

GRANT & LYONS LLP



ENVIRONMENTAL, LAND USE AND REAL ESTATE LAW

23 May 2017

Via UPS Deliver and
Email to: LJKiefer@hvc.rr.com

Lou Kiefer, Chairman, and
Members of the Town of Thompson Planning Board
Thompson Town Hall
4052 Route 42
Monticello, NY 12701

Re: Thompson Education Center (TEC)

Subj: Applicant's EIS Revised Plan for Preparation Work :
Proposed Additional 5 Test Wells
Project Location: Tax Parcel No. 26.-1-6.

Dear Mr. Kiefer and Members of the Planning Board:

Grant & Lyons, LLP is a law firm dedicated to the practice of environmental, land use and real estate law. We represent the Basha Kill Area Association (BKAA).

Since its founding in 1972, the mission of the BKAA has been to protect the Basha Kill wetlands and surrounding area from ecological degradation, promote education and respect for the environment in general, and preserve the beauty of the area. The BKAA consists of some 800 members working together to preserve the unspoiled quality of the beautiful and unique Basha Kill, and to serve as a local guardian for the wetland by being alert to threats such as pollution, vandalism and unwise development.



The BKAA is intensely interested in the TEC project, and has been since its inception, because the wetlands on TEC's Thompson property are part of the Harlan Swamp Wetland Complex, located within the western portion of the Basha Kill's Watershed.

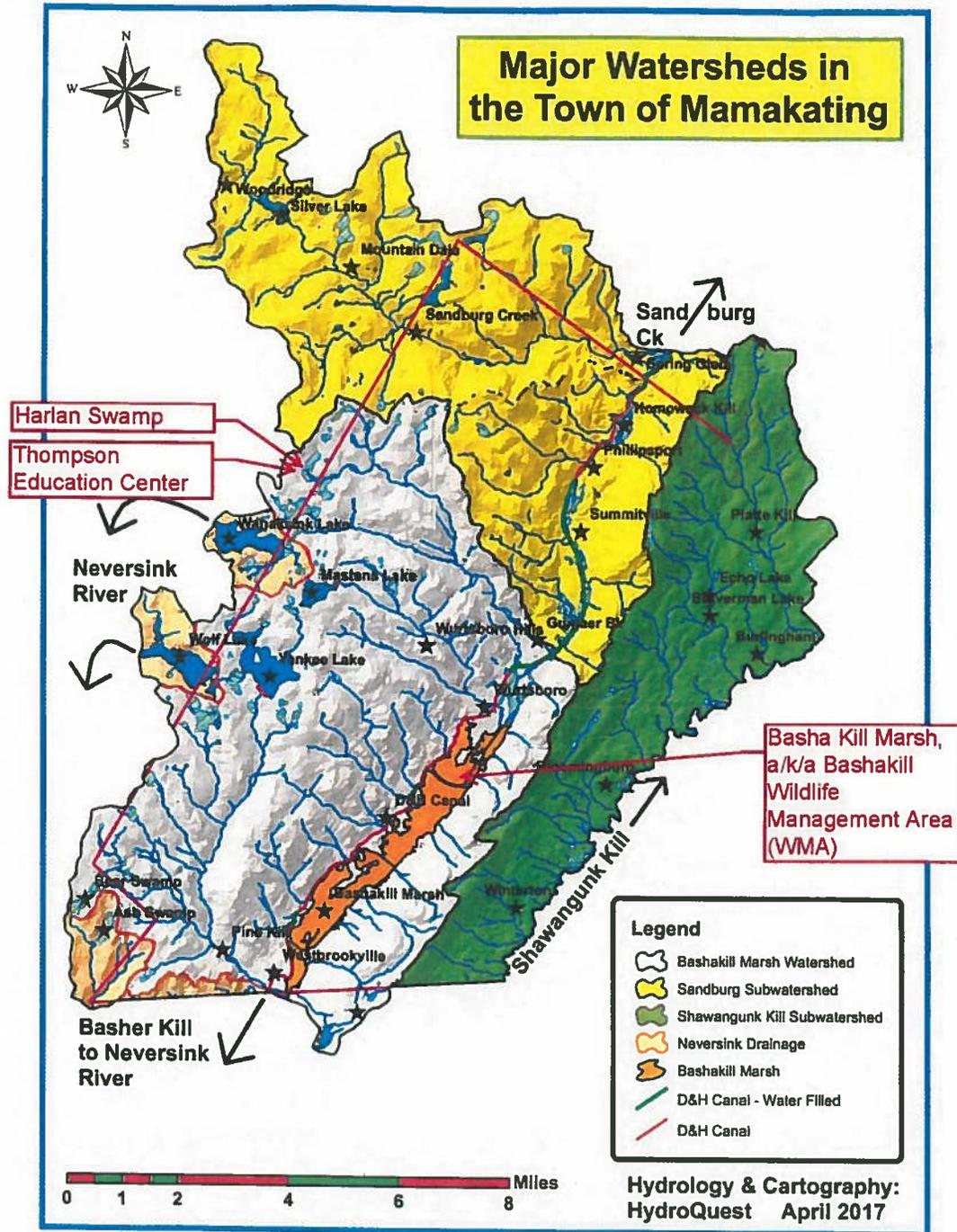
Shown below is a map which depicts the relationship between the Harlan Swamp Complex and the protected Basha Kill Marsh, a/k/a the Bashakill Wildlife Management Area (WMA). The location of the Harlan Swamp and TEC's Thompson property are indicated on the map by the red arrows. On the map, the 3,000 acre Bashakill protected WMA is shown in orange. Surrounding it, in white (with gray-shaded topography), is the Basha Kill's 36,000 acre

Office address:
149 Wurtemberg Road
Rhinebeck, New York 12572

jlyons@grantlyons.com
845 876 2800
grantlyons.com

Mailing address:
P. O. Box 370
Rhinecliff, New York 12574

watershed, whose waters, including the Harlan Swamp, drain down to the WMA. Thus, a threat to the ecological health of the Harlan Swamp Wetlands also a threatens the ecological health of the WMA. Therefore, the BKAA has a keen interest and desire to protect the wetlands on TEC's Thompson property.



Since 2015, the BKAA has been very concerned about Thompson Education Center's (TEC) plan to drill test wells and construct an access road on its Thompson parcel.¹ The land where TEC proposes to build its 5 million square foot educational facility contains a significant area of New York State wetlands. These wetlands are important ecological resources because they provide habitat for a variety of wetland species.

In its initial well drilling plan in 2015², TEC relied on an outdated wetlands delineation from 2006. Those test wells were located adjacent to wetland buffer boundaries, but the buffer boundaries were based on a 2006 delineation. At that time, the BKAA objected to the granting of any drilling permits.³ Wetland boundaries typically fluctuate over time due to precipitation levels, topographical gradients and changes to the types of vegetation cover.⁴ Therefore, the BKAA was concerned that the 2006 wetland delineation was no longer accurate for the 2015 project. Because wetland boundaries are dynamic, there was a real danger that the test wells could be located within the wetland buffer areas, or even in the wetlands themselves. Another of BKAA's concerns was the damage to be caused to on-site vegetation by the construction of the test well access road. As a whole, the TEC test well drilling plan involved the construction of 2.75 miles of access road, disturbing 8.36 acres.⁵

Nevertheless, on August 2, 2016 the Town issued permits to TEC for the drilling of three (3) test wells. Now, more than a year later, TEC is back and is seeking permits from the Town to drill five (5) more test wells. TEC is still using the outdated 2006 wetland delineation, only now it is even more outdated. The same concerns are again raised for the BKAA, except that now, due to the passage of two more years, they have become even more acute.

BKAA's concern about the potential damage which this plan may cause to the wetlands and their buffers is now higher than ever. We urge you to advise the Town of Thompson that TEC's request for permits to drill new test wells should be denied at this time.

Part 1. Summary

The purpose of this letter is twofold.

¹ Tax Parcel No. 26.-1-6.

² In February of 2015, TEC approached the Town of Thompson to seek permits to construct three test wells on its Thompson Parcel. The stated purpose of digging test wells was "to determine the availability of water on the project site" and that it was "necessary to the preparation of the EIS [Environmental Impact Statement]." See Letter of John Privitera, Esq., dated February 18, 2015, to Paula Kay, Esq. Counsel to the Town of Thompson Planning Board, at p.1.

³ See, letters of Grant & Lyons, on behalf of the BKAA, to you dated March 20, 2015 and on March 25, 2016. Grant & Lyons also wrote to the NYSDEC by letter dated April 7, 2015. Grant & Lyons submitted yet another letter to you dated August 8, 2016, not knowing at the time it was drafted, that the Town had already issued the drilling permits days earlier on August 2, 2016.

⁴ Letter of Norbert Quenzer, Professional Wetland Scientist (Society of Wetlands Scientists), to the Town of Thompson Planning Board on behalf of the BKAA, dated August 5, 2016, at p. 2.

⁵ Letter of Andrew Willingham, PE, of Willingham Engineering, to the Town of Thompson Planning Board on behalf of the BKAA, dated April 22, 2015, at p.1.

Regarding TEC's request to drill five (5) more test wells, we ask you to fulfill your duty as lead agency for the environmental review of the TEC project under SEQRA, and to fulfill your responsibility to be the community's stewards of the important ecological resources on the TEC Thompson parcel. For the reasons discussed in this letter, in order to do that, you must advise the Town that TEC's requests for new drilling permits should be denied until such time as: (1) the SEQRA process has begun and scoping has been completed; and (2) the wetlands boundaries have been updated by field verification by the NYSDEC. Only then, with full information before you, should you consider allowing the issuance of permits for further test well drilling.

Second, we also urge you, again in your capacity as lead agency, to be proactive in preventing improper segmentation of the TEC project. We ask you to contact Fallsburg and advise them that no permits or approvals may be issued for the construction of the Security/Caretaker Facility until the whole project has undergone SEQRA environmental review.

Part 2.
**The Drilling of These Test Wells is
Premature and Should Not be Permitted.**

The drilling of test wells on TEC's land was, and is, premature.⁶ In general, the SEQRA regulations prohibit project applicants from commencing physical alteration of their properties until SEQRA has been complied with.⁷ The intent of this regulation is to prevent physical alterations to property before the completion of the very environmental review which is intended to objectively evaluate whether, and under what conditions, those physical alterations should be allowed in the first place.⁸ And although there is an exception that allows physical alteration of the property in order to conduct environmental and engineering studies,⁹ it has been stated that lead agencies should be guided by the NYSDEC's principal purpose in adopting § 617.3(a) of the regulations - to avoid the wholesale destruction of the very resource that SEQRA was intended to protect.¹⁰

TEC's stated purpose for drilling the wells is to prepare an EIS for the SEQRA review. However, in this case, that process has barely begun. Physically disturbing the site, and risking destroying wetlands and wetland buffer areas long before an EIS scope is settled, makes no sense.

It has been two (2) years since TEC initially applied for drilling permits, and one (1) year since it received a permit to drill the three (3) wells. In that time, not only has the SEQRA process not moved forward an inch, it's actually moved backward. And at the same time, the wetlands

⁶ See, letters of Grant & Lyons to Town of Thompson Planning Board on behalf of the BKAA dated March 20, 2015 (at pps. 1-2) and March 25, 2016 (at pps. 2-3).

⁷ 6 NYCRR 617.3(a).

⁸ Gerrard, Ruzow, Weinberg, *Environmental Impact Review in New York*, Revised October 2016, at § 3.01[3][h].

⁹ 6 NYCRR 617.5(c)(18).

¹⁰ Gerrard, Ruzow, Weinberg, *Environmental Impact Review in New York*, Revised October 2016, at § 3.01[3][h].

delineation is two (2) years older. Even though TEC has failed to move the SEQRA review process forward at all, it wants to use EIS preparation as an excuse to disturb the site, and perhaps to destroy sensitive resources.

As lead agency and steward of the environment, you have a duty to prevent further disturbance to TEC's site under the dubious guise of preparing an EIS until such time as the environmental review has been substantively started and advanced to the point of the completion of scoping.

**Part 3.
The Long-expired 2006 Wetlands Boundaries
Must be Updated to Protect the Environment.**

Even if, for argument's sake, you were to consider allowing new test wells at this time, a NYSDEC field validation of present-day wetland boundaries must be done before any further test well drilling is allowed.

Wetlands and wetland buffer boundaries are not static. They are dynamic. In some circumstances, they are capable of tremendous location changes. These modifications occur in response to various weather and environmental factors.

The NYSDEC, in its guidance on Freshwater wetlands mapping, confirms the following:

Wetlands are a changing natural resource and their boundaries often change over time. Sometimes, the boundary changes are minor so the maps do not need to be amended. However, when boundaries change substantially, which can happen over longer periods of time, the maps need to be revised to accurately reflect the new wetland boundary.¹¹ (emphasis added).

Based on this science, back in 2013, the NYSDEC recommended that the wetlands boundaries on TEC's Thompson parcel should be field inspected and validated by NYSDEC staff.¹² Three years later in 2016, Norbert Quenzer, a Professional Wetland Scientist, echoed that and testified that it is "imperative that the wetlands [on the TEC Thompson parcel] be re-delineated." Mr. Quenzer explained that both the NYSDEC and the U.S. Army Corps of Engineers (ACOE) issue jurisdictional determinations (confirming wetland boundaries) that are only valid for a 5-year period based on the fact that both scientific and empirical studies have shown that wetland boundaries fluctuate over time. A copy of Mr. Quenzer's August 5, 2016 letter to you is attached again for your reference.

The Thompson parcel wetlands delineation is now more than ten (10) years old; over twice the age for valid NYSDEC and US ACOE jurisdictional determinations. The science is undisputed. It is very likely that the location of the wetlands on this site have moved since 2006. To prevent damage to ecologically important wetlands and buffers, the present-day wetlands boundaries

¹¹ NYSDEC, *Freshwater Wetlands Mapping*, NYSDEC web site at www.dec.ny.gov/land/5124.html.

¹² Letter to the Town of Thompson Planning Board commenting on the TEC project (then known as "China City") on TEC project by NYSDEC Environmental Analyst Joseph R. Murray, dated October 25, 2013, at p.1.

must be field verified by the NYSDEC before the Town even considers allowing any further drilling.

Part 4.

You Asked to Be Lead Agency, and So Now You must Lead, and Fulfill the Duties and Responsibilities Placed in Your Hands by SEQRA.

You asked to be SEQRA lead agency for this project. You got it, and so you must lead. You have a responsibility to carry out both the letter and spirit of SEQRA. You have a duty to conduct yourselves with the awareness that you are stewards of the air, water, land and living resources, and that you have an obligation to protect the environment for the use and enjoyment of this and future generations.¹³

You are in charge of the SEQRA review process. The request to drill these new test wells falls squarely within your jurisdiction as lead agency because the stated purpose of the wells is to eventually provide information for the SEQRA review. It is your duty to assure that the SEQRA review process is not abused or misused by actions in bad faith by TEC.

Is the request to drill more test wells being made in good faith? Evidence suggests otherwise.

This test well drilling work is premature and out of sequence. The Applicant is preparing for an EIS before there has even been scoping. There are still important procedural steps in the SEQRA review to be taken before EIS preparation is appropriate.

Meanwhile, TEC has consistently insisted on using the outdated 2006 wetlands delineation and just as consistently calls to update the delineation. An applicant acting in good faith who values the environmental resources would not ignore the need to update a long-expired wetlands delineation.

Moreover, an applicant acting in good faith would also not be attempting to circumvent a complete SEQRA review by improperly segmenting the project by constructing a part of the project in a neighboring town prior to any SEQRA compliance on the project as a whole.

In the face of this evidence, it is up to you as the lead agency to act promptly and definitively to prevent the possible destruction of sensitive environmental resources on the TEC Thompson parcel until such time as SEQRA has been complied with. Hence, TEC's requests for new drilling permits should be denied until such time as: (1) the SEQRA process has begun and scoping has been completed; and (2) the wetlands boundaries have been updated by field verification by the NYSDEC. Only then, with full information before you, should you consider allowing the issuance of permits for further test well drilling.

Part 5.

You must Act to Prevent the

¹³ As stated in the State Legislature's goals for the State Environmental Quality Review Act (SEQRA), New York State Environmental Conservation Law, § 8-0103(8).

Improper Segmentation of this Project.

By this time you have received our May 8, 2017 letter to the Town of Fallsburg Supervisor notifying Fallsburg that it would be illegal for the Town to grant to TEC any permits or approvals for the Security/Caretaker Facility on TEC's Renner Road parcel in Fallsburg. Given its obvious connection with the larger TEC project, the rule against improper segmentation prohibits Fallsburg from approving or issuing permits for that facility until full compliance with SEQRA has been achieved. In practical terms, that means that Fallsburg cannot issue any permits for this facility until the Town of Thompson Planning Board, as lead agency for the SEQRA review of the whole project, has issued either a negative declaration, or a Statement of Findings based on a Final EIS.

You are the lead agency for the SEQRA review of the entire TEC project. You have a duty to take steps to assure that improper segmentation does not occur and undermine the environmental review of the project as a whole. Consequently, we urge you to contact the Town of Fallsburg and advise Fallsburg that SEQRA prohibits Fallsburg from issuing any permits or approvals for a part of this project until SEQRA compliance is achieved.

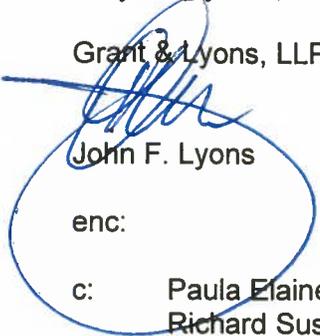
**Part 6.
Conclusion**

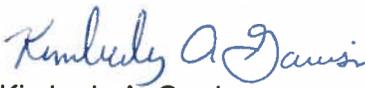
You sought lead agency status for the TEC project. With that status comes responsibility. We respectfully ask you to meet those responsibilities head on and: (1) advise the Town of Thompson that TEC's request for permits to drill new test wells should be denied at this time; and (2) advise Fallsburg that it may not issue any permits or approvals at this time for the Security/Caretaker Facility on TEC's Renner Road parcel.

Thank you for your time and consideration.

Very truly yours,

Grant & Lyons, LLP


John F. Lyons


Kimberly A. Garrison

enc:

- c: Paula Elaine Kay, Esq., Attorney to the Town of Thompson Planning Board
- Richard Sush, Deputy Supervisor, Town of Thompson
- James Carnell, Jr., Director - Building, Planning & Zoning, Town of Thompson
- Logan Morey, Code Enforcement Officer, Town of Thompson
- Richard D. McGoey, PE, Town Engineer, Town of Thompson
- Steven Vegliante, Town Supervisor, Town of Fallsburg
- Mollie Messinger, Code Enforcement Officer, Town of Fallsburg
- Will Illing, PE, Town Engineer, Town of Fallsburg
- Bill Herrmann, Supervisor, Town of Mamakating

Daniel T. Whitehead, Regional Permit Administrator, NYSDEC Region 3
Joseph R. Murray, Environmental Analyst, NYSDEC Region 3
Freda Eisenberg, AICP, Commissioner, Sullivan County Div of Planning & Env Mgmt
Paula Medley, Basha Kill Area Association
Toby Boritz, Rock Hill Neighborhood Coalition
Laura Coruzzi, Yankee Lake Preservation Association
Andrew Willingham, PE, Willingham Engineering
Katherine Beinkafner, Mid-Hudson Geosciences
Norbert Quenzer, Bagdon Environmental

c via email: Heather Zangla, at planning@townofthompson.com
Paula Elaine Kay, Esq., at peklaw@hvc.rr.com
Richard Sush at rsush@townofthompson.com
James Carnell, Jr. at jcarnell@townofthompson.com
Logan Morey at lmorey@townofthompson.com
Richard D. McGoey, PE, at rdm@mhepc.com
Steven Vegliante at svegliante@fallsburgny.com
William Illing, PE, at willing@fallsburgny.com
Mollie Messinger at mmessenger@fallsburgny.com
Bill Herrmann at supervisor@mamakating.org
Daniel Whitehead at daniel.whitehead@dec.ny.gov
Joseph R. Murray at joseph.murray@dec.ny.gov
Freda Eisenberg, AICP, at planning@co.sullivan.ny.us
Toby Boritz, at boritzt@gmail.com
Laura Coruzzi, at lacoruzzi@gmail.com
Andrew Willingham, at awillingham@willinghamengineering.com
Norbert Quenzer, at nquenzer@bagdonenvironmental.com



August 5, 2016

Ms. Patrice Chester, Chairwoman
And Members of the Town of Thompson Town Board
Thompson Town Hall
5052 Route 42
Monticello, NY 12701

Re: Thompson Education Center

Dear Ms. Chester and Members of the Planning Board:

I am a certified Professional Wetland Scientist (Society of Wetland Scientists) with over thirty years of experience delineating wetlands. I have been trained in the interagency methodology for delineating federally regulated wetlands and have taught an advanced wetland delineation workshop for the New York State Wetlands Forum. I have extensive experience in delineating NYSDEC regulated wetlands and was the lead Wetland Scientist for the NYSDEC wetland re-mapping project in the NYC watershed, as described below.

Bagdon Environmental was selected by the NYSDEC to conduct the wetland map amendments in the New York City drinking water watersheds. This very successful effort was the first time that the NYSDEC had contracted with a private consulting firm for these services. The project involved providing the technical basis for the map amendments and undertaking the steps to promulgate the maps, as required in ECL Article 24. Bagdon Environmental conducted a variety of tasks including extensive GIS analysis, field mapping, data compilation, map preparation and participation in public information meetings and hearings. The wetlands included in this work encompassed thousands of acres located in Delaware, Greene, Ulster, Sullivan, Schoharie, Dutchess, Putnam and Westchester counties.

Bagdon Environmental's qualifications and experience statement, highlighting representative wetland project experience and our professional staff's qualifications, is available online at www.BagdonEnvironmental.com.

At the request of John F. Lyons of the firm of Grant & Lyons, LLP, counsel to the Basha Kill Area Association, I have reviewed a map of the proposed Thompson Education Center (TEC) plan to construct three wells and an access road on its Thompson parcel, revised on June 17, 2016. I write this letter in support of the BKAA's request that the wetlands TEC's Thompson parcel be re-delineated by the New York State Department of Environmental Conservation (NYSDEC) before any Town of Thompson approvals are granted for the proposed plan.

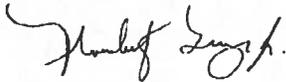
The proposed TEC test wells shown on the map are proposed to be in close proximity to mapped NYSDEC Wetland WO-54, a Class I wetland. I am advised that this wetland was last delineated in 2008, approximately eight years ago.

Both the NYSDEC and the U.S. Army Corps of Engineers (ACOE) issue jurisdictional determinations (confirming wetland boundaries) that are valid for a 5-year period. The rationale for limiting jurisdictional determinations to a 5-year period is based on the fact that wetlands are transitional ecological communities between truly aquatic and upland communities. Both scientific and empirical studies have shown that wetland boundaries fluctuate due to changes in precipitation levels and other hydrological inputs. Other factors such as topographic gradients and changes to vegetation cover types affect the "fluid" nature of wetland boundaries.

Physical damage to the wetlands and/or wetlands buffer is not the only adverse environmental consequence to consider. Wetlands can be significantly altered by groundwater wells through draw-down of groundwater levels in the well vicinity. The "cone of influence" from groundwater draw-down depends on the nature of the soils, depth of the well and amount of water/duration of water extraction. The impact of the proposed test wells and their proposed long-term use needs to be examined to prevent potential degradation to the adjacent wetlands.

Given the potential for impacts to the wetland from the test wells and uncertainty of the current wetland boundaries, it is imperative that the wetlands be re-delineated. If the wetlands have expanded since they were delineated in 2008, the 100' buffer regulated by the NYSDEC would have also expanded. The NYSDEC regulates activities in the 100' buffer, including the proposed test wells. Thank you for considering this matter in your environmental review process.

Sincerely,



Norbert Quenzer Jr., PWS, CWB, CE
Vice President/Senior Ecologist



NORBERT QUENZER JR.

EDUCATION

B.S., Forest Biology-Wildlife, 1979, State University of New York, College of Environmental Science and Forestry, Syracuse, NY.

A.S., Forest Management, 1977, Columbia-Greene Community College, Hudson, NY.

EMPLOYMENT HISTORY

Vice President/Senior Ecologist - Bagdon Environmental, Delmar, New York. January 1986 to present.

Mr. Quenzer is responsible for managing and conducting ecological and wetland studies at Bagdon Environmental. Duties include state and federal wetland delineation; mitigation and restoration plan development; permit application preparation; client/regulatory liaison; and expert testimony. As Senior Ecologist, Mr. Quenzer conducts and supervises ecological evaluations; wildlife/vegetation inventory and analysis; endangered species surveys; and habitat evaluations. Mr. Quenzer has been principal investigator and supervisor of hundreds of wetland and ecological projects during his tenure at Bagdon Environmental.

Interpretive Naturalist - New York State Department of Environmental Conservation, Albany, New York. 1985.

Developed and presented educational programs on the ecological, cultural and historic attributes of the New York State Forest Preserve.

Environmental Biologist - Jason M. Cortell and Associates, Inc., Gladstone, New Jersey. 1982 to 1985.

Primary responsibilities were wetland assessment and wildlife/vegetation inventory and analysis. Additional duties included: aquatic vegetation surveys, macroinvertebrate analysis, electrofishing, field monitoring and analysis of water quality, air quality, noise and meteorological data.

Wildlife Research Assistant - Cornell University, Department of Natural Resources, Highland, New York. 1980 to 1981.

Organized and directed field studies for pine vole (*Microtus pinetorum*) control project in Hudson Valley apple orchards.

PROFESSIONAL MEMBERSHIPS

The Wildlife Society
Ecological Society of America
New York State Wetlands Forum - Chair (1994-1996) and Founding Member
Society of Wetland Scientists – Professional Certification Standards Committee
Association of State Wetland Managers

PROFESSIONAL CERTIFICATION AND TRAINING

Certified Professional Wetland Scientist, Society of Wetland Scientists
Certified Wildlife Biologist, The Wildlife Society
Certified Ecologist, Ecological Society of America
Federal Wetland Identification and Delineation Techniques
U.S. Fish and Wildlife Service - Certified Habitat Evaluation Procedures (HEP)
U.S. Fish and Wildlife Service Qualified Bog Turtle Surveyor – Phases I & II

PROFESSIONAL LICENSES

New York State Department of Environmental Conservation

- Scientific Collectors License - #LCP01-183
- Endangered Species amendment for Bog Turtles (*Glyptemmys muhlenbergii*)