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Two Issues at Junius Ponds:
(1) Has State Regulation Failed?
(2) Is it Too Late to Preserve Them?*

*By: Herman S. Forest
September 1988*

THE ROCHESTER COMMITTEE FOR SCIENTIFIC INFORMATION
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**Two Issues at Junius Ponds: (1) Has State Regulation Failed?
(2) Is It Too Late to Preserve Them?**

by
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Summary

The Junius Ponds Area (Seneca County, New York) is a bog region with unique biological, geological and limnological features. It is home to the rare bog turtle and a number of rare plant species. Its ecological value notwithstanding, however, private owners have permitted extensive land mining in the area.

The current issue is an application by Seneca Meadows, Inc. to remove soil for use as cover for its landfill at nearby Waterloo. Rather than simply extend the existing permit, as is often done in such cases, the New York State Department of Environmental Conservation (DEC) held a meeting to prepare for a public hearing on the matter. As a result of this "scoping meeting," DEC concluded that the proposed operation would have no adverse effect on wildlife habitat. At the public hearing which followed, qualified specialists testified that the most unique of the ponds (Pond V) could be disturbed and damaged by nearby excavation. They showed that needed information on the ecology, geology and hydrology of the location was not extant, and objected that available evidence was inadequate to support the DEC's finding of "no adverse impact." The Administrative Law Judge in charge of the hearing upheld the DEC and ruled in favor of the applicant.

This ruling ignored all the expert testimony documenting a serious lack of environmental information. This Bulletin shows how burdensome and frustrating it has become for unpaid expert testimony on an environmental issue to be given due weight at a public hearing.

Background

The Junius Ponds watershed, with eight ponds, a bog, fen and other wetlands, is located in the Town of Junius, Seneca County, New York. The watershed is cut across the middle by the New York State Thruway, built before environmental impact statements were required. The

ponds serve as public water supply for the Village of Lyons, and some of the property is held as a preserve by the Seven Lakes Council of the Girl Scouts of America. At this writing, the Nature Conservancy is attempting to purchase some of the land, and the State approved its acquisition with Environmental Bond Act funds on May 25, 1988.

The author evaluated the uniqueness of the area while considering whether to serve as consultant to the applicant for its land mining permit application, and he concluded that Junius Ponds ranked of highest merit for protection and preservation among sites in central and western New York, including some of those already protected. Some of the factors influencing his decision were that:

- (1) Bogs are rare habitat types in the region.
- (2) The biota includes the rare bog turtle, and five or more rare plant species, as listed (but not described as rare) in the DEIS [1,2].
- (3) The glacial geology of the vicinity is unusual and exemplary [3].
- (4) The physical and biological character of the ponds is so unique that they can be regarded as a scientific study resource. They offer a valuable opportunity for studies of lake dynamics and ecology [4 - 6].

Land Mining, the Current Application

Sand is the most common soil in the Junius Ponds watershed. It had little commercial use until 1986, when Seneca Meadows, Inc., operator of a large landfill near Waterloo, New York, was given permission to use sand as cover. After mining out a previously permitted section, the company applied for a permit to use an additional ten acres east of Junius Pond V (Mined Land Reclamation Permit Application UPA No. 80-86-1592/MLR 8083-30-0413, filed November 6, 1986). In the interim, a large (and controversial) excavation just south of the ponds has been mined for cover material.

There are two primary legal vehicles for regulating land use in the area. The Village of Lyons uses the Ponds as its water supply, and regulations generally protect its purity. In addition, land mining is regulated to the extent that reclamation is required, and the action may be subject to the State Environmental Quality Review Act, which requires preparation of an environmental impact assessment and a public hearing.

Ordinarily, the extension of a previously worked area is a fairly routine matter, presuming that potential impacts were carefully evaluated at the beginning of the operation. Since fill is a rather cheap commodity, the user is reluctant to spend large amounts on assessment, monitoring, and mitigating measures. Thus a granted permit can be effectively nullified by loading it with expensive conditions. The ideal situation would be to obtain fill from a site

which qualifies for a negative declaration of adverse environmental impact. In the case of Junius Ponds, there is an ample amount of suitable material in the vicinity, and this writer's cursory survey of maps indicated that much of it could be mined without adverse impact.

Draft Environmental Impact Statement

When Seneca Meadows, Inc.'s application for an extension of their excavation permit was reviewed, the DEC considered it proper to require a DEIS. At a "scoping meeting" conducted on April 15, 1987 by the DEC with representatives of the applicant and opponents of the proposed project. After hearing the objections (see What the Procedure Missed, below), the DEC decided that water quality (principal concern of the Village of Lyons) was the only important consideration in preparing the DEIS. The DEC's comments accordingly called for significant modifications only in this area. The DEIS was submitted on July 21, 1987. It was explicitly adopted as DEC's own statement (as lead agency) .

Public Hearing

Paradoxically, DEC did determine that "substantive and significant issues were raised," and arranged for a public hearing, conducted by Administrative Law Judge Frank Montecalvo on January 11, 1988 at Waterloo, New York. The nature of the issues which justified the hearing were not specified, so that the Judge was unaware of them. At the hearing the DEC presented a draft permit (which is intended not to prejudice the decision but rather to provide an idea of what might follow). The DEC also stated that the application had been reviewed in light of the standards and criteria of applicable regulations and found "satisfactory." The DEC concluded further that "we do not believe that the project will have an adverse impact on the quality or quantity of water or wildlife habitat in Pond V" [7].

The judge's subsequent ruling (February 26, 1988) did not address the content of assertions that the DEIS was faulty or that specific threats of damage existed in respect to the physical and biological character of Pond V. Indeed, the ruling says almost nothing except that the intervenors "did not present conclusions which run counter to the assertions of the applicant" [8].

On April 11, 1988, the DEC conveyed some revisions of the permit to the Judge. It noted also that the intervenors had submitted no further statements [9]. However, the Village of Lyons [10] submitted a statement to the DEC on April 13 expressing dissatisfaction with the revisions and calling for:

- (1) A complete hydrological study
- (2) A limit on the area mined in one year to two acres
- (3) Reporting more frequently than once a year

- (4) More specific requirements for revegetation of reclaimed land
- (5) An immediate halt to all land mining in the watershed.

What and Who Counts in a Hearing

Environmentally concerned citizens may be surprised to learn that there have been substantial changes recently in the procedures established in the early 1970's for preparing DEIS's and conducting public hearings [11]. Although the changes were undoubtedly intended to improve these processes, it appears that their practical result is to obstruct effective citizen participation.

Specifically, the scope of subject matter to be considered in a public hearing can be severely limited in early stages. For example, the dearth of fundamental information regarding the geology, hydrology and ecology of the Junius Ponds watershed was not considered in this case. Also, hearings now resemble litigations: the services of legal counsel are needed, and qualified expert witnesses must be sworn and subjected to cross-examination if their testimony is to carry any weight. Intervenor must enter cases early, virtually as soon as an application is filed, and be prepared follow them closely for months or even years.

It is still possible for anyone to participate in a hearing, as the writer did. One can still say anything one wishes, but it is now necessary to *qualify* as an intervenor. The Village of Lyons was accepted without question, the Girl Scouts of America on a limited basis (although they were not prepared to give testimony and probably had no influence). The Bergen Swamp Preservation Society was accepted after satisfactorily explaining why they had missed the deadline for application. Although only a minimal "interest" seems to be needed to qualify as an intervenor, the Administrative Law Judge decides whose testimony he will consider seriously.

The open sessions are followed by formal, trial-like proceedings. When asked whether unsworn testimony was worth giving, the Judge responded that such statements merely served to develop some feeling for the public view. That informal testimony is a waste of time is evidenced by Judge Montecalvo's dismissal of the whole subject of possible environmental damage with the brief comment that the DEC staff had determined that there would be no adverse impact.

What the Procedure Missed — Some Conclusions

In the Junius Ponds case, there was evidence of good will and competence on the parts of the applicant, his consultant and the DEC. Unfortunately, adherence to correct procedure resulted

in neglect of considerations which should have been treated seriously and specifically. These include:

- (1) Assertions that the DEIS was inadequate
- (2) There is surprisingly little information about the ecology of the site itself and the adjacent pond area. There is certainly not enough evidence to support the conclusion that no adverse impact will result from the land mining operation.
- (3) The question of whether the wind regime of Pond V (which helps keep it unmixed) would be altered by removal of an adjacent hill was not discussed. No expert opinion was sought. The writer examined diagrams in the DEIS to try to determine if the profile of the protecting hill would be lowered. The two diagrams presented conflicting evidence and did not resolve the question.
- (4) The Village of Lyons has called for a complete hydrological study. This is only the latest in a series of assertions that there is simply not enough information available to judge what effect, if any, there will be on the springs and other water entering Pond V.
- (5) Nowhere in the record is an acknowledgment — or denial — that the Junius Ponds watershed is a natural treasure. The writer offered the rule of thumb that the greater an area's uniqueness, the greater should be the degree of caution exerted to protect it.

References

1. Erdman, Anthony Assoc., DEIS Mined Land Reclamation Application. Seneca Meadows Inc. Junius Borrow Area, Seneca County, New York. July 20, 1987.
2. Brown, L. Unpublished DEC internal report to John Cole. February 11, 1987.
3. Young, R.A. Unpublished report (as consultant geologist). February 3, 1987.
4. Bubeck, R.C. Letter. March 3, 1987.
5. Buchanan, C. Letter. February 3, 1987.
6. Stewart, K.M. Personal communication with Herman Forest. December 5, 1987.
7. NYSDEC (Region 8). Statement at opening of public hearing on Seneca Meadows Inc. Mined Land Reclamation Permit Application UPA No. 80-86-1592/MLR No. 8083-30-0413. January 11, 1988.
8. Montecalvo, F. Decision by administrative law judge following public hearing on the application. February 26, 1988.
9. NYSDEC Letter to Judge Montecalvo. April 11, 1988.
10. Village of Lyons. Letter in response to decision [8]. April 13, 1988.
11. NYSDEC. A guide to permit hearings. Revised 1987.

Dear Mr. [Name],
I am writing to you regarding the [Topic] that we discussed in our meeting on [Date].

The [Topic] is a very important matter for our organization, and we are committed to finding a solution that works for everyone involved.

We have reviewed the [Topic] and have identified several key areas that need to be addressed. We will be working closely with you to ensure that all concerns are taken into account.

We are confident that we can reach a mutually agreeable solution. We will be in touch with you again in the near future to discuss the next steps.

Thank you for your patience and understanding. We appreciate your contribution to our organization and look forward to working with you on this project.

Sincerely,
[Name]
[Title]

[Address]
[City, State, Zip]

[Phone Number]
[Email Address]

[Additional Information]