

A meeting of the Town of Hamburg Planning Board (the “**Planning Board**”) was convened in public session at Hamburg Town Hall, 6100 South Park Avenue, Conference Room 7B, Town of Hamburg (“**Town**”), New York, on November 1, 2023 at 7:00 p.m., local time.

The meeting was called to order by the Chair William Clark, upon roll being called, the following members of the Planning Board were:

PRESENT:

William Clark	Chair
Kaitlin McCormick	Vice Chair
Dennis Chapman	Member
Cynthia Gronachan	Member
Dan Szewc	Member
Kaitlin Chmura	Member

NOT PRESENT:

Margaux Valenti	Member
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ABSTAINED:

Margaux Valenti	Member
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THE FOLLOWING ADDITIONAL PERSONS WERE PRESENT:

Jennifer Puglisi, Esq.	Planning Board Counsel
Kimberly Nason, Esq.	Planning Board Counsel

The attached resolution was offered by Chair William Clark, seconded by Vice Chair Kaitlin McCormick:

Resolution of the Town of Hamburg Planning Board as Lead Agency Pursuant to the State Environmental Quality Review Act to Adopt Negative Findings and Final Decision to Deny the Site Plan Application for A.L. Asphalt Corporation's Proposed Hot Mix Asphalt Plant at 5690 Camp Road

Lead Agency: Town of Hamburg Planning Board ("Planning Board")
6122 South Park Avenue
Hamburg, New York 14075

Lead Agency Contact Person: Mr. William Clark, Planning Board Chairman

Project Name: Hot Mix Asphalt Plant ("Project" or "Action")

Project Sponsor: A.L. Asphalt Corporation ("Project Sponsor" or "Applicant")

SEQR Classification: Unlisted

Location of Action: 5690 Camp Road, Hamburg, NY 14075 ("Site")

Whereas, the Town of Hamburg Planning Board ("Planning Board" or "Board") received a Site Plan application ("Application") from A.L. Asphalt Corporation ("Project Sponsor" or "Applicant") in June 2019 for the construction of a Hot Mix Asphalt Plant ("Project" or "Plant") and related accessory uses at 5690 Camp Road in the Town of Hamburg ("Town"); and

Whereas, in compliance with Article 8 of the New York State Environmental Conservation Law and its implementing regulations at 6 NYCRR Part 617, commonly known as the State Environmental Quality Review Act ("SEQR"), the Planning Board classified the Project as an Unlisted Action, properly established itself as Lead Agency, and conducted a coordinated review of the Project's potential for significant adverse environmental impacts; and

Whereas, the Planning Board determined that the proposed Plant may include the potential for at least one significant adverse environmental impact and therefore required the preparation of an environmental impact statement; and

Whereas, the Planning Board received a draft Environmental Impact Statement prepared by the Applicant on August 5, 2022 ("Initial DEIS"); and

Whereas, the Planning Board, with assistance from its consultants and other Town departments determined, in accordance with Section 617.9 of the SEQRA

regulations, that the Initial DEIS was incomplete and by resolution dated September 21, 2022 the Planning Board requested the Applicant make certain revisions to the Initial DEIS and attached a copy of the scoping document checklist, and a document entitled "Inadequacies/Deficiencies of the A.L. Asphalt DEIS" to assist the Applicant with the completion of a revised DEIS (the "Listed Deficiencies"); and

Whereas, the Planning Board received a revised Draft Environmental Impact Statement prepared by the Applicant and submitted on April 5, 2023 ("Revised DEIS"); and

Whereas, the Planning Board reviewed the Revised DEIS with assistance from its consultants and other Town departments and determined, in accordance with Section 617.9 of the SEQRA regulations, to accept the Revised DEIS for public review, subject to the Listed Deficiencies, consistent with the resolution adopted by the Planning Board at its May 3, 2023 meeting and with the Notice of Completion of the DEIS issued by the Planning Board dated May 4, 2023 ("Notice of Completion"); and

Whereas, the Planning Board, with minimum possible delay and with assistance from its consultants and other Town departments, but without any material assistance from the Applicant (the Applicant was invited but declined to participate in any meaningful way), prepared the FEIS for the Project in accordance with 6 NYCRR 617.9; and

Whereas, the Planning Board accepted the FEIS on October 18, 2023, issued a Notice of Completion of the FEIS in accordance with 6 NYCRR 617.12 on October 20, 2023, and the statutory ten day waiting period passed on October 30, 2023; and

Whereas, the Planning Board as Lead Agency finds that the procedural requirements of SEQR have been met, and in accordance with SEQR the Planning Board must issue findings based on the FEIS; and

Whereas, the findings contained herein are based on the FEIS and the full record of the proceedings and submissions that were presented to the Planning Board and are included as part of its administrative record (collectively, the "Environmental Record");

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE TOWN OF HAMBURG PLANNING BOARD AS FOLLOWS:

Section 1. Based upon a thorough review and examination of the FEIS and the Environmental Record, the Planning Board makes the findings attached to this resolution as **Appendix A** with respect to the Project.

Section 2. Based upon the Planning Board's review of the Environmental Record and considering the relevant environmental impacts, facts and conclusions disclosed in the FEIS, and weighing and balancing relevant environmental impacts with social, economic and other considerations, the Planning Board finds that *it cannot* certify that, consistent with the social, economic and other essential considerations from among the reasonable alternatives available, the Project is one which avoids or minimizes adverse environmental effects to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigation measures which were identified as practicable.

Accordingly, the Planning Board hereby issues Negative Findings.

Section 3. Because the Board concludes that it must issue Negative Findings, the Site Plan Application is hereby denied.

Section 4. The Planning Board hereby certifies that this Resolution satisfies the requirements under Part 617 of the SEQR Regulations.

Section 5. The Planning Board staff are hereby authorized and directed to distribute copies of this Resolution with Appendix A to the Applicant and to perform such acts as may be necessary to comply with 6 NYCRR 617.12 or otherwise required to implement the provisions of this Resolution.

Section 6. This Resolution, together with the Findings attached hereto as Appendix A, which are adopted by a majority vote of the Planning Board, shall serve as the Findings Statement (as described in 6 N.Y.C.R.R. 617.11) for the Project, and are issued by the Planning Board pursuant to and in accordance with SEQR, and shall take effect immediately.

The question of the adoption of the foregoing Resolution was duly put to a vote on roll call, which resulted as follows:

William Clark	YAY
Kaitlin McCormick	YAY
Dennis Chapman	YAY
Cynthia Gronachan	YAY
Dan Szewc	YAY
Margaux Valenti	NOT PRESENT/ABSTAINED
Kaitlin Chmura	YAY

The foregoing Resolution was thereupon declared duly adopted.

Appendix A:
SEQR Negative Findings

**Town of Hamburg Planning Board SEQR Findings pursuant to 6 NYCRR 617.11 for
A. L. Asphalt Corporation's Site Plan Application for Proposed Hot Mix Asphalt
Plant at
5690 Camp Road, Hamburg, New York**

Lead Agency: Town of Hamburg Planning Board
6122 South Park Avenue
Hamburg, New York 14075

Lead Agency Contact Person: Mr. William Clark, Planning Board Chairman, 716-649-2023

Project Name: Hot Mix Asphalt Plant

Project Sponsor: A.L. Asphalt Corporation

SEQR Classification: Unlisted

Location of Action: 5690 Camp Road, Hamburg, NY 14075 ("Site")

These findings ("Findings") are issued by the Town of Hamburg Planning Board ("Board" or "Planning Board") as Lead Agency for the proposal by A.L. Asphalt Corporation ("Applicant" or "Project Sponsor") to construct and operate a Hot Mix Asphalt Plant ("Plant" or "Project") at 5690 Camp Road ("Site") in the Town of Hamburg ("Town"). The Board issued the Final Environmental Impact Statement ("FEIS") for the Project on October 20, 2023, and the Board has prepared these Findings in compliance with Article 8 of the New York State Environmental Conservation Law and its implementing regulations at 6 NYCRR Part 617, commonly known as the State Environmental Quality Review Act ("SEQR").

Consistent with 6 NYCRR 617.11 these Findings:

- consider the relevant environmental impacts, facts and conclusions disclosed in the FEIS;
- weigh and balance relevant environmental impacts with social, economic and other considerations;
- provide a rationale for the Board's decision;
- certify that the requirements of SEQR have been met; and
- certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the Project as proposed cannot be certified as one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, nor can it be certified as a Project that would

avoid or minimize adverse environmental impacts to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

The Planning Board as Lead Agency makes the following Findings:

1. The Applicant has not complied with the substantive or procedural requirements of SEQR

The Applicant's participation in the SEQR review of the Project, whether intentional or incidental, has circumvented the intent of the Environmental Impact Statement ("EIS") process. By providing insufficient, often outdated or inapplicable information, and refusing to comply with the Final Scoping Document and requests to address the Listed Deficiencies, the Applicant has made it impossible for the Planning Board to take a hard look at the Project's potential environmental impacts as required by SEQR.

The Planning Board received an application for Site Plan Approval in June of 2019 ("Application") submitted by Applicant for the proposed development and operation of the Project at 5690 Camp Road. *See* FEIS, Executive Summary attached as **Exhibit A**. The Application included a Part 1 of the Short Environmental Assessment Form prepared by the Applicant. The Planning Board requested the Applicant prepare a Part 1 of the Full Environmental Assessment Form, which the Applicant prepared and submitted on September 6, 2019. At its September 28, 2019 meeting the Board classified the Project as an Unlisted Action. The Board determined that the Project may include the potential for at least one significant adverse environmental impact and issued a Positive Declaration pursuant to SEQR on November 4, 2019.

In December 2019 the Applicant filed an Article 78 Petition to challenge the Board's classification of the Project as an Unlisted Action (NYSCEF Index No. 0001117/2019) arguing that it was instead a Type II action and therefore not subject to SEQR review. The Town filed a motion to dismiss the Petition, which the Court granted by decision filed January 21, 2020, and the Project's SEQR review continued. The Project Sponsor submitted a draft scope to the Board on March 6, 2020 and the Board issued a final scoping document on April 29, 2020 ("Final Scope" or "Final Scoping Document").

Then, for a period of more than two years the Project Sponsor declined to proceed with the Project in the Town of Hamburg, and instead pursued an alternate location in the Town of Niagara ("Alternate Niagara Site"). After more than two years of declining to move forward with the Application, the Applicant submitted a proposed Draft Environmental Impact Statement on August 5, 2022 to move forward with the Project on the Site (the August 5, 2022 Draft Environmental Impact Statement is the "Initial DEIS"). By the time the Applicant submitted the Initial DEIS after the two-year delay, the Town was well underway with a wholesale update of the Town's land use plans. Beginning in 2019 the Town had formed a Comprehensive Plan Committee and

Subcommittees to develop working drafts of an updated Comprehensive Plan (the Town-wide land use plan had not been updated since 2007). During the Fall of 2022 the Town issued an updated Draft Comprehensive Plan and made it available for public review. The updated Comprehensive Plan was adopted by the Town Board in January 2023 (the “Comprehensive Plan”) and includes specific recommendations for the Site and surrounding area.

The Board, with assistance from its consultants and other Town departments, determined at a Board meeting on September 21, 2022 in accordance with Section 617.9 of the SEQR regulations, that the Initial DEIS was incomplete. Accordingly, the Board requested that the Applicant make revisions to the DEIS as detailed in the document titled “Inadequacies/Deficiencies of the AL Asphalt DEIS” (the “**Deficiency Determination**”), provided to the Applicant at the Board’s September 21, 2022 meeting. The Deficiency Determination detailed the nineteen Listed Deficiencies that the Planning Board identified in the Initial DEIS.

In response to its receipt of the Listed Deficiencies the Project Sponsor did not revise or supplement the Draft EIS but rather submitted a Deficiency Response Letter dated October 11, 2022 (“**Project Sponsor’s October Letter**”) that asserted the Planning Board acted improperly in rejecting the DEIS. Thereafter, between November 2022 and February 2023, the Planning Board engaged in several rounds of correspondence with the Applicant to reassert, clarify, and simplify the Listed Deficiencies and provide guidance as to the minimum necessary information that must be included to accept the DEIS as adequate for public review.

By correspondence to the Applicant dated November 10, 2022 (“**Board’s November Letter**”), the Board responded to the Applicant’s refusal to revise the Initial DEIS. The Board’s November Letter established that the Listed Deficiencies identified in the Deficiency Determination were contemplated within the Final Scope, and further that 6 NYCRR 617.8(f) permits a lead agency to raise issues to include in an EIS for a proposed action even after the issuance of a final scope when it identifies the nature of the information sought, the importance and relevance of the information to a potential significant impact, and explains the reasons why the information was not identified during scoping and why it should be included in the review at a later stage. Given the meaningful developments in the Town’s land use policies in the intervening two years that had passed between issuance of the Final Scope and the Board’s first receipt of the Initial DEIS, the Board’s November Letter explained the Board’s specific request that the Applicant revise the Initial DEIS to analyze the Project’s consistency with the Town’s Draft Comprehensive Plan, which was then before the public and Town Board for review and approval.

Though the November Letter clarified that each of the Listed Deficiencies was proper pursuant to the Final Scoping Document, and 6 NYCRR 617.9(a)(2) and 617.8(f), the

November Letter indicated that the Planning Board would consider accepting the Initial DEIS for public review if the Applicant would revise the Initial DEIS to address a reduced number of Listed Deficiencies including only those requests for revisions to Sections 4.2 Executive Summary; 4.3 Introduction/Description of Action; 4.4 Environmental Setting/Existing Conditions; 4.5.1 Impact on Surface Water, Groundwater Resources, and Flooding; 4.5.6 Impact on Transportation; and 4.5.10 Consistency with Community Plans. The Planning Board requested the Applicant address only those sections because the Planning Board believed they were most critical to assist public review and ensure the DEIS contains an accurate description of the proposed action, plus reasonably supported discussions of significant impacts, alternatives, and mitigation measures requested by the lead agency.

Considering the reduced set of issues to be addressed prior to public review, and the Board's prior determination that the Initial DEIS contained a larger set of Listed Deficiencies, the Board's November Letter expressly reserved its rights to raise any and all of the Listed Deficiencies as the Board's public comments on the DEIS if ultimately accepted for public review. *See FEIS, Appendix 3, citing SEQR Handbook, p. 129.* The Board's November Letter explained that under SEQR when a fundamental disagreement occurs between a project sponsor and the lead agency regarding the content of a DEIS, the lead agency may proceed to accept that DEIS for public review, but explain the disagreement in its notice of completion and invite public comment related to the disagreement itself, in addition to comments on the DEIS. The Board's November Letter stated that if the Applicant would provide a revised DEIS to the Town by December 7, 2022 that in good faith addressed the reduced set of deficiencies, the Planning Board would be in a position to accept the DEIS as complete for public review at a Planning Board meeting on December 21, 2022.

By letter dated December 6, 2022 ("Project Sponsor's December Letter") the Applicant notified the Board that the Applicant again refused to revise the Initial DEIS in response to even the reduced set of Listed Deficiencies described in the Board's November Letter. By letter to the Applicant dated January 5, 2023 ("Board's January Letter"), the Planning Board reiterated that to assist public review of the document, the Project Sponsor should revise the Initial DEIS to address the Listed Deficiencies, specifically as reduced in the Board's November Letter. The Board's January Letter outlined the simple changes to the document that the Board had requested in the Deficiency Determination and as reduced in the November Letter, and again requested the Applicant make the necessary revisions to the Initial DEIS because the Board was eager to move the DEIS forward to public review. The January Letter promised that if the Applicant submitted a revised DEIS that in good faith addressed the deficiencies by February 1, 2023, then the Board would work to review and accept the document for public review at its February 15, 2023 meeting.

The Applicant replied by letter dated January 31, 2023 ("Project Sponsor's January

Response") and once again refused to make any revisions to the Initial DEIS, not even minor revisions to include existing documents in the Applicant's possession, not simple revisions to the executive summary, nor even straightforward revisions to the Project description, nor any other revisions in response to the Board's repeated and earnest requests for basic information typically included in a DEIS prepared by an applicant. The Project Sponsor's January Response threatened litigation against the Town and Board if the Board would not move the DEIS forward to public review at its February 15, 2023 meeting.

By letter dated February 21, 2023 ("Board's February Letter") the Board wrote the Applicant to assert its continued disappointment at the Applicant's refusal to submit a revised DEIS, and to note that the Board was perplexed that the Applicant would simply refuse to revise the Initial DEIS rather than make revisions (some relatively minor) to respond to the Board's reasonable requests. In keeping with the collaborative process that SEQR intends for the EIS process, the Board's February Letter requested a meeting with the Applicant to discuss the Listed Deficiencies and the ongoing disagreement between the parties and to seek a good faith resolution of the dispute.

Representatives of the Planning Board met with representatives of the Project Sponsor on March 17, 2023 (the "March Meeting") in a good faith effort to resolve the Applicant's refusal to address the Listed Deficiencies and continued insistence that the Initial DEIS was complete as submitted. Thereafter, the Applicant made superficial revisions to the Initial DEIS and submitted a revised Draft Environmental Impact Statement to the Board on April 5, 2023 (the "DEIS"). The DEIS was the same as the Initial DEIS except for minor changes, including: the addition of a single aerial view of aggregate stockpiles (DEIS, Figure 3); a purported stormwater pollution prevention plan map (DEIS, Figure 4) that is in fact a site plan for a separate operation on Site; additional narrative discussion of aggregate use and storage in Section 4.5.1, and of the Project's consistency with the Town's Comprehensive Plan in Section 4.5.10.

The DEIS (just like the Initial DEIS) simply repurposed certain air quality modeling and odor analyses that had been prepared for the Project Sponsor's potential asphalt operation at the Alternate Niagara Site. In addition to inappropriately repurposing documentation prepared for a different site and facility, the DEIS lacked information about the Project at the Site that would be necessary to allow the Board to conduct a meaningful review of the Project's environmental impacts, particularly with regard to impacts from stormwater, air, noise, odor, traffic and consistency with community plans. Despite repeated attempts by the Planning Board to resolve good faith differences with regard to which information and analysis should be included in the Environmental Impact Statement for the Project, the Applicant continually refused to revise the DEIS to address the Listed Deficiencies, but for minor changes that followed months of correspondence and the March Meeting

Upon its review of the DEIS as revised April 5, 2023, the Board found it still suffered from each of the Listed Deficiencies previously identified in the Deficiency Determination and subsequent correspondence, but that the DEIS did contain a sufficient description of the proposed Action, plus some reasonably supported discussions of significant impacts, references to alternatives, and cursory review of mitigation measures requested by the lead agency. Therefore, the Board could conclude that the DEIS met SEQR's bare minimum requirements to assist public review.

However, because the Planning Board believed that the DEIS still contained those Listed Deficiencies, the Planning Board wrote the Applicant on May 1, 2023 ("Board's May Letter") to advise the Applicant that the Board was considering a path forward where it would accept the DEIS as revised April 5, 2023 for public comment to invite public comment on the DEIS in addition to the Listed Deficiencies, and to propose a reimbursement agreement whereby the Applicant would reimburse the Town for the Planning Board's costs in preparation of the FEIS (which the Planning Board anticipated would be considerable in light of the many repeatedly asserted deficiencies in the DEIS). The Applicant did not respond to the Board's May Letter.

Ultimately the Planning Board accepted the DEIS subject to the Listed Deficiencies as described in the Notice of Completion of the DEIS issued on May 4, 2023. The Notice of Completion of the DEIS invited public comment on the DEIS itself and the dispute regarding the Listed Deficiencies through the comment period ending July 28, 2023 ("DEIS Comment Period"). Copies of the DEIS and the Notice of Completion of the DEIS were prepared, filed, published, and distributed in accordance with 6 NYCRR 617.12 and made available for public review at the Town Hall, and posted on the Planning Board's website.

During the DEIS Comment Period, the Board held two SEQR Hearings on June 14, 2023 and July 12, 2023 ("SEQR Hearings") to receive comments directly from the public, and received more than 150 individual comments (the "Public Comments"). In light of the fundamental disagreement between the Lead Agency and the Project Sponsor about the inclusion of necessary information in the DEIS, the Board repeated its criticisms of the DEIS and reiterated the Listed Deficiencies as the Board's public comment on the DEIS by resolution adopted at the Board's July 19, 2023 meeting ("Board's Public Comment"). The Public Comments also included written comments from Interested/Involved agencies, such as the NYSDEC and the Erie County Department of Environmental Planning ("ECDEP"), which requested additional information and analyses similar to those requested by the Board in the Listed Deficiencies.

Particularly, the NYSDEC's comment letter dated July 26, 2023 ("NYSDEC Comments on the DEIS") echoed the Planning Board's requests for additional Site-specific and Project-specific information in the Listed Deficiencies. The NYSDEC Comments on the DEIS noted that though there is a pending Air State Facility Permit Application ("ASF Application") for the Project, that ASF Application was determined to be incomplete by

a letter to the Applicant dated November 5, 2019. The NYSDEC Comments on the DEIS further noted that the Applicant had inadequately included in the DEIS a draft Air State Facility Permit and accompanying air and odor analysis prepared for the Alternate Niagara Site. The NYSDEC's Comments on the DEIS requested that the DEIS and its analyses be supplemented with current emissions factors, additional stormwater information, and a Site-specific air and odor analysis of the Camp Road location in the Town of Hamburg (and not analyses of the Applicant's previously pursued project at a different location in the Town of Niagara on Whitmer Road). The NYSDEC Comments on the DEIS also noted that the DEIS should be revised to consider a variety of mitigation measures that had not been evaluated by the Project Sponsor, such as:

- Mitigations for emissions from the liquid asphalt storage tank proposed by the Project.
- Mitigations for the Plant's drum mixer and heating system, burner and storage silos, conveyors and load-out operations.
- Mitigations for trucks leaving the Site loaded with hot mix asphalt and associated emissions.
- Recommendations for annual tune-ups, daily record keeping and monitoring, temperature limitations.
- Requirements for reclaimed/recycled asphalt pavement to be used in Plant materials.

The Board also received input during the Public Comment Period from the experts it retained to assist with the Project's SEQR review. The Board retained GHD Consulting Services, Inc. ("GHD") to provide expert review of the Project's noise, traffic, and stormwater impacts and EA Engineering, P.C. and its Affiliate EA Science and Technology ("EA") to provide expert review of the Project's air, odor and emissions impacts. The Board received a report prepared by GHD (the "**GHD Report**") and a technical memo from EA ("**EA Technical Memo**") as public comments from those experts during the Public Comment Period. Both the GHD Report and the EA Technical Memo indicate the DEIS's analyses of and conclusions regarding the Project's impacts are deficient and based on incomplete or underdeveloped Project information as supplied by the Applicant, and often rely on outdated or inapplicable data and modelling derived from alternate locations/facilities not established to be sufficiently comparable to the Project on the Site in the Town (the GHD Report and the EA Technical Memo are together the "**Expert Reports**").

The GHD Report found significant deficiencies with regard to the DEIS's analysis of the Project's impacts to stormwater, traffic and noise. Particularly with regard to stormwater impacts, GHD noted that the Stormwater Pollution Prevention Map as labeled in Figure 4 of the DEIS, was not a Stormwater Pollution Prevention Map for the Project, but rather, was merely a site plan for Great Lakes Concrete Products, LLC which does not show the proposed Project at all. *See FEIS § 3.4.5.* Similarly, the EA Technical Memo called out deficiencies in the DEIS's analysis of air, odor, and

emissions impacts. The EA Technical Memo echoed the NYSDEC Comments on the DEIS and stated that the DEIS's analysis of air impacts was inappropriately based upon a draft NYSDEC air permit issued for the Alternate Niagara Site in lieu of generating new Site-specific and Project-specific calculations to reflect the actual proposed operations of the Project at the Site. The EA Technical Memo concludes that "it is not typical nor appropriate to assess air quality impacts for the Project based on the information provided for the Niagara Facility." *See* FEIS § 3.5.5. The EA Technical Memo further notes that the DEIS's air and odor analyses do not include emissions from the Project's proposed 25,000 gallon liquid asphalt storage tank based on the DEIS's application of outdated regulations that the NYSDEC has since revised at Part 201-3.2(c)(21) so that liquid asphalt storage tanks in excess of 10,000 gallons are no longer permit exempt sources. The EA Technical Memo concludes that "[w]ithout such an analysis of the 25,000 gallon liquid asphalt storage tank, the Project's air emissions are underestimated and the DEIS's conclusions regarding Project impacts to air quality are, therefore, inaccurate." The NYSDEC Comments on the DEIS also noted the outdated status of the DEIS's air analyses and explained that ambient air contaminant regulations have subsequently been revised, such that the DEIS and its analyses should be updated to "reflect current regulatory requirements."

Upon the close of the Public Comment Period, the Board wrote the Applicant on August 9, 2023 and enclosed all Public Comments. The Board called the Applicant's attention especially to the NYSDEC Comments on the DEIS, the ECDEP's Comments; the Board's Public Comment, the GHD Report and the EA Technical Memo, which as described above all included substantive criticisms of the DEIS's analyses and requests for supplemental information. The Board's August Letter requested that the Applicant summarize all substantive Public Comments and provide the Applicant's responses thereto, including supplemental analyses and revisions to the DEIS language as would be necessary to respond and accurately and adequately assess the Project's environmental impacts. The Board's August Letter stated the Board would work to issue the FEIS at the Board's meeting on October 18, 2023, and requested the Applicant's responses no later than September 15, 2023 to allow sufficient time for the Board to consider and incorporate into the FEIS.

The Applicant sent the Board a letter on September 15, 2023, but did not summarize the substantive Public Comments, nor provide any supplemental analyses to aid the preparation of an adequate and accurate FEIS for the Project. Instead, the Applicant's September Letter re-attached the NYSDEC Comments on the DEIS and stated that in order for the Project Sponsor to be able to respond, the Board must first request that the NYSDEC complete its review and approval process for an applicable air quality permit: "In order for the [NYSDEC] to complete their determination for the Camp Road site, they require municipal approval. We want to resolve the issues outlined in the [NYSDEC Comments] but cannot unless the Town instructs the [NYSDEC] to complete the review. I am asking that the Town of Hamburg request the DEC to complete their

approval of the ASF on Camp Road contingent upon municipal approval.”

The Board’s letter in reply dated September 21, 2023 reiterated SEQR’s basic requirements and procedures for the Applicant, which do not allow the Lead Agency, NYSDEC, or any other interested agency to issue “contingent” approvals or permits for the Project prior to the completion of the Board’s SEQR review and the filing of the final environmental impact statement for the Project and subsequent findings by the Lead Agency. The Board again explained to the Applicant that it aimed to issue the FEIS for the Project at the Board’s October 18, 2023 meeting, and that it would prefer to have the benefit of the Project Sponsor’s responses to the NYSDEC Comments, ECDEP Comments, and other substantive Public Comments, including the GHD Report and EA Technical Memo.

On October 18, 2023, consistent with the Applicant’s prior refusals to participate meaningfully in the EIS process, the Board received a brief four-page letter from the Applicant with nine bullet points offering some cursory responses to a handful of the Public Comments (“**Applicant’s October 18, 2023 Letter**”). The Applicant reattached prior correspondence already considered by the Board regarding the DEIS and Listed Deficiencies, and provided a letter from the Applicant’s traffic engineer, Passero Engineering and Architecture (“**Passero**” and the “**Passero Letter**”) to respond to the GHD Report’s traffic related comments on the DEIS and the Traffic Impact Study attached to the DEIS as Appendix L (the “**TIS**”). The Passero Letter offered minor clarifications, but no additional substantive information or analysis, and only reasserted the DEIS’s conclusion that the Project would not have significant adverse impacts to traffic. The Applicant’s October 18, 2023 Letter, together with all attachments, including the Passero Letter, was attached to the FEIS as Appendix 13. The Board’s traffic consultant, GHD, reviewed the Passero Letter and prepared a letter to the Board dated October 27, 2023 with an overview of the Passero Letter’s responses and confirmed that it fails to substantively address the deficiencies in the DEIS’s traffic analysis and related conclusions. GHD’s October 27, 2023 letter to the Board is the “**GHD Review Letter**” and is attached as **Exhibit B**.

The Applicant’s October 18, 2023 Letter also declined to respond substantively to any of the NYSDEC Comments on the DEIS and referred to the NYSDEC’s recommendations to evaluate certain mitigation measures as “premature and speculative.” The Applicant’s October 18, 2023 Letter also criticized the EA Technical Memo as “premature and speculative” and further charged that it was “not accurate” because the EA Technical Memo commented that the DEIS’s emissions calculations do not account for a 25,000 gallon liquid asphalt cement storage tank. The Applicant’s October 18, 2023 Letter stated “[the tank] is referenced many times in the [DEIS] modeling calculations.” A review of the DEIS and its Appendix E indicates that although the tank is referenced, it is regularly referred to as a “permit exempt source,” which is not accurate under the latest applicable regulations consistent with the NYSDEC Comments on the DEIS and

the statements in the EA Technical Memo. The Applicant's October 18, 2023 Letter otherwise declined to respond to any Public Comments and completely deferred to the Lead Agency to determine which Public Comments were substantive and respond accordingly.

Based on the foregoing and all the Board's correspondence with the Applicant regarding the appropriate content of the EIS, the Planning Board finds these deficiencies to be a result of the Applicant's consistent refusal to participate meaningfully in the SEQR process for the Project. Instead, the Applicant has provided inadequate, often outdated or inapplicable information and analysis, and refused to make any substantive additions or revisions. This lack of meaningful participation impermissibly constrains the Planning Board's ability to fulfill its obligations under SEQR.

2. *Despite the Planning Board's good faith efforts, the DEIS and FEIS do not contain information necessary to evaluate the Project's potential environmental impacts*

As detailed above, the Planning Board has attempted to rectify the inadequacy of the information provided by the Applicant throughout the SEQR review of the Project. Despite these good faith efforts, the Applicant has substantively declined to provide further information necessary for the Planning Board to fulfill its obligations under SEQR. As a result, the DEIS remains critically deficient, and the FEIS can now only function as a summary of these deficiencies.

Of the Listed Deficiencies more fully detailed in the FEIS, the analyses of the following areas of Project impact are most significantly lacking due to the Applicant's refusal to supplement or revise the DEIS in response to repeated requests from the Board:

Impacts to Water

Section 4.5.1 of the DEIS fails to provide meaningful analysis of the Project's potential impacts to regulated water bodies as required under the Final Scoping Document and as requested by the Board. Contrary to the requirements of the Final Scoping Document, and numerous requests by the Planning Board, the DEIS fails to provide any analysis of potential impacts to downstream waterbodies. The Final Scoping Document specifically states that "particular attention needs to be taken with the run-off from the Site that goes through the culvert on Sunset Drive and into the Forest Glen neighborhood." The DEIS makes no mention regarding the run-off from this culvert nor does it discuss potential impacts that may occur, beyond directing the Planning Board, and the reader, to "refer to the NYSDEC. They have readily available material of the drainage system under their jurisdiction after it leaves the property that this project is located on." See FEIS § 3.4.4.

Further, the DEIS asserts that a SPDES MSGP has been obtained for the Site "to ensure

adequate water quality in the Town of Hamburg” and that “water runoff from this site is monitored, approved, and protected by the NYSDEC Division of Water through a SPDES permit.” The DEIS fails to provide any documentation on such a SPDES MSGP aside from the general assertion that it exists. Failure to provide a detailed description of water quality protection under the permit’s terms and/or to analyze the effectiveness of the current permit terms for a hot mix asphalt plant significantly interferes with the Planning Board’s obligation to take a hard look at the water quality impacts of the Project or to analyze and develop appropriate mitigation. *Id.*

GHD found significant deficiencies with regard to the Project Sponsor’s analysis of stormwater impacts from the Project. First, GHD noted that the Stormwater Pollution Prevention Map as labeled in Figure 4 of the DEIS, was not, in fact, a Stormwater Pollution Prevention Map for the Project, but rather, was a site plan for Great Lakes Concrete Products, LLC and does not show the proposed Project at all. Further, GHD found that Figure 4 contained several unlabeled storm system inlets and a drainage swale but no silt fence or other erosion controls were shown. Such features must be shown to qualify as a pollution prevention plan. *See* FEIS § 3.4.5.

GHD further observed that the DEIS fails to provide any information regarding downstream connections to the Project’s stormwater system. GHD notes that typically information regarding downstream connections consists of information such as: the receiving water body that the stormwater feature ultimately drains to, the stormwater flow quantity before and after the Project, duration of flow, and type and size of the conveyance facility. GHD concludes that the existing conditions of downstream connections must be incorporated into the development of a reasonable stormwater management plan and identification of appropriate mitigation measures. *Id.*

GHD also points to several other flaws in the DEIS analysis of impacts to surface waters. GHD notes that Figure 4 identifies a stormwater retention basin which is not explained or described. In addition, the DEIS states that material stockpiles will be located to prevent runoff but no further discussion is provided. As such, GHD concludes that the DEIS does not contain sufficient analysis to support its conclusion that there will be no changes to discharges from the Site. *Id.*

The GHD Report also discusses discrepancies relative to the DEIS discussion of the SPDES MSGP. GHD explains that the DEIS states in Section 4.5.1 that the SPDES MSGP has been obtained for the Site, but in Section 4.5.9 it states the property owner will obtain a SPDES permit. GHD states that no details were provided in the DEIS regarding SPDES MSGP and that such information is typically provided by an applicant and is necessary to accurately assess the Project’s impact to stormwater. *Id.*

The GHD Report then identified the existing SPDES MSGP for the Site through an independent record search which was issued to Cheektowaga Concrete LLC, and was

issued for Sector E: Glass, Clay, Cement, Concrete and Gypsum products and with a Standard Industrial Classification (“SIC”) Code of: 3241 - Cement, Hydraulic, 3273 - Ready Mixed Concrete, and 3275 - Gypsum Products. GHD explains that while no additional permit would be necessary, the existing SPDES MSGP will require revisions to permit the Project which falls under a different industrial sector (Sector D, Asphalt Paving & Roofing Materials & Lubricant Manufacturers) and different SIC code (2951 for Asphalt Paving Mixtures and Blocks). *Id.*

GHD explains further that the existing SPDES MSGP would have required the implementation of a Stormwater Pollution Prevention Plan (“SWPPP”) but none was included in the DEIS for evaluation. The DEIS does state that the existing SPDES MSGP requires testing of stormwater leaving the site for compliance, but as pointed out by GHD, no testing data was provided. GHD states that submission of the existing SPDES MSGP and SWPPP for the Site should have been provided in the DEIS to allow the Board to conduct a thorough and meaningful review of the Project’s stormwater features and potential impacts and, impose appropriate mitigation as necessary. Therefore, GHD concludes, the DEIS “does not contain sufficient information to support the conclusion that stormwater impacts have been mitigated to the maximum extent practicable.” *Id.*

Impacts to Air

The Project Sponsor’s reliance on the Alternate Niagara Facility’s Draft Air State Facility Permit (“**Niagara Draft Air Permit**”) as the basis for its air impact analysis in Section 4.5.2 of the DEIS is inappropriate given that the Niagara Draft Air Permit was issued for an entirely different facility in an entirely different county. Further, the air regulations have been updated since the Niagara Draft Air Permit was issued. For instance, page 2 of the Niagara Draft Air Permit (which was included as Appendix E to the DEIS), states that permit exempt emission sources include the Project’s 25,000 gallon liquid asphalt storage tank. NYSDEC Regulations in 6 NYCRR 201-3.2 (effective February 25, 2021) have since removed the blanket exception of liquid asphalt storage tanks, instead limiting the exception to tanks under 10,000 gallons. As the storage tank exceeds such limit by 15,000 gallons, it is not exempt and Project emission calculations now must include emissions from the storage tank. *See* FEIS § 3.5.4

Furthermore, the DEIS provides no significant information or evidence that would allow a reasonable determination that the Alternate Niagara Site was substantially similar in operation to the Project such that impacts would be analogous. Moreover the Final Scoping Document required that the DEIS address the issues identified in a NYSDEC Notice of Incomplete Application dated November 5, 2019 issued to the Applicant in connection with the Plant at the Site (“**NOIA**”). The DEIS does not provide the NOIA, nor address any of the issues identified there. Further, the DEIS alludes to an updated odor analysis submitted in response to the NOIA but provides no further

information. *Id.*

Overall, the Project Sponsor's premise that the Alternate Niagara Site is sufficiently analogous to the Project such that materials prepared for that separate site could substitute for a proper evaluation of air impacts from the Project lacks sufficient support in the record to be relied on by the Planning Board. Moreover, reliance on the fact that NYSDEC previously issued the Niagara Draft Air Permit in no way obviates the Board's obligation pursuant to SEQR to take a hard look at the air impacts of the Project. Simply stated, the DEIS lacks adequate information on the Project's impacts to air quality to allow the Planning Board to take a hard look at the air quality impacts of the Project or to analyze and develop appropriate mitigation. *Id.*

The EA Technical Memo determined that "there are various inconsistencies in the DEIS and supporting documents . . . a number of technical issues must be addressed more completely and in greater detail to allow the [Planning Board] to conduct a complete analysis under SEQR and to determine what conditions and mitigation measures are appropriate for the Project." The following summarizes EA's findings:

- Many of the DEIS's analyses and conclusions are drawn from Appendix F to the DEIS, which is a NYSDEC Air State Facility Permit Application and supporting air modeling data that is not representative nor sufficiently applicable to the proposed Facility because it was originally prepared by the Project Sponsor for another hot mix asphalt plant proposed in Niagara County, New York.
- The Niagara Draft Air Permit attached as Appendix E to the DEIS contains material discrepancies in the description of the proposed Plant and improperly excludes a significant source of air emissions, a 25,000 gallon liquid asphalt storage tank that must be accounted for under current NYSDEC regulations.
- The Applicant's air emission calculations do not account for all the potential emission sources, which means that the completeness and accuracy of the air quality impact analysis, air toxics analysis and odor analysis in the DEIS, cannot be relied upon.
- The DEIS fails to adequately address the potential emissions of "blue haze" from the proposed Plant, including an assessment of how the potential off-Site impacts of blue haze and other atmospheric pollutants from the Project would comply with the Code § 280-133(C)(1)(b), which limits uses in the M-3 District from disseminating atmospheric pollutants, noise, or odor into any R, C, M-1 or M-2 District in the Town.
- A complete SEQR analysis must assess how blue haze and other atmospheric pollutants from the Project could be mitigated to the maximum extent

practicable, including an analysis from the Project Sponsor of the feasibility of utilizing, a blue haze control system for the Project. *See* FEIS § 3.5.5.

The EA Technical Memo indicates that the DEIS's analysis of air impacts was based upon the Niagara Draft Air Permit issued for a different facility with a materially different location in lieu of generating calculations which reflect the actual proposed operations of the Project. After review of the Niagara Draft Air Permit and the calculations it was based upon, the EA Technical Memo concluded that "it is not typical nor appropriate to assess air quality impacts for the Project based on the information provided for the Niagara Facility." NYSDEC similarly commented that the DEIS "should contain the ASF Permit application for the Camp Road site" and stated that assertions in the DEIS that the Project has a valid permit may be misleading to the reader. As explained by NYSDEC, "no DEC [Air State Facility Permit] exists for this site." *Id.*

In reaching its conclusions, the EA Technical Memo explained that the Niagara Draft Air Permit was issued by the NYSDEC pursuant to a now outdated regulation that previously would have exempted certain liquid asphalt storage tanks from consideration as air emissions sources. Specifically, the Niagara Draft Air Permit did not include emissions from the proposed 25,000-gallon liquid asphalt storage tank for the Project because the same was exempt under previous regulations. However, since February 2021, when the Niagara Draft Air Permit was issued, the NYSDEC revised Part 201-3.2(c)(21) so that liquid asphalt storage tanks in excess of 10,000 gallons are no longer a permit exempt source. EA concludes that "[w]ithout such an analysis of the 25,000 gallon liquid asphalt storage tank, the Project's air emissions are underestimated and the DEIS's conclusions regarding Project impacts to air quality are, therefore, inaccurate." NYSDEC also commented on the outdated status of the Niagara Draft Air Permit. Explaining that ambient air contaminant regulations have subsequently been revised, NYSDEC asserted that air permit applications contained in the DEIS "should reflect current regulatory requirements." *Id.*

EA also noted that the Niagara Draft Air Permit contains material inconsistencies with regard to the equipment to be utilized which render the permit calculations unreliable. As an example, the EA Report explains that page 1 of the Niagara Draft Air Permit states that the "dryer is fired by a Hauck Eco-Star II model 75 *liquid propane burner*" with a maximum heat input capacity of 83 MMBtu/hr. Whereas page 17 of the Niagara Draft Air Permit, under the Item 13.1, states that the dryer is fired by a Hauck Eco-Star II *natural gas burner* with a burner heat input rating of 0.25-MMBtu/ton aggregate (75-MMBtu/hr). Due to the DEIS reliance on the Niagara Draft Air Permit and these unresolved discrepancies, EA concludes that "the DEIS's conclusions with regard to air impacts are based on inaccurate and incomplete data associated with an analysis of a separate facility under outdated NYSDEC regulations." *Id.*

EA further reviewed and analyzed the emission calculations in the DEIS and found that they underestimate the Project's potential to emit ("PTE"). EA identified the following errors which must be corrected to accurately account for the Project's air emissions:

- The manufacturer's specification sheet including guaranteed emissions performance data, must be included to verify NOx, CO, and VOC emission factors.
- Correct for PM10 emissions that were underestimated in the DEIS's air emissions calculations. PM10 emission factor of 0.0039 lb/ton used in the calculation is only for filterable PM10. AP-42 Table 11. 1-3 also provides emissions factors for condensable inorganic PM and condensable organic PM. The correct analysis for the Project must use PM10 emission factor of 0.023 lb/ton as total PM including filterable PM10, condensable inorganic PM and condensable organic PM (Particulate matters released from bituminous processing facility include both filterable PM and condensable PM)
- Include an assessment of vapors from the Plant operations that load material into transport trucks that continue to release vapor from loaded material for a period of time following load-out operations, including the potential for off-Site impacts on transport routes away from the Site. The total organic carbon (TOC) emissions for the 8-minute period immediately following load-out (yard emissions) can be estimated using an emission factor of 0.0011 lb/ton of asphalt loaded as provided in AP-42 Section 11.1, page 11.1-9. These fugitive yard emissions need to be included to develop an accurate PTE calculation.
- Recalculation of load-out/yard emissions and silo filling/asphalt storage tank emissions which were mis-calculated or omitted from the calculations in the DEIS. Total PM, Organic PM, TOC and CO were calculated in the DEIS based on the emissions factors at Table 11.1-14 which are representative of drum mix plant load-out and silo filling. However, those calculations are flawed because they do not include fugitive yard emissions or emissions from the proposed 25,000 gallon asphalt storage tank as described above.
- Confirm the maximum capacity of the asphalt storage tank of 25,000 gallons since DEIS Appendix F Process Flow Diagram shows the asphalt storage tank as 30,000 gallons and include emissions from the asphalt storage tank using the procedures described in AP-42 Section 7.1, Organic Liquid Storage Tanks. *Id.*

In addition, EA found that the failure of the DEIS to accurately estimate the PTE for the Project results in compounding discrepancies regarding analysis of air emissions because the calculated PTE serves as a basis for air toxics analysis and odor analysis. Therefore, EA concludes, because the PTE for the Project was underestimated, the

“Project impacts on air will be greater than estimated by the air toxics analysis and odor analysis in the DEIS.” *Id.*

Further, the EA Technical Memo details that the DEIS wholly fails to account for “blue haze” which is emitted by hot mix asphalt plants from silo vents and truck load out stations and is composed of volatile organic compounds and toxic and odorous compounds. EA states blue haze is regulated under NYSDEC regulation 6 NYCRR 211.11 and Hamburg Town Code § 280-133(C)(1)(b) and must be accounted for in the DEIS, including mitigation of such impacts

EA performed an independent air quality analysis to assess fugitive dust/particulate Project impacts on air quality. This included analysis of fugitive particulate emissions and dust emissions from non-road mobile sources, truck traffic, solid material stockpiles, and transfer operations in order to evaluate fugitive particulates impacts at the Site boundary line. The results of the analysis indicated that fugitive particulate emission from the Project will have a significant impact to nearby M-2 district receptors which would not comply with the Code requirements in § 280-133(C)(1)(b) prohibiting dissemination of atmospheric pollutants into M-2 districts. EA noted that actual emissions from the Project are likely to exceed these results because EA was unable to include emissions from the proposed 25,000 gallon liquid asphalt storage tank due to a lack of information from the Project Sponsor on the tank. Notwithstanding, the conservative estimates provided in EA’s air modeling analysis indicate fugitive dust/particulate emissions from the Project will have “problematic impacts to the nearby M-2 District.” *Id.*

Additionally, NYSDEC commented that the Climate Leadership and Community Protection Act (“CLCPA”) analysis contained in Appendix P of the DEIS (“CLCPA Analysis”) was completed for the Alternate Niagara Facility. The CLCPA imposes broad carbon emission reduction mandates and requires NYSDEC to analyze whether a proposed action such as a permit approval will contribute to meeting the mandates of the CLCPA. The NYSDEC stated that the CLCPA Analysis in DEIS should be replaced with a new CLCPA analysis for the current proposed Project and should utilize the most current emission factors. *Id.*

Impacts to Transportation

The DEIS in Section 4.5.6 fails to provide any information, or visualization of truck routes as required by the Final Scoping Document and requested by the Board. Instead, the DEIS only provides that access will be routed through Camp Road and that access to the site from Elmview Road will be prohibited. Furthermore, the section contains no discussion of the type of vehicles entering and exiting the Site or the times in which customers or deliveries are expected beyond generally stating employees will arrive between 6-7 AM and the Project will be operating between 7AM-4PM. It should be

noted that the Traffic Impact Study attached to the DEIS (“TIS”) also states the Project’s hours of operation as 7 AM to 4 PM but also states the Project will operate twelve (12) hours per day. *See FEIS § 3.9.4*

Furthermore, Section 4.5.6 provides no information regarding crash data or potential impacts as required under the Final Scoping Document. The TIS attached to the DEIS as Appendix L does discuss crash data, stating that three of the intersections studied have crash rates higher than the state average and that for one intersection, Camp Rd/ Sunset Dr, “NYSDOT may want to review signal timings and make adjustments to reduce the number of rear-end collisions.” The DEIS Section 4.5.6 also fails to provide any discussion of mitigation measures which could reduce impacts to traffic from the Project.

GHD analyzed Section 4.5.6 of the DEIS and conducted a comprehensive review of the its analysis of impacts to traffic and the supporting TIS. After careful analysis, GHD identified the following deficiencies:

- The Project Sponsor’s TIS does not include any analysis for road segments to meet the requirements of the Final Scoping Document, including existing traffic counts, forecasted traffic or truck volumes, volume-to-capacity ratios, or any operational or level of service calculations for any of the road segments in the study area that would typically be provided to analyze the project’s impacts on the road segments in the study area.
- The Project Sponsor’s TIS presents a discussion on the ITE Trip Generation Manual but does not describe why the ITE trip rates were not used, which gives the false impression that ITE was the source of the trip rates used, when in fact it was not the basis of the Applicant’s calculations
- The Project Sponsor’s TIS utilizes a trip generation calculation for employees based on six employees, with six in and six out trips during both the AM and PM peak hours. It is unlikely all employees would enter and exit the site in the same hour, and accordingly the Applicant’s TIS fundamentally relies on an inaccurate value, and results in unreliable conclusions regarding the Project’s impacts to transportation.
- A complete evaluation of Project related impacts to transportation must include an estimation and evaluation of the daily trip generation for Projected related traffic to and from the Site, and not be confined to just the AM and PM peak hours as in the Applicant’s TIS. The Project’s daily trip generation is typically in a TIS and is necessary to evaluate the Project’s impact on the transportation system.

- Page iii of the Project Sponsor’s TIS states the Plant will typically operate from 7:00 AM-3:00 PM (with certain instances of nighttime operation for overnight paving jobs). Meanwhile, page 6 states the plant will operate from 7:00 AM-3:00PM, but also states the Project will operate for 12 hours per day. These inconsistencies make it difficult to understand when the Project will be generating traffic and difficult to evaluate the analysis and recommendations presented in the Applicant’s TIS.
- The Project Sponsor’s TIS utilizes trip generation data for truck traffic to and from the Site that fails to include trucks delivering raw materials to the Site. Without this additional delivery data, the Applicant’s TIS entirely discounts a source of traffic associated with the Project.
- The Project Sponsor’s TIS states that the existing concrete facility on the Site generates 20 trucks per day and the Project’s asphalt operation will generate 50 trucks per day, for a total of 70 trucks per day. The Project Sponsor’s TIS should separate the existing Site traffic from the proposed Site traffic so that the impacts of the Project can be evaluated. The existing traffic counts presented in the Project Sponsor’s TIS are inconclusive if the existing operation is currently generating 20 trucks per day.
- The Project Sponsor’s TIS states: *The proposed Asphalt Plant Project will add approximately 50 truck trips per day resulting in a total of approximately 70 truck trips per day generated by the site. Given that the Project will operate 12 hours per day, approximately 4 to 5 truck trips per hour are anticipated.* This math is in error as five trucks per hour for 12 hours equals 60 trucks, which would result in a total of approximately 80 truck trips per day following the logic of the Applicant’s TIS which combines the assumed existing and proposed trips per day. Accurate calculation of traffic generated by the Project is a foundational element of a TIS that any subsequent analysis is built from, and therefore these inaccuracies in the Project Sponsor’s TIS with regard to calculation of the traffic generated by the Project render the conclusions in the Project Sponsor’s TIS unreliable. *See FEIS § 3.9.5.*

Furthermore, the GHD Report stated that the DEIS fails to identify the types of vehicles that will enter/exit the Site, the proposed routes of these trucks, or any discussion on how trucks would be discouraged from utilizing nearby residential streets. *Id.*

Lastly, GHD analyzed the TIS for errors and omissions pursuant to generally accepted traffic impact study guidelines and found 14 substantive deficiencies and inconsistencies related to Project’s trip generation estimates. GHD stated that certain critical inputs, summary sheets, and assumptions are absent, or unsupported in the TIS. Therefore, GHD determined, “the conclusion reached in the Project Sponsor’s TIS—

specifically that the Project will have no impacts on the existing transportation system lacks adequate analysis to support the conclusion and is therefore, not reliable.” *Id.*

The Passero Letter was provided by the Applicant in response to the GHD Report and the foregoing comments on the TIS. The Passero Letter attached some documentation for the comparative average crash rates presented in the TIS. The Passero Letter also attempted to clarify that the TIS was in error in its statements that the Project would operate twelve (12) hours per day, and confirmed the Project would operate from 7 AM to 4 PM. Though the Board notes that the DEIS’s description of the Project indicates the Project could operate outside of those hours, both overnight and on weekends. The GHD Review Letter concluded that the Passero Letter and the information provided there did not resolve the GHD Report’s prior comments on the TIS, nor the deficiencies with the DEIS’s analyses of the Project’s potential for impacts to traffic.

Impacts from Odor, Noise

The DEIS in Section 4.5.8 fails to provide information on the Project’s noise generating equipment and the noise level generated from each type as required under the Final Scoping Document and as requested by the Board. Furthermore, where existing operations would be used to analyze potential noise impacts, the Final Scoping Document required verification that such operations used the same equipment and was operated in the same manner as that planned for the Project. Neither the DEIS or the accompanying Noise Report from Neu-Velle (“**Neu-Velle Noise Report**”) provide any information on the existing asphalt plant used as a surrogate for the Project (“**Gernatt Plant**”) except to state that it was a larger operation located in a similar setting. Without understanding the nature of the Gernatt Plant, its operations, hours, the equipment used, the location and height of nearby buildings and uses, or topography and landscape composition, meaningful comparison with the Project is not possible and makes it impossible for the Board to take a hard look at the potential noise impacts of the Project. *See* FEIS § 3.11.4.1.

Furthermore, there are notable discrepancies between the information contained in the DEIS, and that which is cited in the Neu-Velle Noise Report. Notably, the DEIS provides a table summarizing the number and location of noise monitoring sites around the Site, listing nine in total, and indicating two which were apparently recorded in 2019. However, the Neu-Velle Noise Report only cites seven location monitored during 2022. It appears that the DEIS is attempting to incorporate data recorded from the 2019 Encorus Study attached as an appendix to the Neu-Velle Noise Report. The Neu-Velle Noise Report makes a single mention of the Encorus Study, stating that “*based on the previous data obtained by Encorus Group in September 2019*, as well as the data presented in this report, the assessments indicate that the proposed facility will not violate this ordinance or have an impact in the sound levels of the area.” Neu-Velle Noise Report at 7.

The Neu-Velle Noise Report provides no analysis of the methodology of the Encorus Study, which was completed one day after noise monitoring for the study was recorded. Nor does it account for the explicit discrepancy between the lower output (135,000 tons/year) analyzed in the Encorus Study in comparison to the current proposed Project as analyzed in the Neu-Velle Noise Report (150,000 tons/year). Furthermore, the DEIS makes no mention of the Encorus Study or attempt to clarify the above described discrepancies. As such, the Board is unable to determine the applicability of the Encorus Study at best, and the lack of explanation is misleading at worst. Therefore, for the reasons cited above, the analysis of noise impacts in the DEIS is deficient. *See* FEIS § 3.11.4.1.

The Board retained GHD to analyze Section 4.5.8 of the DEIS and the supporting documentation included by the Project Sponsor in the DEIS related to noise impacts from the Project. After careful analysis, GHD states that the Neu-Velle Noise Report attached as Appendix N to the DEIS does not adequately evaluate sensitive noise receptors within ½ mile of the Site as required by the Final Scoping Document. Furthermore, the Neu-Velle Noise Report is based on noise measurements which were collected over a period of only 15 minutes during a single day, which GHD explains is an inadequate amount of time to measure baseline noise. Additionally, the timing of these measurements, taken in the evening, is not representative of when the Project will operate, and provides a poor basis of comparison as noise levels may be elevated in the evening due to commercial traffic and extended peak traffic (this would make ambient noise levels appear much higher than they actually are). GHD states that this methodology does not provide information that is representative of the lowest, highest, or even the average noise produced during a typical day. *See* FEIS § 3.11.5.1.

GHD determined that the Neu-Velle Noise Report obtained only a single noise source measurement, rather than identifying and measuring primary noise sources. GHD explained that noise is very dependent on source height and location relative to off-site receptors, as well as site specific variables including lines of sight, distances, and reflection/absorption effects from different ground covering. The GHD Report indicates that use of a single point noise measurement is not an accurate way to evaluate off-site noise impacts of the Project with its numerous site-specific variables. *Id.*

GHD evaluated the Neu-Velle Noise Report noise modeling methodology and determined that some components were consistent with common practices or were generally appropriate. However, the short, often 15 minute, noise measurements for background sampling, as well as the timing of those measurements (in the evening when background noise levels are higher and when the Project will not be in operation) fail to meet industry standards and do not provide a representative baseline for evaluation of potential noise impacts. Rather, GHD states, noise monitoring for

baseline ambient noise should have been conducted at the time consistent with the operation of the Project and for the typical measurement duration of 24 hours or more. As such, GHD concludes that the Neu-Velle Noise Report is not acceptable and cannot be relied upon to accurately evaluate Project impacts from noise. *Id.*

The GHD Report also determined that the methodology regarding comparison of baseline noise measurements against the representative asphalt plant, the Gernatt Plant was deficient. The DEIS made no qualitative assessment of the Gernatt Plant's layout, operations, or equipment for comparison except to state it has a greater output than the Project. GHD characterized such methodology as a "high level-screening assessment" and concluded that by failing to account for location, height, intervening structures, line of sight, and ground absorption, the use of a single noise measurement from the Gernatt Plant was not suitable for a proper detailed study of the Project's potential noise impacts. *Id.* Additionally, despite repeated requests by the Board for clarification, the Applicant did not clarify whether or not the Gernatt Plant was actively producing asphalt at the time that Neu-Velle conducted the single sound measurement at that surrogate facility.

GHD also noted that the Neu-Velle Noise Report failed to evaluate noise from predicted heavy truck traffic to and from the Site. GHD states that based on the volume of trucks and their location to sensitive receptors, Project truck traffic could have a significant noise impacts to surrounding areas. Without such analysis, GHD concludes, the Project's impacts cannot be adequately evaluated. *Id.*

GHD concluded that given the absence of proper acoustical modeling, failure to evaluate site specific truck volumes, and limited evaluation of existing noise levels, the Neu-Velle Noise Report, and the DEIS by extension, "is fundamentally flawed and cannot be relied upon to adequately assess the Project's noise impacts." *Id.*

The Final Scoping Document required the DEIS to analyze the use of specific mitigation measures to reduce odorous emissions from the Site. However, as accurately asserted by the Board in the Listed Deficiencies, the DEIS contains no such analysis. Furthermore, the Final Scoping Document required the DEIS to perform specific odor dispersion modeling to determine impacts from odor, with specific emphasis on impacts experienced by non-industrial zoned properties located within ½ mile of the Site. Upon review of the DEIS however, and in light of public comment and expert EA Technical Memo, the odor analysis provided has significant discrepancies and inaccuracies which render such analysis deficient. *See FEIS § 3.11.4.2.*

One example of such deficiency is the discrepancy contained within the Odor Report attached to the DEIS as Appendix O. Specifically, the Appendix O Odor Report was prepared for the Alternate Niagara Site. Furthermore, the description of the facility in the Odor Report is of an HMA plant that will produce 450,000 tons per year of HMA.

The DEIS provides no discussion as to how the Odor Report conducted for a wholly different facility in a different location would be applicable to the Project. No meaningful information was provided on the equipment, operations, and build out of the Alternate Niagara Site which would allow reasonable comparison with the Project. The absence of necessary information to account for or evaluate the potential discrepancies between the Project and the baseline used in the Appendix O Odor Report, prevents the Planning Board from fulfilling its obligations to take a hard look at potential impacts and reasonably determine whether any adverse impacts may result from the Project. Therefore, the analysis of odor impacts in the DEIS is deficient. *Id.*

EA analyzed Section 4.5.8 of the DEIS and the supporting documentation included by the Project Sponsor in the DEIS related to odors and odor impacts from the Project. The EA Report provided a comprehensive review of the Odor Report included in the DEIS and concluded that the Odor Report does not adequately account for all odor emission sources or use appropriate assumptions. EA explains that the DEIS identified two sources of odor emissions from the Site: the daily filling of the asphalt oil storage tank, and the loading of hot mix asphalt into the storage silo and customer trucks. However, as the EA Report notes, the DEIS only analyzes impacts from the latter and wholly fails to account for odor emissions from the once or twice daily filling of the 25,000-gallon asphalt tank because such emissions are not "steady or continuous" and so are "difficult to quantify." EA indicates that emissions from the filling of the asphalt tank can be estimated and that such emissions are likely to be high on a mass rate basis. Therefore, EA concludes, failure to include this source renders the Odor Report, and by extension the DEIS's evaluation of odor impacts, unreliable. *See* FEIS § 3.11.5.2

EA also determined that the Odor Report did not use appropriate assumptions for modelling odor impacts. The EA Report explained that the Odor Report operated on the assumption that all odor would be emitted from the highest point of the asphalt storage silo, which EA determined was not appropriate because a higher release point would result in greater predicted dispersion of odor and result in modelling of less odor impacts. EA stated that the Odor Report must be updated to include facility wide emissions at lower elevations to provide an accurate analysis of potential odor impacts. *Id.*

The EA Report further analyzed the H2S Modeling included in the DEIS. EA Found that the H2S Modeling, which presented emission rates from sources including the combustion dryer, silo, and load-out operations, provided no reference to verify emissions rates. To verify the same, EA completed an independent odor analysis ("EA Odor Analysis") based on the Health Consultation reference document and determined that H2S emissions from the Project presented problematic impacts. EA found that while the unsubstantiated emissions rates provided in the DEIS fell below applicable ambient air quality standards for H2S ("NYSAQS"), the EA Odor Analysis, using substantiated emission rates based in the Health Consultation reference document,

indicates that the Project's H₂S emissions impact will actually exceed NYSSAQs. *Id.*

NYSDEC also reviewed the Odor Report, noting that it was prepared for the Alternate Niagara Site, not the Project. NYSDEC states that the Project Sponsor actually prepared an odor analysis in 2019 for the Project which should have been included in the DEIS for public review. Furthermore, the NYSDEC Comments on the DEIS state that the Odor Report needs to be revised to consider the potential impacts of additional constituent asphalt chemicals as well as analyzing odor from all aspects of the Project. NYSDEC also recognized the presence of nearby sensitive receptors to the Project and stated that odor detection is subjective and can vary from person to person and based on the weather. *Id.*

Consistency with Community Plans

The Town Board adopted amendments to the Zoning Code on January 23, 2023 to expressly prohibit bituminous processing facilities (like the Plant) at the Site (and anywhere else in the Town). Though the Project Sponsor contends that the Project is an expressly permitted use pursuant to the former Zoning Code Section 280-133(A)(10), that subsection regarding bituminous processing facilities was repealed. Therefore, under the Town's current and applicable Zoning Code, the Project's proposed use as a hot mix asphalt plant is prohibited throughout the Town, including at the Site.

Even if the Zoning Code Section 280-409 prohibition on bituminous processing facilities were not applicable to the Project, any use at the Site would be subject to the specific limitations on those uses pursuant to Zoning Code Section 280-133(C), which prohibits (among other things) a use in the M-3 District that would normally result in the dissemination of an atmospheric pollutant, noise or odor into any R, C, M-1 or M-2 District. As applicable to the Site, Zoning Code Section 280-133(C) applies to limit the Plant from causing any pollutant, odor, or noise, from entering the M-2 portion of the Site approximately 0.05 mile (or 264 ft.) south; the adjoining C-2 General Commercial District approximately 0.09 mile (or 475 ft.) to the east; or the R1 Residential District 0.16 mile (or 844 ft.) *See* FEIS Appendix 12. Based upon the GHD Report (Appendix 6) and the EA Technical Memo (Appendix 7), the Project may disseminate noise, odors, and pollutants to adjoining uses and zoning districts in violation of Section 280-133(C).

The Project is inconsistent with the Camp Road Overlay District which is meant to provide guidelines to proactively manage increasingly intense uses in the Camp Road corridor through supplemental regulations on development and architectural design to: (1) encourage the development of uses that are safe, orderly, and in harmony with the Camp Road corridor, (2) improve the visible character of the area, (3) protect adjoining residential uses and (4) enhance the character of the area as an important "gateway" or transitional area to the Village's smaller retail businesses.

According to the analysis presented in the FEIS Sections addressing air, noise and odor, and upon the GHD Report (FEIS Appendix 6) and the EA Engineering Technical Memo (FEIS Appendix 7), the Project is not in harmony with existing conditions because the Plant may disseminate noise, odors, and pollutants to adjoining uses and zoning districts in violation of Zoning Code Section 280-133(c)(1)(b). Accordingly, based on the Project's Sponsor's analyses in the DEIS, it is not apparent how the Project could proceed and achieve the Overlay's purpose to protect residential areas that surround the Site. The general nature of the Project's use as a highly intensive industrial activity with seasonal potential for evening, overnight and weekend production of hot mix asphalt is inconsistent with Village's character and smaller retail businesses, which-- traveling north on Camp Road from the Town into the Village include: salon/spa, restaurants, Baptist church, apartments, real estate/ insurance offices, vehicle sales/repair shops, bank, and similar uses. *See Appendix 12.* The Overlay is intended to promote well-designed, village-type, small-scale, street and pedestrian friendly development in and around the Camp Road corridor to create a charming "gateway" feeling in the area. The Project is expressly prohibited in the Town as a bituminous processing activity, a highly intensive industrial use with the potential for air, odor, and traffic impacts that is not in accord with these objectives of the Overlay district. *See FEIS Appendix 6 (GHD Report); FEIS Appendix 7 (EA Engineering Technical Memo).*

The Project is inconsistent with the Town's Comprehensive Plan recommendations for the Site. Camp Road corridor recommendations include the consideration of new mixed use zoning designations and the elimination of the industrial zoning in the areas along Camp Road. The Site on Camp Road is contiguous to the Village and is an example of an isolated portion of the M-3 District set apart from other examples of the M-3 District in the Town, which tend to be more concentrated in the northwest portion of the Town along the traditional industrial corridor on Route 5. *See Zoning Map; FEIS Appendix 2 (Comp. Plan Economic Development Map).* As such, the Comprehensive Plan's recommendations as applicable to the Site include specific directions to evaluate alternative and lesser intensive zoning district designations in place of heavy industrial uses. The Town's updated Comprehensive Plan specifically recommends the transformation of this Camp Road area to a "Gateway area" between the Town of Hamburg and the Village of Hamburg. The Comprehensive Plan appends the "Hamburg Gateway Revitalization Design Project" report to the Comprehensive Plan. This Hamburg Gateway Revitalization Design Project illustrates a specific plan to change the industrial areas formerly known as the Reifler Concrete Plant on Site and surrounding lands to a mixed-use development area.

And finally the Project is inconsistent with the Village's Comprehensive Plan. Based on

the Project's proposed use as a highly intensive industrial activity, with outdoor operations and the potential for air, odor, and noise impacts to surrounding areas, (see FEIS Appendix 6 (GHD Report); FEIS Appendix 7 (EA Engineering Technical Memo)), the Project is inconsistent with the Village's Comprehensive Plan and the kinds of enclosed, small-scale light industrial uses the Village's land use patterns envision for the area. Moreover, given the Village Plan's focus on limiting non-local, heavy truck traffic on Village roads and on the Route 75/Camp Road corridor, the Project's truck traffic for supplies and customer pick-up of the hot mix asphalt materials in large open back construction trucks (the DEIS estimates the Project would add 50 daily truck trips to the Site), is fundamentally incompatible with the Village's land use policies as embodied in its Comprehensive Plan.

Mitigation Measures

The Final Scoping Document required the DEIS to include a discussion of potentially significant adverse environmental impacts and a description of the proposed mitigation measures to be implemented to minimize any identified significant impacts to the maximum extent practicable. However, because the DEIS generally concludes that the Project would not have adverse environmental impacts), the DEIS is generally devoid of any evaluation of mitigation measures.

The NYSDEC Comments on the DEIS provided a list of proposed air and odor mitigation measures to be evaluated for the Project, including:

- Find an alternate location for the proposed asphalt plant which is not located near sensitive receptors, such as long-term care facilities and schools, or population centers.
- Use a different plant technology with lower emissions.
- Require regularly scheduled maintenance of high-efficiency baghouse and low NOx burner.
- Establish a lower rate of production and/or limitations on tonnage of asphalt production per year.
- Limit the hours the plant can operate. Avoid overnight hours when wind conditions may be calm.
- Establish dust mitigation through a dust control plan.
- Pave truck traffic roadways on-site for further dust mitigation.
- Heat to the minimum necessary temperature to reduce air emissions.
- Emissions from heating each liquid asphalt cement storage tank should vent through a tank vent condenser, activated carbon filter, or suitable control device to reduce volatile organic compound (VOC) emissions.
- When liquid asphalt cement is added to the storage tank, all vapors displaced from the tank should be ducted back into the delivery truck and returned to the asphalt supplier instead of releasing them into the environment. If this is not

possible, then the displaced vapors should be captured and minimized, eliminated, or destroyed using a tank vent condenser, activated carbon filter, or suitable control device so there are no odors from liquid asphalt tank fillings.

- Liquid asphalt should be loaded into the tank(s) at a rate that ensures proper operation of the pollution control equipment.
- Perform an annual tune-up of the liquid asphalt tank heating system and burner.
- Use electricity to heat the liquid asphalt instead of a combustion device.
- Perform an annual tune-up of the aggregate dryer/mixer burner.
- Perform a visual inspection of the baghouse tubesheet and internal structure within 30 calendar days after plant start-up and annually thereafter.
- Perform a black light inspection of the baghouse internals at the beginning of each operating season and within 30 calendar days after plant start-up. Record the inspection findings and any corrective actions taken. These records should be maintained for the life of the permit.
- Replacement bags, parts, and tools should be kept onsite, with the quantity adequate to replace at least 20% of the bags at a time.
- Inspect all ductwork for leaks and perform needed maintenance prior to operating during the asphalt pavement production season.
- The particulate matter (filterable, PM) plus condensable particulate matter (CPM) from the aggregate dryer emissions should not exceed 0.015 grains per dry standard cubic foot. This limit is achievable by new asphalt plants and would demonstrate that the facility is minimizing emissions from the aggregate dryer.
- The oxides of nitrogen (NOx) emissions from the aggregate dryer low NOx burner should not exceed 40 parts per million @ 3% O₂ or 0.048 lbs/million Btu.
- PM, CPM, and NOx compliance testing should be conducted within 180 calendar days of commencing operations.
- Enclose aggregate and hot mix asphalt conveyors and silos.
- Emissions associated with the drag conveyor, and/or hot screens, pug mill, and hot mix asphalt storage silo filling operations should be captured and returned to the drum mixer burner or controlled with coalescing filters or another acceptable method.
- The distance between hot mix asphalt and aggregate drop points should be minimized and/or shrouded.
- Collect and control blue smoke emissions from loading-out hot mix asphalt.
- Require all trucks loaded with hot mix asphalt to cover the hot mix asphalt with a cover rated for the high temperature of the asphalt to reduce emissions from the truck on-site and off-site.
- Control dust on the site roadways and plant property by applying water, calcium chloride, or other acceptable and approved fugitive dust control compounds. Dust suppressants should be applied often enough to prevent dust emissions from leaving the plant property. Tracking dust onto public roadways should be minimized using the same methods along with any other reasonably available

methods.

- All paved areas should be swept and watered, as needed, to reduce emissions

Given the risk of potential noise impacts from the Project, GHD recommended evaluation of the following noise mitigation measures:

- Administrative controls on hours of operation.
- Limitations on hourly volumes of heavy trucks during day and night periods.
- Utilizing stockpiles as noise barriers.
- Silencers on process stacks and emission points.
- Physical noise barriers such as engineered noise walls or concrete block ensuring that line of sight is blocked to the most sensitive receptor location.
- If any updated noise study recommends a proposed noise barrier it should be evaluated for proper placement on site to determine the required height/length for optimal noise reduction and should be required as a condition of site plan approval with the planning authority along with a post construction clearance letter in which a qualified acoustical engineer has confirmed that it was constructed to the segment dimensions (length and height) as detailed in an updated Noise Impact Study.
- Enclosing processing equipment in buildings (example - enclosing noisy equipment could result in an 8-10 dB noise level reduction, a 9-inch brick wall can reduce SPL by 45-50 dB).
- Additional considerations could be made with respect to noise controls for back-up beepers ('shushing,' ambient sensing). GHD recommends that these controls be made a requirement for all applicable outdoor equipment/vehicles, to the extent feasible.

The Applicant's October 18, 2023 Letter stated the NYSDEC's recommendations to evaluate mitigation measures were "premature and speculative," and the Applicant has otherwise refused to supplement its Project analysis to consider mitigation measures in any way despite repeated requests from the Board, and despite the many pertinent Public Comments. The many mitigation measures described above that should be evaluated to avoid or minimize the Project's areas of potential environmental impact to the maximum extent practicable are not evaluated in the DEIS.

3. The Planning Board is unable to assume the burden to rectify the deficiencies of the FEIS

The deficiencies described above regarding the Project's potential for impacts to stormwater, air, odor, noise, traffic, and consistency with community plans, and the DEIS failure to address mitigation measures are only a subset of the Listed Deficiencies as identified by the Board throughout the EIS process and described more fully in Section 3.0 the FEIS. In summary, the DEIS failed to provide the necessary information and analysis necessary to permit the Planning Board to fulfill its obligations as the lead

agency under SEQR.

The Project Sponsor provided the Planning Board with a DEIS that failed to provide the minimum information and analysis necessary for the Planning Board to fulfill its obligations under SEQR. Furthermore, the GHD Report and EA Technical Memo, the NYSDEC Comments on the DEIS, and ECDEP Comments have clarified that the scope of deficiencies is large and will take significant time and expense to rectify. Moreover, to remedy the Listed Deficiencies it would require additional Project-specific information and details that can only be supplied by the Applicant, who has refused to provide such information despite repeated, good-faith requests from the Board. The Project Sponsor has abdicated responsibility for the SEQR review of the Project, and the Planning Board lacks the information needed to fill the critical gaps in information which have been identified by the Expert Reports as detailed above.

These gaps include, but are not limited to, critical deficiencies with regard to the DEIS's analysis of impacts to air, water, transportation, noise, odor, human health, consistency with community plans, and development and discussion of potential mitigation measures. As detailed above and in Section 3.0 of the FEIS, the underlying reports relied upon in the DEIS are largely flawed beyond use because they are outdated, for a different project or site, and/or rely on inadequate assumptions or methodologies. The Planning Board has continuously attempted to provide the Project Sponsor with adequate opportunity to rectify these deficiencies as detailed in the Deficiency Correspondence, but these attempts have been rejected.

One extreme example of the Project Sponsor's abdication of its responsibility to provide relevant information throughout the EIS process is described in § 4.5.1 of the DEIS. Specifically, in the Listed Deficiencies the Planning Board requested analysis of impacts from water run-off from the Site through the Sunset Drive culvert and into the Forest Glen Neighborhood, as specifically required in the Final Scoping Document. In response, the DEIS stated simply, "refer to the NYSDEC. They have readily available material of the drainage system under their jurisdiction after it leaves the property that this project is located on. They can also answer any question relative to the drainage and its effects on any body of water in NYS." *See* DEIS p. 30; FEIS § 4.5.1. Conversely, the NYSDEC Comments on the DEIS noted several deficiencies and discrepancies which it asserted needed to be corrected or addressed, including information necessary to assess the Project's impacts from run-off.

The Planning Board finds the Project Sponsor's unwillingness to address the gaps of necessary information in the DEIS is impossible to overcome. The Planning Board is without the basic information necessary to address the gaps in the SEQR information which would require, among other things, the completion of entirely new, Site-specific and Project-specific studies and reports with regards to impacts to air, water, transportation, noise, and odor. These inadequacies in the DEIS are self-imposed by the

Project Sponsor, and severely inhibit the ability of the Planning Board to analyze the Project's adverse environmental impacts and determine which mitigation measures are practicable.

4. Given the significant deficiencies in information, the Planning Board is unable to certify the Project minimizes or avoids adverse environmental impacts to the maximum extent practicable, or that it incorporates those mitigation measures identified as practicable in the SEQR process

SEQR requires a lead agency, prior to approving an action, to weigh and balance public need and other social, economic, and environmental benefits of the project against significant environmental impacts. Thereafter, to approve a project, a lead agency must "certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable." 6 NYCRR 617.11(d)(5). Based on the information provided by the Applicant in the DEIS, as well as that information provided in the Public Comments and Exert Reports, the Planning Board is unable to make such certification for the following reasons:

Insufficient information on the benefits and public need of the Project

In order to perform the necessary weighing of the Project needs and benefits against potential adverse impacts, the Planning Board must review and analyze the same as discussed in the DEIS and FEIS. The DEIS fails to adequately address the public need and benefits of the Project in its Description of Proposed Action as required under SEQR. Specifically, the Project Sponsor failed to identify with any sufficient degree of clarity: (1) the existing asphalt market in Western New York; and (2) the need for a new asphalt plant in Western New York in general and the Town of Hamburg in particular. The SEQR Handbook explains that a "'[n]eed' is a lack of something required, desirable, or useful." SEQR Handbook, p. 113. The DEIS failed to detail what needs the Project fulfilled that were not being satisfied except to state that asphalt is a widely used construction material and the Project will reduce delivery times from those provided by five similar plants located within 13-30 miles of the Site. *See* DEIS at 19, 86. The Project Sponsor also fails to describe the public benefit of the Project other than summarily asserting it will result in increased tax revenue to the Town and will create six seasonal jobs.

Insufficient information on potential impacts

The information provided in the DEIS, in stark contrast to the requirements of the Final

Scoping Document; is critically inadequate to permit the Planning Board to take a hard look at potential adverse impacts from the Project and perform the necessary balancing under SEQR. As identified in the Expert Reports, NYSDEC Comment Letter, and the Public Comments, the DEIS and its underlying reports and studies are largely outdated, inapplicable to the Project, and/or rely on inadequate assumptions and methodologies.

Furthermore, several further deficiencies of the DEIS were noted by the Planning Board pursuant to the Listed Deficiencies as detailed in the FEIS in Section 3.0. These include the following:

- The DEIS fails to adequately address the public need and benefits of the Project in its Description of Proposed Action as required under SEQR. Specifically, the Project Sponsor failed to identify with any sufficient degree of clarity: (1) the existing asphalt market in Western New York; and (2) the need for a new asphalt plant in Western New York in general and the Town of Hamburg in particular. The Project Sponsor also fails to describe the public benefit of the Project other than summarily asserting it will result in increased tax revenue to the Town. This missing information makes it difficult for the Board to “balance social and economic considerations against environmental impacts that cannot be avoided or mitigated.” SEQR Handbook p. 85. Because this balancing process must be documented in the written SEQR findings ultimately issued by the Board, the failure of the Project Sponsor to provide any meaningful analysis of the public need and benefits of the Project severely hinders the ability of the Board to “certify that consistent with the social, economic and other essential considerations from among the reasonable alternatives available, the action remains one which avoids or minimizes adverse environmental effects to the maximum extent practicable . . .”

The Project Sponsor’s description of the Project also limits the ability of the Board to take a hard look at the potential adverse environmental impacts of the Project. For example, the description of the action in the DEIS fails to provide any information regarding stormwater management or on-site traffic circulation for the proposed Plant. This, in turn, limits the Board’s ability to analyze the Plant’s operation and its potential impacts on surface waters or traffic. In addition, the Project Sponsor’s description of the Project fails to sufficiently describe the hours of operation of the Plant. A statement is made that the Plant will operate infrequently in evenings and on weekends, but no further detail is given. This lack of specificity makes it difficult for the Board to sufficiently mitigate potential impacts from Project operation’s in evenings and on weekends. Furthermore, no information is provided regarding timing of deliveries to and from the Plant except that they will likely occur during work hours. Without the ability to analyze these potential impacts with any degree of

certainty, the Board is significantly hindered in its ability to carry out its SEQR obligations.

Lastly, the Description of Proposed Action fails to sufficiently describe the proposed access to the Site, as it provides two potential access points along two different roads but makes no attempt to indicate the likely primary access. This is significant in that it injects uncertainty with respect to impacts on transportation as variations in frequency of use of either access will necessarily have different impacts on traffic. This deficiency limits a fulsome analysis of the potential impacts of the Project. *See* FEIS § 3.2.4.

- The DEIS in its Environmental Setting/Existing Conditions section fails to provide sufficient description or detail regarding the environmental setting to help the reader understand the Project Sponsor's analysis of potential adverse impacts in the remainder of the DEIS. As an example, the description of existing drainage provides uncertainty with regard to the NYSDEC State Pollutant Discharge Elimination System ("SPDES") compliance of the Site or the Project. It states there is a current SPDES MSGP for the stormwater discharges from construction activities but qualifies that one is only required for activities disturbing more than one acre. It goes on to state that "[d]uring operations, the property will maintain an existing SPDES, Multi-sector General Permit for stormwater discharges associated with Industrial activity for the property as a whole." Despite citing to only a single permit for construction activities, the Project Sponsor goes on to state that "[a]s noted above the existing drainage and stormwater management is facilitated by an existing MSGP permit . . . [t]his permit currently covers the entire property, therefore there is no additional permitting necessary." Further, despite reference to an existing SPDES MSGP, no copy of the same was provided in the DEIS which would permit vetting of its applicability and adequacy, nor were any testing results provided to give the Board an understanding of the scope and frequency of outfall testing. Furthermore, there is no description of the quality or quantity of the discharge, its location, or the waterbody affected by such discharge or any waterbodies downstream from the Site, as required under the Final Scoping Document and requested by the Board. Without a sufficient description of the water pollutant discharge mechanisms currently in place, the Board is significantly hindered in its ability to assess the potential water quality impacts resulting from the Project.

As another example, the description of the current status of the existing industrial facility on the Site states that "[t]he existing property is industrial manufacturing of concrete and concrete related products" and states these operations as "current." However, it is understood by the Board that concrete manufacturing at the Site is not occurring, and has not occurred on the Site for a significant period of time. In addition, there is reference elsewhere in the

description to an existing tenant - Brenner Oil Company which has an Air Registration Permit from NYSDEC. No further details on Brenner Oil's operations are provided. The Final Scoping Document specifically required a description of the setting and conditions of the Project, as they currently exist. The Board requested clarification on this description on multiple occasions but no further information was provided by the Project Sponsor.

Other deficiencies in the Environmental Setting/Existing Conditions section include the Project Sponsor's failure to provide any information as to existing air quality (even though there is reference to air emissions from Brenner Oil) and noise levels as required by the Final Scoping Document and as requested by the Board. Additionally, as requested by the Board and detailed as requirements in the Final Scope, the description of the setting and existing conditions of the Site should have included the use of visual exhibits such as photographs, aerials maps and site plans to provide a full understanding of the context of the Project. This lack of sufficiently detailed information prevents the Board from taking a hard look at the environmental impacts of the Project and has significantly hindered the Board's ability to carry out its SEQR obligations. *See FEIS § 3.3.4.*

- In its comments to the DEIS, the ECDEP noted that the Project proposes the storage of liquid asphalt cement in a storage tank but the DEIS fails to provide any information about the storage tank location (i.e., elevation, grade, slope) that would assist the Board in evaluating the potential environmental risks associated with a tank spill or failure (possible spread, in size and direction. In addition, Public Comments on the DEIS described the land uses within an approximately half mile radius of the Site, and noted that such uses include: single family residences, townhomes and communities for the elderly, Elderwood, the Middle and High Schools, Howe Field, daycare centers, pediatricians, and the seasonal Farmer's Market on Church Street. *See FEIS § 3.3.5.*
- The DEIS in Section 4.5.3 fails to comply with the requirements of the Final Scoping Document because it limits study of impacts on plants and animals to only those listed as federal or state rare, threatened, or endangered species. The Final Scoping Document requires "a detailed discussion of the potential impacts of the proposed project on plants and animals" which includes but is not limited to those federally or state listed rare, threatened, or endangered species. The DEIS is wholly devoid of any information regarding the potential for impacts to non-listed plants or animals, including as identified by the Board, the Monarch Butterfly. The Board, in its Listed Deficiencies, explained that the Monarch Butterfly is a candidate species for federal listing and has been identified as being in the vicinity of the project by the USFWS mapping resources.

Furthermore, the DEIS states as evidence that no impacts to plants or animals

will occur because the Site has a history of industrial use which has eliminated greenspace. However, the limited current usage of the site coupled with its size certainly create the possibility of the presence of plants and animals at the Site. Moreover, the Final Scoping Document requires the analysis of impacts associated with the Project from “noise, light, and activity at the project site on adjacent areas.” The DEIS makes no mention or analysis of potential impacts from noise, light, or activities resulting from the Project that may impact species offsite. The lack of adequate baseline information about plants and animals currently present of the Site, the failure to address the potential presence of the Monarch Butterfly and the failure to address potential impacts to plants and animals on-Site or an adjacent undeveloped sites makes it impossible for the Board to take a hard look at the impacts of the Project on plants and animals or to analyze and develop appropriate mitigation. *See FEIS § 3.6.4.*

- The DEIS states that there will be no adverse impacts to aesthetic resources because “[t]he height of existing structures and significant elevation changes from the property line to public roadways will make the proposed facility difficult to perceive.” There is inadequate documentation to confirm same (visualizations from only five locations were provided). Further, the DEIS fails to adequately identify whether any local aesthetic resources would be impacted by the Project as the Project Sponsor declined to consult with the Town and Village regarding the presence of such local resources. The lack of this information makes it impossible for the Board to take a hard look at the aesthetic impacts of the Project or to analyze and develop appropriate mitigation. *See FEIS § 3.7.4.*
- As stated in the Listed Deficiencies, the Final Scoping Document requires the analysis of possible mitigation measures determined by OPRHP, the Hamburg Historical Society and the Village of Hamburg Historic Preservation Commission. The DEIS omits any discussion of the same apart from acknowledging the Village Historical Preservation Commission Letter. As explained by the Board in the Deficiency Letters, the Village Historical Preservation Commission Letter described a list of historical and archeological resources that may be eligible for listing with the State or National Registers and which are within 0.5 miles of the Site, and further requested a detailed map of the targeted area of potential Project activity for assessment, including off-site locations to be impacted by truck traffic from the Project. The DEIS utterly ignores these identified sites, let alone analyzes potential impacts or potential mitigation that may be necessary. As such, Section 4.5.5 of the DEIS fails to fulfill the requirements of the Final Scoping Document. This, in turn, makes it impossible for the Board to take a hard look at the cultural resource impacts of the Project or to analyze and develop appropriate mitigation. *See FEIS § 3.8.4.*
- The Final Scoping Document required the DEIS to consider the use of energy

efficient equipment for the Project, timing of Project activities to coincide with off-peak energy demand, and use of renewable sources of energy as alternatives to conventional fossil fuels. The DEIS provides no discussion of any mitigation whatsoever, instead resting on the assertion that the same is not required because there is existing capacity to serve the Project without requiring modifications to the energy supply system. However, regardless of available capacity to serve the Project, the DEIS was nonetheless required to consider ways to mitigate energy use by the Project. The Project Sponsor's failure to include this information in the DEIS makes it impossible for the Board to take a hard look at the impacts of the Project on energy sources or to analyze and develop appropriate mitigation. *See FEIS § 3.10.4.*

- The Final Scoping Document requires Section 5.0 to be a summary discussion of the mitigation measures identified with regard to each environmental impact throughout the DEIS. However, as the Project Sponsor concluded that the Project would not have adverse environmental impacts (other than air quality as noted above), the DEIS is generally devoid of necessary mitigation measures. As demonstrated throughout this FEIS Section 3.0, however, the Project Sponsor's failure to comply with the Final Scoping Document throughout its analysis of potential impacts, coupled with limited and flawed analysis of critical areas of environmental concern, render this Section 5.0 of the DEIS deficient. *See FEIS § 3.14.4.*
- The DEIS in Section 6.0 Alternatives to be Evaluated lacks adequate discussion of alternative technologies. The Final Scoping Document requires the DEIS to "identify and describe how the use of alternative asphalt technology (such as warm asphalt) would change the potential impacts analyzed in the [DEIS]." The DEIS provides a brief mention that WMA exists and then summarily dismisses the same as a viable alternative. It provides no actual evidence for its conclusions and provides no meaningful discussion on how the use of WMA would change the potential impacts analyzed by the DEIS. Failure to satisfy these requirements of the Final Scoping Document renders this subsection deficient under SEQR.

Furthermore, the DEIS fails to provide adequate analysis regarding potential alternative uses of the Site. The DEIS provides a brief analysis of potential uses of the Site as it was zoned and as it was envisioned under the prior 2007 Plan. It fails to mention potential uses of the property as envisioned under the new 2023 Plan and the Camp Road Gateway Area initiative. As a result, the DEIS lacks an adequate analysis of alternative uses of the Site as called for by the Final Scoping Document, and as such, is deficient. *See FEIS § 3.15.4.*

- The Final Scoping Document required the DEIS to analyze "impacts of the

proposed action in the context of other proposed projects (if any) in the vicinity of the project site.” As explained in the Listed Deficiencies, the DEIS fails to provide any analysis of, or even a clear description of, other existing or proposed projects on or in the vicinity of the Site. The DEIS considers cumulative impacts from those uses occurring wholly on-Site, and the evaluation of those uses is only in general terms, with no actual data or sources provided. The anecdotal analysis of existing on-Site uses, as well as the total lack of consideration or mention of nearby proposed or existing uses occurring off-site, render the DEIS deficient in its analysis of cumulative impacts. *See* FEIS § 3.16.4.

- The Final Scoping Document requires the DEIS to analyze whether the Project would encourage similar uses on the Site and in the area, and to illustrate where there are other heavy industrial users. As the Listed Deficiencies explains, the DEIS contains no such analysis. The DEIS contains two sentences regarding the potential for the Project to encourage similar uses which state, in sum, that the because there is minimal industrial land in the Town, which is close in proximity to the Site, “it is unlikely the project will induce additional development.” There is no detailed analysis to support this assertion and no study or data to obviate the anecdotal nature of the statement. SEQR requires lead agencies to take a hard look at potential environmental impacts prior to rendering a decision on a Project. The failure to provide any meaningful analysis renders the Section deficient. *See* FEIS § 3.17.4.
- The Final Scoping Document Stated that “[t]he appendices shall contain copies of studies and reports that supplement and support the narrative in the DEIS” and that “site-specific documents that are not readily available to the public should be included.” It then provided a list of suggested documents to include as appendices, including:
 - Minutes of relevant meetings of the Town of Hamburg Board;
 - The NOIA;
 - The current SPDES permit issued for the Project; and
 - An Engineer’s Report of Facility size and layout.

The DEIS fails to provide these documents, which were also requested by the Board in the Listed Deficiencies. These are critical documents needed to support assertions made in the DEIS with regard to potential impacts of the Project. They are also not readily available to the public as discussed in the Final Scoping Document. Without these documents, the Board is unable to verify conclusions of the DEIS which rest on the applicability or relevance of these documents. As such, the Appendices to the DEIS are deficient and not in compliance with SEQR requirements. *See* FEIS § 3.18.4.

Insufficient information on potential mitigation

As explained above, the DEIS fails to provide any meaningful discussion of potential mitigation measures for the Project (apart from conditions codified in the Niagara Draft Air Permit) except to assert that, because the DEIS indicates a lack of adverse impacts from the Project, no mitigation is necessary. As detailed above, as well as in the Listed Deficiencies, FEIS, Public Comments, and Expert Reports--the DEIS is fatally flawed and unreliable and the Expert Reports indicate there will likely be a number of significant impacts from the Project which require mitigation. The Expert Reports and NYSDEC provided the following mitigation measures determined to be necessary to analyze to ensure adverse impacts from the Project are adequately mitigated:

Air and Odor

- Find an alternate location for the proposed asphalt plant which is not located near sensitive receptors, such as long-term care facilities and schools, or population centers.
- Use a different plant technology with lower emissions.
- Require regularly scheduled maintenance of high-efficiency baghouse and low NOx burner.
- Establish a lower rate of production and/or limitations on tonnage of asphalt production per year.
- Limit the hours the plant can operate. Avoid overnight hours when wind conditions may be calm.
- Establish dust mitigation through a dust control plan.
- Pave truck traffic roadways on-site for further dust mitigation.
- Heat to the minimum necessary temperature to reduce air emissions.
- Emissions from heating each liquid asphalt cement storage tank should vent through a tank vent condenser, activated carbon filter, or suitable control device to reduce volatile organic compound (VOC) emissions.
- When liquid asphalt cement is added to the storage tank, all vapors displaced from the tank should be ducted back into the delivery truck and returned to the asphalt supplier instead of releasing them into the environment. If this is not possible, then the displaced vapors should be captured and minimized, eliminated, or destroyed using a tank vent condenser, activated carbon filter, or suitable control device so there are no odors from liquid asphalt tank fillings.
- Liquid asphalt should be loaded into the tank(s) at a rate that ensures proper operation of the pollution control equipment.
- Perform an annual tune-up of the liquid asphalt tank heating system and burner.
- Use electricity to heat the liquid asphalt instead of a combustion device.
- Perform an annual tune-up of the aggregate dryer/mixer burner.
- Perform a visual inspection of the baghouse tubesheet and internal structure

within 30 calendar days after plant start-up and annually thereafter.

- Perform a black light inspection of the baghouse internals at the beginning of each operating season and within 30 calendar days after plant start-up. Record the inspection findings and any corrective actions taken. These records should be maintained for the life of the permit.
- Replacement bags, parts, and tools should be kept onsite, with the quantity adequate to replace at least 20% of the bags at a time.
- Inspect all ductwork for leaks and perform needed maintenance prior to operating during the asphalt pavement production season.
- The particulate matter (filterable, PM) plus condensable particulate matter (CPM) from the aggregate dryer emissions should not exceed 0.015 grains per dry standard cubic foot. This limit is achievable by new asphalt plants and would demonstrate that the facility is minimizing emissions from the aggregate dryer.
- The oxides of nitrogen (NOx) emissions from the aggregate dryer low NOx burner should not exceed 40 parts per million @ 3% O₂ or 0.048 lbs/million Btu.
- PM, CPM, and NOx compliance testing should be conducted within 180 calendar days of commencing operations.
- Enclose aggregate and hot mix asphalt conveyors and silos.
- Emissions associated with the drag conveyor, and/or hot screens, pug mill, and hot mix asphalt storage silo filling operations should be captured and returned to the drum mixer burner or controlled with coalescing filters or another acceptable method.
- The distance between hot mix asphalt and aggregate drop points should be minimized and/or shrouded.
- Collect and control blue smoke emissions from loading-out hot mix asphalt.
- Require all trucks loaded with hot mix asphalt to cover the hot mix asphalt with a cover rated for the high temperature of the asphalt to reduce emissions from the truck on-site and off-site.
- Control dust on the site roadways and plant property by applying water, calcium chloride, or other acceptable and approved fugitive dust control compounds. Dust suppressants should be applied often enough to prevent dust emissions from leaving the plant property. Tracking dust onto public roadways should be minimized using the same methods along with any other reasonably available methods.
- All paved areas should be swept and watered, as needed, to reduce emissions

Noise

- Administrative controls on hours of operation.
- Limitations on hourly volumes of heavy trucks during day and night periods.
- Utilizing stockpiles as noise barriers.
- Silencers on process stacks and emission points.
- Physical noise barriers such as engineered noise walls or concrete block ensuring

that line of sight is blocked to the most sensitive receptor location.

- If any updated noise study recommends a proposed noise barrier it should be evaluated for proper placement on site to determine the required height/length for optimal noise reduction and should be required as a condition of site plan approval with the planning authority along with a post construction clearance letter in which a qualified acoustical engineer has confirmed that it was constructed to the segment dimensions (length and height) as detailed in an updated Noise Impact Study.
- Enclosing processing equipment in buildings (example - enclosing noisy equipment could result in an 8-10 dB noise level reduction, a 9-inch brick wall can reduce SPL by 45-50 dB).
- Additional considerations could be made with respect to noise controls for back-up beepers ('shushing,' ambient sensing). GHD recommends that these controls be made a requirement for all applicable outdoor equipment/vehicles, to the extent feasible.

See FEIS § 3.14.5.

Furthermore, the DEIS lacks adequate discussion of alternative technologies. The Final Scoping Document requires the DEIS to "identify and describe how the use of alternative asphalt technology (such as warm asphalt) would change the potential impacts analyzed in the [DEIS]." The DEIS provides a brief mention that warm mix asphalt ("WMA") exists and then summarily dismisses the same as a viable alternative. It provides no actual evidence for its conclusions and provides no meaningful discussion on how the use of WMA would change the potential impacts analyzed by the DEIS. Failure to satisfy these requirements of the Final Scoping Document renders this subsection deficient under SEQR. *See FEIS § 3.15.4.*

Further, the DEIS fails to provide adequate analysis regarding potential alternative uses of the Site. The DEIS provides a brief analysis of potential uses of the Site under outdated zoning regulations and community plans. It fails to mention potential uses of the property as envisioned under the new 2023 Plan and the Camp Road Gateway Area initiative. Therefore, the DEIS is deficient because it lacks an adequate analysis of alternative uses of the Site as called for by the Final Scoping Document. *Id.*

As a result of the failure of the DEIS to adequately analyze and discuss the needs and benefits, potential adverse impacts, and mitigation measures and alternatives for the Project, the Planning Board finds that it cannot reasonably "certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as

practicable.” 6 NYCRR 617.11(d)(5).

Exhibit A

FEIS Executive Summary

Introduction

This Final Environmental Impact Statement (“**FEIS**”) is issued by the Town of Hamburg Planning Board (“**Board**” or “**Planning Board**”) as Lead Agency for the proposal by A.L. Asphalt Corporation (“**Applicant**” or “**Project Sponsor**”) to construct and operate a Hot Mix Asphalt Plant (“**Plant**” or “**Project**”) at 5690 Camp Road (“**Site**”) in the Town of Hamburg (“**Town**”). The FEIS was prepared by the Board as Lead Agency pursuant to and in compliance with Article 8 of the New York State Environmental Conservation Law and its implementing regulations, commonly known as the State Environmental Quality Review Act (“**SEQRA**”). The Board retained expert consultants to aid its review of the Project and prepare this FEIS. Wendel Companies provided planning expertise; GHD Consulting Services, Inc. (“**GHD**”) provided expert review of the Project’s noise, traffic, and stormwater impacts (see Appendix 6 (“**GHD Report**”)); and EA Engineering, P.C. and Its Affiliate EA Science and Technology (“**EA**”) provided expert review of the Project’s air, odor and emissions impacts (see Appendix 7 (“**EA Engineering Technical Memo**”)).

Proposed Action & Description

The Project Sponsor proposes the construction and operation of a counter flow drum mix hot mix asphalt plant on an approximately 46-acre Site in the Town at 5690 Camp Road. The proposed Plant consists of: aggregate stockpiles, aggregate bins, conveyor belts, a drag slat conveyor to move bulk materials, a burner/dryer drum, bulk material storage hoppers and storage silos, a baghouse, liquid asphalt cement storage tank and heater, and a batching office. There are some existing bulk material stockpile bins and access ways on Site that the proposed Project would repurpose, but the Plant’s primary prefabricated components would be constructed at the Site on a footprint of 160 ft. x 200 ft.

Project Site & Description

The Site consists of approximately 46-acres at 5690 Camp Road. The proposed Plant would be on a portion of the Site that is in the M-3 Zoning District (“**M-3 District**”) and in the Camp Road Overlay District pursuant to the Town of Hamburg Zoning Code (“**Zoning Code**”). The M-3 District allows a variety of industrial uses on the Site pursuant to Zoning Code Section 280-133(A), but all uses are subject to the specific limitations at Zoning Code Section 280-133(C), which prohibits uses in the M-3 District that would normally result in the dissemination an atmospheric pollutant, noise or odor into any R, C, M-1 or M-2 District. Several of these other zoning districts immediately

adjoin the Site. Bituminous processing facilities, like the proposed Plant, are not permitted at the Site, (see Zoning Code Section 280-415).

The Town of Hamburg 2022 Comprehensive Plan as adopted by the Town Board in January 2023 (“**Comprehensive Plan**”) recommends that industrial zoning along Camp Road be removed from the Town’s Zoning Map particularly near the Village and the Site. See Comp. Plan, p. 28.

SEQR Process to Date

The Board received an application for Site Plan Approval for the Project in June of 2019 (“**Application**”). Thereafter the Board requested the Applicant prepare a Part 1 of the Full Environmental Assessment Form, which the Applicant prepared and submitted on September 6, 2019. *See DEIS, Appendix A.* At its September 28, 2019 meeting the Board classified the Project as an Unlisted Action. The Board determined that the Project may include the potential for at least one significant adverse environmental impact and issued a Positive Declaration pursuant to SEQR on November 4, 2019. *See DEIS, Appendix B.*

In December 2019 the Applicant brought a formal legal challenge to the Board’s classification of the Project as an Unlisted Action (NYSCEF Index No. 0001117/2019) arguing that it was instead a Type II action and therefore not subject to SEQR review. The Town filed a motion to dismiss the Petition, which the Court granted by decision filed January 21, 2020 stating “[t]his Court is not persuaded by [Applicant’s] argument that its project is not subject to SEQRA, because it should have been classified as a Type II action. The Court declined to accept the Applicant’s arguments, dismissed the legal challenge, and the Project’s SEQR review continued on. The Project Sponsor submitted a draft scope to the Board on March 6, 2020 and the Board issued a final scoping document on April 29, 2020 (“**Final Scope**” or “**Final Scoping Document**”). *See DEIS, Appendix C.*

Then, nothing happened for more than two years as the Project Sponsor declined to proceed with the Project in the Town of Hamburg, and instead pursued an alternate location for the Plant in the Town of Niagara (“**Alternate Niagara Site**”). After more than two years of declining to move forward with the Application, the Applicant submitted a proposed Draft Environmental Impact Statement on August 5, 2022 to move forward with the Project on the Site (the August 5, 2022 Draft Environmental Impact Statement is the “**Initial DEIS**”). By the time the Applicant submitted the Initial DEIS after the two year delay, the Town was well underway with a wholescale update of the Town’s land use plans. Beginning in 2019 the Town had formed a Comprehensive Plan Committee and Subcommittees to develop working drafts of an updated Comprehensive Plan (the Town-wide land use plan had not been updated since adoption of the prior 2007 Plan (defined below)). During the Fall of 2022 the Town

issued an updated Draft Comprehensive Plan and made it available for public review. The updated Comprehensive Plan was adopted by the Town Board in January 2023 (the “Comprehensive Plan”) and includes specific recommendations for the Site and surrounding area.

The Board, as Lead Agency in a coordinated SEQR review, determined the Initial DEIS was incomplete for commencing public review. The Board requested revisions to the Initial DEIS as detailed in a September 2022 Deficiency Determination that listed 19 material deficiencies (the “**Listed Deficiencies**”) in the Initial DEIS. *See Appendix 3.* Each of the Listed Deficiencies as identified by the Board is described completely in Section 3.0 below. For each Listed Deficiency, Section 3.0 provides an analysis of the deficiency as identified by the Board prior to the Public Comment Period, the Final Scope’s applicable requirements for the information that should have been included in the DEIS to allow an assessment of each area of potential impact, a summary of the relevant content (or lack of content) in the DEIS, an additional which outlines how the DEIS is deficient in a particular area of potential impact, and describes any further deficiencies on each area of impact that may have been identified during the Public Comment Period.

Through correspondence with the Applicant between October 2022 and February 2023 (which is described more fully in Section 1.3 below), the Board repeatedly requested that the Project Sponsor submit revisions and supplements to the Initial DEIS to resolve the Listed Deficiencies and allow the Project’s SEQR review to move forward, and the Project Sponsor continually refused to do so.

In response to the Board’s extensive and good faith efforts to engage the Applicant in the SEQR process over more than eight months, and following an in person meeting in March 2023 attended by representatives of the Board and the Applicant (also described in Section 1.3 below), the Applicant made superficial revisions to the Initial DEIS and submitted a revised Draft Environmental Impact Statement to the Board on April 5, 2023 (the “**DEIS**”). The DEIS (just like the Initial DEIS) simply repurposed certain air quality modeling and odor analyses that had been prepared for the Project Sponsor’s potential asphalt operation at the Alternate Niagara Site. In addition to inappropriately repurposing documentation prepared for a different site and facility, the DEIS lacked information about the Project at the Site that would be necessary to allow the Board to conduct a meaningful review of the Project’s environmental impacts, particularly with regard to impacts from stormwater, air, noise, odor, traffic and consistency with community plans.

Though the Board found the DEIS still suffered from each of the Listed Deficiencies, the Board accepted the DEIS subject to the Listed Deficiencies as defined in the Notice of Completion issued on May 4, 2023. *See Appendix 4.* The Notice of Completion set a public comment period that would close on July 28, 2023 (the “**Public Comment**

Period"). The Board held two SEQR Hearings during the Public Comment Period on June 14, 2023 and July 12, 2023, and received more than 150 comments on the DEIS and the Listed Deficiencies (the verbal comments at the SEQR Hearings and all written comments received during the Public Comment Period are the "**Public Comments**").

Public Comments & Responses

The Board received comments from interested and involved agencies, including the New York State Department of Environmental Conservation ("NYSDEC") and the Erie County Department of Environmental Planning ("ECDEP"), that raised concerns similar to the Board's requests as specified in the Listed Deficiencies. Notably, the NYSDEC Comments on the DEIS request that the Project Sponsor remove any materials, permit applications, air/odor modelling etc. in the DEIS that were prepared for the Alternate Niagara Site. In their place the NYSDEC Comments on the DEIS request the Project Sponsor provide appropriate Site-specific analyses and materials prepared for the Plant in the Town of Hamburg. The Board also received verbal and written comments from dozens of community members and Village and Town residents who opposed the Project due to its intense industrial use and potential for environmental impacts to the vibrant Town and Village communities around the Site.

Substantive public comments were received, summarized, and responded to on the following areas of potential impact:

- air quality,
- Project alternatives,
- consistency with community plans,
- cultural resources,
- cumulative impacts,
- environmental setting,
- human health,
- noise & odor,
- lack of available information about the Project,
- the Project Sponsor's resistance to engagement in the SEQR process,
- stormwater and surface water impacts; and
- potential impacts from increased truck traffic on Camp Road nearby the Town's gateway to the Village.

To date, the Project Sponsor has not responded substantively to the Listed Deficiencies, nor any Public Comments. The Applicant's refusal to respond to substantive Public Comments on the DEIS comes even despite an August 9, 2023 letter and a September 21, 2023 letter from the Board to request the Applicant's responses and Site-specific supplemental analyses to aid the Board in its preparation of this Final EIS. Though the Board would have preferred to have the benefit of the Applicant's responses to all

substantive Public Comments, in Section 5.0 of this FEIS the Board reviews, groups, summarizes and responds to all substantive Public Comments.

Corrections, Revisions & Supplements to the DEIS

Section 4.0 of the FEIS provides the corrections, revisions, and supplements to the DEIS that the Board determined were necessary to complete an accurate and adequate environmental impact statement for the Project.

The FEIS Section 4.0 revisions and supplements to the DEIS include significant revisions and in some cases outright replace the DEIS's analyses of areas of potential impact. Section 4.0 includes the revisions and supplements the Board found were necessary to:

- Accurately analyze the Site's location in a transitional area of the Town surrounded by a mix of residential and commercial uses and a variety of sensitive receptors (homes, schools, parks, outdoor gathering areas).
- Assess the Project's consistency with the Town's and Village's long range land use plans, and the Town's Zoning Code and its important recommendations and requirements for uses in the M3 District and the Camp Road Overlay District.
- Correct for the DEIS's reliance on air and odor analyses prepared for a separate plant previously proposed by the Project Sponsor at a different site in the Town of Niagara.
- Address the errors and omissions in DEIS's technical analyses and related conclusions on the Project's potential for impacts to stormwater, air quality, traffic, odor and noise, based on the GHD Report and EA Engineering Technical Memo attached as FEIS Appendix 6 and 7 respectively. Based on the GHD Report and the EA Engineering Technical Memo, many of these revisions note that the Project Sponsor has not established that atmospheric pollutants will not be disseminated into adjoining R, C, M-1 or M-2 zoning districts.
- Recognize that the Project Sponsor has refused to evaluate reasonable mitigation measures that would be required to avoid or minimize to the maximum extent practicable any significant adverse environmental impacts from the Project.

As detailed in Section 1.3 and Section 3.0, the Planning Board has made numerous good faith efforts to rectify the inadequacy of the information provided by the Applicant throughout the SEQRA review of the Project. Despite these good faith efforts, the Applicant has substantively declined to provide further information necessary for the Planning Board to fulfill its obligations under SEQRA. As a result, the DEIS remains critically deficient, and the FEIS can now only function as a summary of these

deficiencies. Furthermore, the Board' experts, NYSDEC, and ECDEP have clarified that the number of deficiencies is large and the data gaps are significant. Whether intentionally or not, the Project Sponsor has basically abdicated responsibility for the SEQRA review of the Project, and the Planning Board lacks the information needed to fill the critical gaps in information which have been identified by the Board's experts, NYSDEC and ECDEP as detailed in Section 3.0 and Section 4.0.

Ultimately the Planning Board lacks necessary information to assume the burden to rectify the deficiencies in the DEIS, and accordingly Section 4.0 provides the following critical conclusions:

- As to potential impacts from Stormwater, based on the GHD Report attached as Appendix 6, the DEIS "does not contain sufficient information to support the conclusion that stormwater impacts have been mitigated to the maximum extent practicable."
- As to potential impacts to air, the EA Engineering Technical Memo determined that "there are various inconsistencies in the DEIS and supporting documents . . . a number of technical issues must be addressed more completely and in greater detail to allow the [Lead Agency] to conduct a complete analysis under SEQRA and to determine what conditions and mitigation measures are appropriate for the Project." Many of the DEIS's analyses and conclusions are drawn from Appendix F to the DEIS and its supporting air modelling for the Alternate Niagara Facility, which is not representative of the proposed Plant.
- The DEIS fails to adequately address the potential emissions of "blue haze" from the proposed Plant, including an assessment of how the potential off-Site impacts of blue haze and other atmospheric pollutants from the Project would comply with the Code § 280-133(C)(1)(b), which limits uses in the M-3 District from disseminating atmospheric pollutants, noise, or odor into any R, C, M-1 or M-2 District in the Town.
- As to potential impacts to transportation, the GHD Report states that the DEIS's Appendix L Traffic Impact Study ("TIS") does not include any analysis for road segments to meet the requirements of the Final Scoping Document, including existing traffic counts, forecasted traffic or truck volumes, volume-to-capacity ratios, or any operational or level of service calculations for any of the road segments in the study area that would typically be provided to analyze the Project's impacts on the road segments in the study area. Further, the TIS uses a flawed trip generation calculation, fails to account for delivery of raw materials to the Plant, and contains other errors and omissions pursuant to generally accepted traffic impact study guidelines. Accordingly the DEIS's conclusion that

the Project would not impact transportation is unreliable.

- As to potential impacts from noise, the GHD Report established that the DEIS's noise analysis and related conclusions are "fundamentally flawed and cannot be relied upon to adequately assess the Project's noise impacts" due to improper acoustical modeling, failure to evaluate Site-specific truck volumes, and limited evaluation of existing noise levels from a single source measurement at a surrogate plant.
- EA's comprehensive review of the DEIS's Appendix O Odor Report concluded that the DEIS does not adequately account for all odor emission sources or use appropriate assumptions because it fails to account for odor emissions from daily filling of a 25,000 gallon liquid asphalt storage tank and uses unsubstantiated emission rates. EA performed an independent odor analysis based on an appropriate reference source which indicates that the Project's potential odorous hydrogen sulfide emissions would actually exceed allowable thresholds.
- The air, odor and noise analyses performed by the Planning Board's consultants EA and GHD establish that the Project as proposed has not been shown by the Applicant to comply with the Zoning Code's limitations on uses in the M-3 District to only those uses that do not normally disseminate atmospheric pollutants, noise, and odor to R, C, M-1, or M-2 Districts.
- Consistent with the NYSDEC Comments on the DEIS, the DEIS's Appendix O Odor Report and related conclusions cannot be relied upon to assess the Project's potential for impacts from odor because they are based on materials prepared for the Alternate Niagara Site and based on a lower annual production rate than the Project proposes. Furthermore, consistent with the NYSDEC Comments on the DEIS, the DEIS's odor analysis would need to be revised to consider the potential impacts of additional constituent asphalt chemicals as well as analyze odor from all aspects of the Project, and would need to recognize the presence of nearby sensitive receptors around the Site.
- Based on the Zoning Code's prohibition on bituminous processing facilities anywhere in the Town, the Project is not a permitted use at the Site. The Board concludes that the Project is not consistent with the general purpose of the Camp Road Overlay District and its "gateway" principles; nor is the Project consistent with the Town's Comprehensive Plan or the Village's Comprehensive Plan and the goals and objectives stated there to eliminate heavy industrial uses (such as the Plant) in the Camp Road corridor.

Conclusion

As detailed in Section 1.0 and Section 3.0, the Applicant's participation in the SEQR review of the Project, or lack thereof, has circumvented the intent of the EIS process. The Applicant has abandoned its responsibility to be a meaningful participant in the SEQR process for the Project. By providing insufficient, often outdated or inapplicable information, and refusing to comply with the Final Scoping Document and address the Listed Deficiencies, Applicant has made it impossible for the Planning Board to take a hard look at the potential environmental impacts of the Project as required by SEQR.

The Planning Board has in good faith attempted to resolve the Listed Deficiencies, but the Applicant has declined to provide further information necessary for the Planning Board to fulfill its obligations under SEQR. As a result, the DEIS remains critically deficient and the Board ultimately concludes that it cannot certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable.

Exhibit B



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Our ref: 11119304

October 27, 2023

**Mr. William Clark, Planning Board Chairman
Town of Hamburg
6100 South Park Avenue
Hamburg, NY 14075**

**GHD Response to Applicant Letter dated October 18, 2023 (Lorigo Law Office)
Evaluation of Traffic Impacts From AL Asphalt Corporation's Proposed Hot Mix Asphalt Plant at 5690
Camp Road, Hamburg, NY 14075.**

Dear Mr. Clark:

GHD Consulting Services Inc. ("GHD") performed an independent review of the draft environmental impact statement (DEIS) as revised and submitted on April 5, 2023 to the Town of Hamburg Planning Board ("Planning Board") by AL Asphalt ("Applicant") in support of its application to develop and operate a hot mix asphalt (HMA) plant ("Project") in the Town of Hamburg, NY ("Town") on approximately 53 acres at 5690 Camp Road ("Site").

Accordingly, GHD reviewed the following critical sections of the DEIS: Section 4.5.6 Impacts on Transportation; Section 4.5.8 Impacts on Noise; and stormwater elements in Section 4.4 Environmental Setting/Existing Conditions and Section 4.5.1 Impacts on Surfacewater, Groundwater and Flooding. GHD summarized its findings in a report ("GHD Report") that was submitted to the Board as a public comment on the DEIS dated July 28, 2023. The Town provided the GHD Report to the Applicant by letter dated August 9, 2023. The GHD Report contained traffic related review comments on the Applicant's Traffic Impact Study attached to the DEIS as Appendix L ("TIS").

By letter dated October 18, 2023 the Applicant prepared a response ("Applicant's Response") to the Town's August 9, 2023 letter stating "the DEIS is a complete, accurate and responsive statement." The Applicant's Response attached a letter dated September 15, 2023 (attachment to exhibit H) from Passero Engineering Architecture ("Passero Letter") that provided a response to each of the GHD Report's review comments on the TIS. Typical responses in the Passero Letter fell into a few broad categories, as follows: the requested analysis was not required in the Town's Final Scope as previously asserted by the Applicant throughout the EIS process, the requested analysis does not need to be provided because it is not typically provided in a TIS, or the requested information was included in the TIS. The Passero Letter confirmed the facility would operate nine hours a day and provided documentation for the comparative average cash rates presented in the TIS.

The purpose of this letter is to provide an overview of the Passero Letter and its responses to six key traffic related review comments in the GHD Report and to explain how the Passero Letter fails to remedy the deficiencies in the TIS and the DEIS's related conclusions.

GHD Report Traffic Comment and Passero Response Summary

GHD staff reviewed the Applicant's TIS for compliance with the Final Scope, inconsistencies between the Applicant's TIS and the Lead Agency information requests, and errors and omissions to generally accepted traffic impact study guidelines. Following is a summary of the GHD Report's key traffic comments and the corresponding responses in the Passero Letter. Please note that these are summaries and not the complete comment and Applicant response. The complete comments and Applicant response for all 23 review comments are included in the response letter from Passero Engineering Architecture dated September 15, 2023 and the GHD Report dated July 28, 2023.

1. **GHD Report Comment: Road Segments:** The Town identified the following roads for analysis: Elmview Avenue, Legion Drive, Sunset Drive and Camp Road. The Applicant's TIS does not include any analysis for road segments to meet this requirement, including existing traffic counts, forecasted traffic or truck volumes, volume-to-capacity ratios, or any operational or level of service calculations for any of the road segments in the study area.
 - a. **Passero Letter's Response:** The analysis of specific roadways is not performed in a typical TIS per standard practice. The intersections of the roadways identified were analyzed per the Final Scope.
 - b. **GHD Response:** Analysis of intersections is different than road segments and are separate analyses, both of which were required per the Final Scope. The assumption that if there are no traffic impacts at intersections means that there are no impacts along roadway segments may not be valid. Therefore, the TIS's conclusion that there is no traffic impact to arterial streets cannot be confirmed.
2. **GHD Report Comment: Trip Generation:** The Final Scope stated: *The TIS should reference any appropriate standards for calculating traffic generation (Institute of Transportation Engineers Manual, studies, etc.) and utilize the maximum vehicles that could be generated at the site (describing how this figure was developed)*. Upon its review, GHD has identified several deficiencies with regard to the site trip generation presented in Applicant's TIS.
 - a. **Passero Letter's Response:** The trip generation as presented is accurate and is based on employee and truck data provided by the project operator, an estimate of daily traffic was not required. The peak hour estimate presented in the TIS presented a worse-case scenario. The 50 trucks per day includes trucks delivering raw materials. The response provided clarification that the plant would operate for nine hours each day.
 - b. **GHD Response:** This response reasserts information and analysis provided in the DEIS and therefore the same concerns remain as stated in the GHD Report regarding the site trip generation and lack of trip generation for a typical weekday, resulting in concerns with the analysis, results, and recommendations presented in the TIS.
3. **GHD Report Comment: Truck Routes:** The Planning Board requested the Applicant to (1) provide routes for each type of vehicle/truck and a description of each type of vehicle/truck needed for operation, and (2) provide a discussion on mitigation measures for control of truck/vehicle routes and avoidance to pedestrian routes.
 - a. **Passero Letter's Response:** The asphalt plant will not employ truck drivers, therefore information regarding the specific routes that trucks will take is unavailable. However, trucks will only be permitted to use the main entrance on Camp Rd.
 - b. **GHD Response:** The TIS nor this response identify the types of trucks, routes, or mitigation measures preventing trucks from utilizing residential streets or pedestrian routes.
4. **GHD Report Comment: Existing Site Traffic:** The traffic generated by the existing site's concrete operation is not shown in Figure 3 (2022 Existing Volumes) or Figure 4 (2023 Background) in the TIS. The TIS needs to include the existing and background traffic generated by the site's existing operation at the two existing site driveways, or discuss why there is no existing site traffic using these driveways.
 - a. **Passero Letter's Response:** Any existing truck traffic from the concrete plant's existing operation is accounted for in the existing traffic counts at the study intersections. Data collection at the site

driveways was not possible at the time the study was completed due to traffic volume reductions associated with the Covid-19 shutdowns.

b. **GHD Response:** It is not clear why the study intersections could be counted but not the site driveways, or why the data collection could not be updated. The TIS's analysis and its conclusions regarding level of service and turn lane needs for the Project at the two site driveways are questionable since the existing site traffic was not included.

5. **GHD Report Comment: Driveway Improvements:** The Applicant's TIS fails to specifically identify if any improvements are proposed for the two existing site driveways, including number of lanes, storage distance, and evaluate the need for right turn deceleration lanes on Camp Road into the site driveways.

- Passero Letter's Response:** There are no recommended improvements to the existing driveways since they operate at LOS C or better during both peak hours under full build with very low traffic volumes entering and exiting the site.
- GHD Response:** The TIS does not present any thresholds where right turn deceleration lanes would be required in order to support the TIS's conclusion that the site traffic is less than such thresholds. The TIS does not present any information on turn lane queuing to support the statement that the existing lanes are sufficient. Additionally, the existing site traffic was not included in this analysis, which means GHD cannot confirm the accuracy and validity of the TIS's analysis, results, or recommendations.

6. **GHD Report Comment: Bicycle and Pedestrian Impacts:** The Applicant's TIS incorrectly assumes that because there are no level of service impacts at the study intersections that the Project will not have a significant adverse effect on the existing bicycle and pedestrian operations. Even assuming that the Applicant's TIS correctly concludes that there are no level of service impacts at the study intersections, the Applicant's TIS fails to evaluate the impact of the additional Site traffic, particularly truck traffic, on the roadway segments and bicycle/pedestrian facilities, which is a different analysis than level of service.

- Passero Letter's Response:** This type of analysis is not performed in a typical TIS in this area. There are no dedicated bike routes in the area that are impacted by the Project and there is very little pedestrian traffic in the area. The increase in site traffic is extremely small and would not be noticeable to pedestrians, bicyclists, or motorists on Camp Rd.
- GHD Response:** The TIS does not evaluate the impact to pedestrians and bicyclists as required by the Final Scope. The TIS's assumption that there are no impacts to pedestrians and bicyclists cannot be validated.

This concludes our review of the Passero Letter's responses to GHD's traffic related comments in the GHD Report. The information provided in the Passero Letter does not resolve the deficiencies in the DEIS's traffic analysis and related conclusions as described in the GHD Report. Feel free to contact us with any questions or to further discuss this review.

Regards,



David P. Sabers, PE (AZ, NV, TX, UT)
Sr Transportation Engineer

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Copy to: Camie Jarrell, PE – GHD