whose wilderness character is protected by the New York State Constitution (Article XIV, Section 1).

In February 2019, OSI purchased a 208-acre property known as the Onteora Lake Addition immediately adjacent to the proposed project, including forest, wetlands and the northern portion of a wild body of water known as Pickerel Pond. OSI purchased the Onteora Lake Addition because it is important to join the two major sections of the Bluestone Wild Forest. The Addition will be integrated into the Catskill Park upon conveyance by OSI to New York State. Thus, as the proposed project is being built and operated, it will be surrounded on three sides with wild, protected lands used by the public for wilderness recreation.

The Negative Declaration Must Be Rescinded as a Matter of State Law

Remarkably, the Planning Board's March 18, 2019 Negative Declaration does not even mention the Bluestone Wild Forest, the surrounding recreational uses or the Onteora Lake Addition in its analysis of environmental impacts of the proposed project. Since the Negative Declaration was issued, the Planning Board has received detailed comments from OSI, including the May 16, 2019 letter from OSI Executive Director, Kim Elliman, accompanied by the report of Dr. Eric Kiviat, a highly regarded professor of ecology; detailed comments from the Woodstock Land Conservancy; focused comments by Mr. Robert Leibowitz of the Ulster County Planning Board, with specific recommendations; and, a number of factual findings and environmental impact observations by CHA, delivered today to the Board, pointing out many environmental matters that have been overlooked.

(M1602500.1)

www.mltw.com

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Of course, the Negative Declaration states, at the outset, that the finding is based on the Board's "consideration of available information". In light of all of the additional, new information the Board now has, it has a legal obligation under New York State Law to rescind the Negative Declaration and to engage in a hard look and meaningful analysis of all of the potential environmental impacts that have been raised on the record before you. Title 6 NYCRR Part 617.7(f), provides as follows:

"At any time prior to its decision to undertake, fund or approve an action, a lead agency **must rescind** a negative declaration when substantive new information is discovered." (6 NYCRR Part 617.7(f)(1)(ii)).

The record conclusively establishes that the Board was fully unaware of the OSI ownership of the adjacent Onteora Lake Addition, much less aware of its destiny to become forever wild lands protected by the New York State Constitution. This is proven by the mailing of notice of last month's public hearing to the prior, private owner. There can be no doubt that the institutional, public and ultimate wilderness character of the Addition is totally new information as a matter of fact.

Since the Negative Declaration makes absolutely no reference to the Bluestone Wild Forest, the Catskill Preserve or the adjacent Onteora Lake Addition, soon to be public and part of the Catskill Preserve, the comments, reports and letters submitted by OSI, the Woodstock Land Conservancy, and the Ulster County Planning Board constitute "new information" as a matter of law. Thus, the mandatory duty set forth in SEQRA applies and the Negative Declaration **must** be rescinded.

The Negative Declaration is Unlawful in Failing to Follow the Town Zoning Law

Special Use Permits, such as that sought here, are a technique or category in local land use law in which a municipality seeks to encourage a particular land use in a specific zone, but only when it is fully regulated and "conditioned" in a manner suitable for the particular location. Special Use Permits, as a zoning law category, demand strict and close scrutiny of all potential "conditions" to be imposed upon the applicant in order to make the use of the property reasonably compatible with the surrounding land uses. Thus, a special use permit applicant has the burden of proving compliance with each of the special use permit criteria that are set forth in the local zoning ordinance. See generally, North Shore Steakhouse, Inc. v. Board of Appeals of the Village of Thomaston, 30 NY2d 238 (1972); Town Law § 274-b(1). See also, Town Law § 274-b(8) (mandating full compliance with SEQRA in evaluating the issuance of special use permits.) The applicant here has not met this burden and the Planning Board has fully disregarded the Town Zoning Law relating to Special Use Permits.

Special Use Permit legislation necessarily delegates power and responsibilities to the Planning Board to closely evaluate the criteria for special use permits listed in the local law and to make use of each of these criteria in fashioning a conditional use that minimizes the impact of the contemplated use on the surrounding area.

Here, the Ulster County Planning Board's recommendation to the Town of Kingston Planning Board (date reviewed May 1, 2019) specifically recommends close scrutiny of visual and noise impacts from the proposed industrial use upon the public's wilderness recreational use of the Bluestone Wild Forest, including Onteora Lake and Pickerel Pond.

The Ulster County Planning Board's recommendation is reasonable, because it generally draws upon the list of conditions set forth in the Kingston Town Law, for close scrutiny by the Planning Board, in an effort to mitigate impacts upon surrounding land uses.

As set forth in the Kingston Town Law, the purpose of Article V of the Zoning Law is to establish the standards that must be applied by the Planning Board in reviewing Special Use Permit applications. Overall, the purpose of this Zoning Law provision is to "ensure the compatibility of such uses by applying appropriate standards." Id.

Specifically, the Town Law relating to special use conditions demands Planning Board analysis and imposes a mandate upon the Board to:

1. "[T]ake into consideration the public health, safety, general welfare, the comfort and convenience of the public in general and that of the immediate neighborhood in particular". Town of Kingston Zoning Law, § 425-20.
2. "[T]ake into strict account" adjacent land uses, such that "The Planning Board shall not approve the Special Use unless, in its determination, the proposed use will not have a negative effect on adjacent land uses." Id. At Subsection A.
3. Consider "the impacts of lighting on adjacent areas and areas within viewing distance". (Id. at subsection M)
4. Impose such conditions, which allow it to find that the proposed use "should not discourage the appropriate development and use of adjacent land and buildings or impair the value" of adjacent land. Id. At Subsection C.

Surely, adding the OSI parcel to the Wild Forest is appropriate development of lands adjacent to the project. As a matter of law, the Town Planning Board is mandated to thoroughly consider under SEQRA all of these Town Law factors and to not issue a special use permit until the impacts have been fully vetted and mitigated.

Upon the record before the Board, there is no evidence that the Board has taken into consideration the comfort and convenience of the public and that of the “immediate neighborhood in particular”, which is constitutionally protected wilderness. The Board has not taken into “strict account” the adjacent land uses. Indeed, the adjacent public lands are not even considered in the Negative Declaration. Thus, the Board cannot make the mandatory finding that the excavation, rock processing and manufacturing operation “will not have a negative effect on the adjacent land uses”. The Board has not done any visual impact analysis, so there is no documentation of the visual impacts of lighting on the wilderness lands. Finally, the Board has not imposed any conditions such that it can make a finding that the proposed project will not impair the value of the wilderness lands or the value of the adjacent Addition. See generally, Zoning Law § 425-20.

As accurately pointed out by the Ulster County Planning Board, the Town Planning Board has not even considered the impacts of this project upon the Wild Forest and the Onteora Lake Addition, to be conveyed to the State for inclusion in the Wild Forest. Most importantly, the Negative Declaration is void of any reference to the four listed mandatory considerations set forth in the Town of Kingston Zoning Law. This is an error of law.

**The Proposed Project Appears to Need a Mining Permit From
the New York State Department of Environmental Conservation**

The Negative Declaration describes the proposed project site as an “unreclaimed rock mine”, where the applicant proposed to construct a “concrete manufacturing facility” that will use “cement, sand and **aggregate**” as the raw materials for concrete. (emphasis added) The Negative Declaration finds further that over the course of at least 3 to 4 years, the applicant will excavate 405,000 cubic yards of rock from the proposed project site and use at least 185,000 cubic yards as aggregate to manufacture concrete.

Under New York State’s Environmental Conservation Law, any person who mines or proposes to mine from each mine site more than 1,000 tons or 750 cubic yards of material within 12 months needs a permit. 23 ECL § 2711(1).

“Mine” means any excavation from which a mineral is to be produced for sale or exchange, or for commercial, industrial or municipal use...” 23 ECL § 2705(5) As used, “mineral” means, essentially, all earth materials. 23 ECL § 2705(7).

Thus, if earth materials are extracted and produced for sale or exchange or for commercial, industrial or municipal use, the place of the extraction is a “mine”.

“Mining” means:

[t]he extraction of overburden and minerals from the earth; the preparation and processing of minerals, including any activities or processes or parts thereof for the extraction or removal of minerals from their original location and the preparation, washing, cleaning, crushing, stockpiling or other processing of minerals at the mine location so as to make them suitable for commercial, industrial, or construction use; exclusive of manufacturing processes, at the mine location; the removal of such materials through sale or exchange, or for commercial, industrial or municipal use; and the disposition of overburden, tailings and waste at the mine location. "Mining" shall not include the excavation, removal and disposition of minerals from construction projects, exclusive of the creation of water bodies, or excavations in aid of agricultural activities.

23 ECL § 2705(8).¹

Obviously, 405,000 cubic yards is more than 1,000 tons. Since the applicant proposes the use of at least 185,000 cubic yards of aggregate, to be extracted, broken, crushed and screened for use by the applicant in the manufacture of concrete, the excavated rock has value. The applicant cannot maintain that 185,000 cubic yards of aggregate has no value. Thus, a "mine" will be created, and the applicant will be "mining".

The applicant has presented various volumes of rock that will be hauled away. The Negative Declaration finds that 162,000 cubic yards of rock will be removed from the site. The applicant provides no explanation, and the Board has no factual basis in the record to establish a need to haul this rock away from such a large, 110-acre site. Further, the applicant declines to defend the need for the environmental impact of this heavy truck traffic over a number of years. Since the rock that will be excavated clearly has significant industrial value to applicant, it is fair to infer that the 162,000 yards of rock to be hauled away has some "commercial, industrial or municipal value", thus also falling within the definition of "mining".

As the Negative Declaration finds, the applicant states a need to excavate 154,000 yards of rock to use as fill material. No cut and fill plan has been drawn by an engineer or geologist to establish this need, so it must be the subject of inquiry by the Board and DEC. The DEC may find that this volume falls within the "construction project" exception to the definition of "mining" upon close scrutiny of a proper cut and fill plan filed with them, but there is certainly no aggregate production exception set forth in the state law that regulates mines. Therefore, a rock "mine" of at least 185,000 cubic yards and as much as 250,000 yards in volume will be created. A DEC Permit is required.

¹ According to this definition, the manufacturing process that is proposed to occur in the batch plant is not "mining", but all other proposed activities are included in the definition except excavation for construction projects.

The Board is obliged to rescind the Negative Declaration and to engage in coordinated review under SEQRA with DEC as an involved agency to determine the applicability of the state mined land laws to the proposed project.

The Record Establishes That the Board Has Not Taken a Hard Look at the Impact of Heavy Industrial Noise From the Project Upon the Wilderness Character of the Forest Preserve and the Addition

The Applicant proposes to create hundreds of thousands of yards of aggregate material at the site from virgin rock and the Board has failed to evaluate, much less mitigate, the impact of this industrial noise upon the public's use and enjoyment of adjacent wilderness lands and the Addition.

Specifically, the production of aggregate involves blasting; large payloaders; at least one breaker; at least one crusher; screeners; sorters and the movement of earth materials.

The record does not establish the specific noise levels that will be created by this activity.

Therefore, the Board is obliged to inquire as to every piece of heavy equipment that will be on-site during the site excavation activities, an explanation as to the duration of these activities, and the specific measure of noise that is anticipated in the wilderness land during the excavation work. Specifically, questions include:

1. What is the reason for blasting and how many blast events will occur?
2. What are the decibel measurements from drilling, blasting, the payloaders/backhoe, a breaker (if used), which creates different noise levels depending on whether it is a 5,500-pound breaker or a 10,000-pound breaker; the stone crusher (often over 100 decibels at the source) and the screener.

DEC often requires, as a condition of a mining permit, that rock walls be built around pieces of heavy equipment like a breaker or a crusher, in order to mitigate noise impacts. This has not been considered.

A focused noise study must be prepared that identifies each piece of heavy equipment, the anticipated noise levels based upon vendor specifications, evaluates the cumulative impact of the machines running at the same time and mitigates the sound to protect the public interest in the character and solitude of protected wilderness lands.

Indeed, the accompanying technical comments of CHA on behalf of OSI establish at least twelve deficiencies in the Noise Study submitted by the applicant, including a failure to place

any receptors at the applicant's property lines to the north of the site. Certainly, the applicant's expectation as set forth in EAF Part 1 of operating all of the excavation/mining equipment during construction for a period of years from 6 a.m. to 7 p.m. on weekends must be evaluated and mitigated by the Board in accordance with law. See EAF Form 1(D)2.1. See also Section E.1.a, which fails to list public recreational areas and the Addition as adjoining/nearby land uses. Other parts of the EAF Form 1 fail to list Pickerel Pond as a lake or pond on the applicant's property. See EAF Form 1E.2.h.iv. Remarkably, the applicant's deficient Noise Study, uninformed by the surrounding wilderness, suggests moving the "crusher pan" closer to the Pickerel Pond, much of which is a recreational, unmotorized public body of water. The mitigation measures recommended in the noise study establish a lack of regard, or lack of knowledge regarding the recreational uses of the bordering lands.

For all of these reasons, the deficiencies in the Noise Study must be rectified. The Board is entitled to know the actual sound levels by the pieces of excavation and processing equipment that are going to be used during the excavation operation in order to take a hard look at the noise impact of the proposed project.

The Stormwater Management Plan is Deficient

The applicant began the application process with the Planning Board by submitting Part 1 of the Environmental Assessment Form that is inaccurate and incomplete in many respects. There is no mention that the proposed project is located in the Hudson River National Heritage Area and within the boundaries of the protected Catskill Forest Reserve/Catskill Park.

The applicant states in the EAF that the stormwater runoff will be directed to existing ponds (D.2eiii), but site plans indicate that the existing ponds discharge to a perennial Catskill Mountain trout stream and its associated wetlands. This trout stream is not mentioned in the EAF and is not shown on the site plans. The Board has an obligation to protect the trout stream from runoff that may impair its function and classification.

Applicant has a legal obligation to comply with two stormwater discharge permits: (1) the SPDES general permit for stormwater discharges from construction activity (GP-0-15-002) (2016); and (2) the SPDES multi sector general permit for stormwater discharges associated with industrial activity GP-0-17-004 (2018). The materials now before the Board reveal that the applicant is unaware of the rigors of these permit requirements.

Specifically, as pointed out in greater detail by CHA, the two "water quality basins" proposed for collection, retention and detention of stormwater on site propose to hold 1.7 million gallons of water through construction of some kind of structures that allow the basins to be twice as deep as the stormwater regulations require. The heavy metals, suspended solids and other runoff from the excavation/mining activity discharges from the massive "water quality basins" to

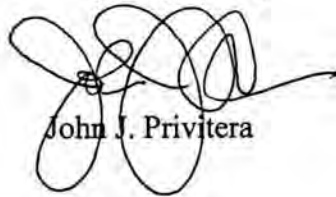
a Catskill trout stream are not discussed. These impacts must be fully reviewed by the Board once a complete Stormwater Management Application for both construction and industrial operations are submitted by the applicant in accordance with State and Federal law.

In addition, New York State reviews the design and construction of large structures that are planned to hold huge volumes of water. DEC should make a determination as to whether the design of any of the ponds are such that the applicant requires a dam permit. See 6 NYCRR Parts 608.3 and 673.

CONCLUSION

For all of these reasons, the Planning Board is obliged to rescind the Negative Declaration of March 2019. The applicant should be directed to provide amended, accurate Environmental Assessment Forms for the Board's review prior to acceptance. The Board must then take a hard look at all of the Special Permit requirements in Town Law that require critical review prior to consideration of a Special Use Permit. Finally, the New York State Department of Environmental Conservation should be notified under SEQRA so that coordinated review will be conducted so that DEC may bring its expertise to bear regarding its stewardship of public recreational lands within the constitutionally protected Catskill Forest Preserve and the Addition. DEC may then coordinate its technical review of the proposed project under New York's mining regulations, wetlands protection laws, stream protection laws and stormwater permit requirements so that the Board can take a hard look at all of the environmental impacts of this proposed project.

Very truly yours,



John J. Privitera

JJP/klh