

**NEW YORK STATE ADIRONDACK PARK AGENCY**

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**In the Matter of APA Project No. 2021-0276,  
Commercial Use – Ballistics Testing Facility  
Project Sponsor: Michael Hopmeier of Unconventional  
Concepts, Inc.**

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**REPLY MEMORANDUM IN SUPPORT OF PROJECT SPONSOR'S  
APPEAL OF FIFTH NOTICE OF INCOMPLETE APPLICATION**

**Please take notice** that, pursuant to 9 NYCRR §572.22(a), Project Sponsor Michael Hopmeier of Unconventional Concepts, Inc. (hereinafter referred to as “UCI”) submits this reply memorandum in support of its appeal of *Fifth Notice of Incomplete Application*, dated January 2, 2024 (hereinafter referred to as the 5<sup>th</sup> NIPA), an action taken by David J. Plante, Deputy Director of Regulatory Programs of New York State Adirondack Park Agency; and

**Please take further notice** that this appeal is being filed on behalf of UCI by the law firm of Norfolk Beier PLLC, with Matthew D. Norfolk, Esq. being of counsel, UCI’s Authorized Representative herein.

**Please take further notice** that this appeal seeks a determination finding that: (1) all requests for information contained in the 5<sup>th</sup> NIPA are duplicative, unnecessary or moot as all information required for the project application to be complete has been submitted by UCI; (2) certain requests for information contained in the 5<sup>th</sup> NIPA are lacking relevancy to attaining a determination of application completion; (3) certain comments contained in the 5<sup>th</sup> NIPA must be stricken from the administrative record as they are based upon factual errors; (4) certain comments contained in the 5<sup>th</sup> NIPA must be stricken from the administrative record as they were made by Agency Staff in an unlawful attempt to issue a *de facto* denial of the application; (5) certain comments contained in the 5<sup>th</sup> NIPA must be stricken from the administrative record as they were made by Agency Staff in an unlawful attempt to alter or change the proposed project or use,

contrary to the intentions of UCI or prejudicial to UCI; (6) UCI's project application is complete; and, (7) pursuant to 9 NYCRR §572.22(h), providing notice of the completeness of the application as required by law and thereafter granting the permit application.

### **DECONSTRUCTING AGENCY STAFF'S OPPOSITION**

Agency Staff's opposition memorandum, in large part, supports UCI's appeal and demonstrates the redundancy and arbitrary and capricious nature of the questions in its 5<sup>th</sup> NIPA. Agency Staff's responses to UCI's objections to each question contained in the 5<sup>th</sup> NIPA are discussed below, starting with Questions 3 and 5, which Agency Staff now deem to be fully answered.<sup>1</sup>

#### **Question 3 of the 5<sup>th</sup> NIPA**

Now, on appeal, Agency Staff deems Question 3 to be satisfactorily answered and no further response needed. Yet, no new information was provided by UCI in its initial appeal papers. UCI put forth its objections and merely stated no additional mitigation is needed, while pointing to its past submissions for support (*see* 1<sup>st</sup> NIPA response; p.5; 2<sup>nd</sup> NIPA response, p.4; Addendum to UCI's 2<sup>nd</sup> NIPA response, pp. 4-6; 3<sup>rd</sup> NIPA response, 6<sup>th</sup> p.; 4<sup>th</sup> NIPA response, p. 5; *see also* H2H Geoscience Engineering, PLLC September 2023 Sound Study submitted, p. 12 (September 2023). This is a prime example of Agency Staff's practice throughout the permit application process – requesting information previously provided.

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<sup>1</sup> In its initial appeal papers, UCI collectively refers to Agency Staff's enumerated comments/questions contained in the NIPAs as "Comments." In opposition to UCI's appeal, Agency Staff refers to them as "Questions." To avoid confusion, herein UCI will also collectively refer to the enumerated comments/questions contained in the NIPAs as "Questions."

### **Question 5 of the 5<sup>th</sup> NIPA**

Similar to how it responded to Question 3 on appeal, Agency Staff deems Question 5 to be satisfactorily answered and no further response needed. Quite telling, it concedes that UCI already answered the question. In its opposition, Agency Staff expressly states it was looking only for “*confirmation*” of an earlier response. Specifically, Agency Staff states in its opposition memorandum, at p. 14:

**Question 5 of the fifth NIPA requested *confirmation* of the proposed maximum number of shots per week, month, and year, and whether there were any atmospheric conditions under which testing would not occur. The applicant responded to this question on pages 16-17 of the appeal, *confirming* that testing is proposed to occur year-round, with a maximum of 10 shots per month, and with no atmospheric restrictions. [Emphasis added.]**

UCI should not be required to confirm that which it already stated and submitted. Agency Staff has at its disposal the entire record. Additionally, Agency Staff’s excuse for Question 5 is not sufficient. Applicants often change their proposed project and information associated therewith. Agency Staff is questioning the truth and veracity of UCI’s submissions. This is not within the purview of Agency Staff’s review of the application.

### **Question 1 of the 5<sup>th</sup> NIPA**

The calculations and tabulations contained in UCI’s objections to Question 1 provide the same information provided earlier to Agency Staff, just said in a different way, in another attempt to have Agency Staff understand the scientific data and technical information supporting the project application. To our knowledge, Agency Staff has not sought the assistance of a qualified expert for it to accurately interpret and understand information UCI has provided. This is so despite Executive Law §804 authorizing it to contract for professional and technical assistance and advice.

With respect to Agency Staff's claim that UCI has not provided the height of the sound source, this can be found on page 8 of the September 2023 Sound Study prepared by H2H Geoscience Engineering, PLLC ("H2H"). The September 2023 Sound Study was submitted to Agency Staff in response to a letter-request, dated August 16, 2023, from Mr. Fritz Aldinger, Agency Environmental Program Specialist 1. The September Sound Study, at p. 8, 1<sup>st</sup> paragraph, states, in pertinent part:

**A receiver height of 5 feet, and *Sound Source height of 6.5 feet is used. This field howitzer model is typical for its type and would represent the noisiest field howitzer tested on Site. The modeled scenario shows the M109A3GN firing from the Firing Pad (only location Sound Source will be operated) as shown on Figure 2. Appendix D summaries model input data.*** [Emphasis added.]

It is disingenuous for Agency Staff to argue that the sound source height was not provided nor "used in noise analysis." (See Agency Staff Memorandum, p. 15, 1<sup>st</sup> ¶.) Again, it is not the applicant's responsibility to direct Agency Staff to a particular part of the record to see information already provided.

Turning to Agency Staff's claim that UCI never provided information regarding the sound source being in the center of the 100-foot by 100-foot firing pad, this is without merit. At the in-person meeting with Agency Staff on July 25, 2022, Mr. Hopmeier explained that the howitzer, the sound source, would be in the center of the pad.

Notwithstanding the foregoing, UCI's September 2023 Sound Study prepared by H2H states that the distances from the sound source (*i.e.*, the howitzer) to the sound receptors was measured from the firing pad. In other words, the measurements were from the edge of the firing pad closest to the sound receptor. Obviously, the edge of the square 100' x 100' firing pad is closer to a sound receptor than the center of the firing pad, a distance of 50'. This is a *de minimis* difference in distance regardless what sound receptor is used in the calculation. A qualified sound

engineer would know this. Nonetheless, the edge of the firing pad closets to any particular sound receptor is a distance less than that from the center of the pad resulting in a “worse case scenario,” undefined standard Agency Staff regularly uses.

But, it bears repeating. The distance between sound receptors measured from the center of the firing pad and the edge of the pad is *de minimis*. The closest sound receptor (Monitoring Location M5) is 504’ from the edge of the firing pad and 554’ from the center of the pad. *See* UCI’s December 2023 submission. Thus, there is only a 9.9% difference in distance. The next closest sound receptor is 5,200’ away (Monitoring Location M4). *See* December 2023 submission (response to the letter-request, dated August 16, 2023, from Fritz Aldinger Environmental Program Specialist 1). There is only a .01% difference in distance using the center of the firing pad compared to the edge of the pad. The percentage of the difference in distance from the center of the firing pad and edge of the pad for the remaining three (farther away) sound receptors (Monitoring Location M1 (5,905’ from firing pad edge), M2 (9,875’ from firing pad edge) and M3(7,676’ from firing pad edge)) is obviously less – drastically less.

If Agency Staff employed the services of a qualified sound engineer, it would have concluded that the difference in distance to the sound receptors from the center of the firing pad and edge of the firing pad is *de minimis* and should not be a reason to reject H2H’s sound study and nit-pick over where the sound source may or may not be on the firing pad.

### **Question 2 of the 5<sup>th</sup> NIPA**

UCI stated it would construct a berm. A “berm” is defined “as a mound or wall of earth or sand.” Merriam-Webster Dictionary. This is common knowledge. That is what UCI’s proposed berm will be constructed with. For Agency Staff to ask what materials will be used to construct a berm would cause most reasonable persons’ eyes to roll.

Notably, the Agency’s own rules and regulations use the term “berm.” *See* 9 NYCRR 578.8(i) (“Other regulated activities may introduce or increase toxins, noise and other forms of pollution, remove or reduce vegetation or expose soil to erosion. Such activities include, for example, the operation of all-terrain vehicles and airboats, construction of utilities in existing or new corridors, either overhead or underground, disposal of chemicals, introduction or discharge of pollutants, application of pesticides and other chemicals, disposal of solid wastes, clearcutting or other timber harvesting practices, and construction or removal of groins, bulkheads, *berms* or levies.”[Emphasis added.]) The term “berm” is not defined in the Agency’s regulations. The drafters did not include a definition presumably because none is needed. A berm is a berm – a mound of earth or soil or sand. It is unreasonable for Agency Staff to ask UCI to “clarify what materials the berms will be constructed with.”

Furthermore, Agency Staff claims no information was provided as to the location of the berm. This is wrong. UCI expressly states where the berm will be located; that is, “along the northern boundary line of the Firing Pad.” *See* UCI’s response December 2023. Moreover, in “Figure -2 Site Map” of UCI’s September 2023 Sound Study it depicts to scale in yellow, having a dog-leg left shape, the berm wrapping around the eastern and northern boundary of the firing pad. To be candid, this is a gross oversight by Agency Staff and causes UCI to again have much concern about Agency Staff’s attention to detail, knowledge of the record and competency in interpreting basic maps.

#### **Question 6 of the 5<sup>th</sup> NIPA**

Deeming a permit application to be incomplete purportedly because an image or map has illegible markings or faint colors is an unreasonable basis, tiptoeing near misuse of statutory

authority. An email or telephone call from Agency Staff to the applicant or authorized representative would have resolved the issue.

In any event, Agency Staff is asking the Agency Board to affirm the need for a “revision to “Image 1.” Such affirmation is not necessary. Image 1 provided by UCI is legible and easy to interpret. Notwithstanding this, UCI shall provide a new copy of Image 1

**Question 7 of the 5<sup>th</sup> NIPA**

Agency Staff’s request for information in Question 7 of the 5<sup>th</sup> NIPA is a result of it not having qualified and able experts well-versed in the science and study of sound, whether in-house or through third-party contracts. Agency Staff is having difficulty understanding why UCI is employing International Organization of Standardization (“ISO”) standards when, according to Agency Staff, “ISO standards have not been used in relation to other recent commercial and mining projects in the Park.” See Agency Staff memorandum, p. 18. Agency Staff is effectively conceding it has no experience with ISO standards nor the method of their application. As a consequence, Agency Staff unabashedly requests UCI to explain what ISO standards are and why they exist and how they are interpreted and applied to UCI’s studies. Question 7 states, in pertinent part, “[p]lease provide an explanation these ISO standards.” UCI, as an applicant, has no obligation to explain to Agency Staff what ISO standards are nor how they are applied.

Moreover, without expertise in the field of sound science, Agency Staff cannot understand the 2007 Norwegian Study nor how UCI use it to measure the sound level at the sound source location (location of the howitzer) as explained in UCI’s response to the 4<sup>th</sup> NIPA and prior submissions. Years into this application, Agency Staff is still asking for *confirmation* of the noise level produced by a howitzer.

Agency Staff must be educated in some manner not involving UCI. Agency Staff should have retained and should now retain a third party expert to assist it with UCI's application and certainly have the third party expert present the application to the Agency Board. UCI fears Agency Staff will not accurately present the science and data to the Board. UCI hereby requests an expert in the field of sound present the application to the Agency Board when the time comes for the Board to take action.

The remaining requests in Question 7 ask UCI to *confirm* that the information *already provided* to Agency Staff is accurate. In other words, Agency Staff is repeating a request for information which it already possesses. UCI's response to Question 7 of the 5<sup>th</sup> NIPA is complete.

#### **Question 8 of the 5<sup>th</sup> NIPA**

Agency Staff baldly asserts that “[t]he charge used in a howitzer may significantly alter the impose noise level produced from firing. *See* Agency Staff memorandum, p. 19. Agency Staff cites no source or authority supporting its conclusion. Agency Staff should be required at oral presentation to explain how it arrived at this conclusion.

Agency Staff is obligated to accept UCI's response to the 4<sup>th</sup> NIPA where it states the charges used will not exceed the maximum sound level to be produced when the howitzer is fired. It has offered no coherent basis to reject the answer. If Agency Staff had the assistance of an audible engineer it would understand UCI's position.

#### **Question 9 of the 5<sup>th</sup> NPIA**

Agency Staff is requesting another sound study to provide a “worse case scenario,” whatever that means, accounting for the height and location of the sound source. UCI has already done this with the September 2023 Sound Study. Measurements were based on the edges of the firing pad and a 6.5 feet sound source (barrel) height. Agency Staff desires UCI to state it again. A qualified audio engineer retained by Agency Staff would not have required this.



### **Agency Staff's Repeated Request for Engineered Stamped Data**

As an initial matter, Agency Staff knows very well that the data provided by UCI has been generated by New York State licensed professional audible engineers, H2H. Moreover, to date Agency Staff has accepted all studies conducted and data offered by H2H, and based all of its NIPAs on the H2H studies and data. Agency Staff is desperately searching for something to support its 5<sup>th</sup> NIPA.

Notwithstanding the foregoing, UCI shall submit the studies and data again signed and stamped by an engineer from H2H. With this commitment, Agency Staff's request is moot.

**CONCLUSION**

UCI has supplied to Agency Staff extensive scientific data supporting a finding that UCI's proposed project (i) will be quieter on surrounding environments than noise generated by the nearby mining operations during blasting, (ii) will create a combined impulse noise event of 7.5 *seconds over a five-year period*, and (iii) does not pose a potentially significant environmental impact due to an increase in sound levels in surrounding land, including those designated Wild Forest. Nothing more is needed from UCI. And, UCI will produce studies and data signed and stamped by a licensed professional engineer from H2H as requested. Accordingly, the application should be deemed complete, or at least so contingent on stamped studies and data.

Dated: May 15, 2024

Norfolk Beier PLLC



By: \_\_\_\_\_  
Matthew D. Norfolk, Esq.  
Authorized Representative

To: Chairman John Ernst  
Dan Wilt, Chair – Committee on Regulatory Programs  
Barbara Rice, Executive Director  
Sarah Reynolds, Esq., General Counsel  
David Plant, Deputy Director for Regulatory Programs