

Executive Summary

The Hudson Valley Preservation Coalition (“HVPC”) and Friends of Hudson (“FOH”), (“Interested Parties”), submit this response to the New York Department of State (“DOS”) in answer to the St. Lawrence Cement Company’s (“SLC’s”) Coastal Consistency Determination dated October 2004 (“October Coastal Consistency Submission”) and supplemented in February 2005 (“February Coastal Consistency Submission”) for its proposed Greenport Project (“SLC project”).¹

The St. Lawrence Cement Company’s redesigned Greenport Cement Project is not consistent with New York State’s Coastal Management Plan or its implementing policies. As will be discussed in detail below, the CMP and its policies seek to achieve a balance between economic development and preservation by requiring the Project to be consistent with each of the Policies in order to ensure that essential natural coastal resources are protected. Due to the Project’s massive size, location and nonstop production schedule, the Project will result in significant and unmitigated visual impacts to scenic coastal resources during daylight and evening hours, adversely impact historic and cultural resources of state-wide and national significance through its visual, noise, fugitive dust and air pollution, undermine the local economy and revitalization efforts by the City Hudson, Village of Athens, and many other communities along the Hudson, diminish open space areas and public access to the water front and recreational use of the Hudson River, adversely affect aquatic resources, among other adverse impacts. Even as redesigned, the mitigation offered by SLC as part of this Project will not eliminate or offset these adverse impacts and will certainly not “significantly improve the overall scenic beauty of the coastal zone”. (SLC October Coastal Consistency Submission, at ES-1).

¹ HVPC and FOH have previously submitted comments on SLC’s Coastal Consistency Determination originally submitted to the Department of State on January 2002. HVPC and FOH request that those comments and the comments of the interested parties, to the extent that they remain relevant in light of the proposed redesign of the Project be incorporated into the record of review for the current Coastal Consistency Determination.

The City of Hudson is intimately tied to the Hudson River and in fact hosts the oldest waterfront park in the country; Promenade or Parade Hill. The Federal Government, New York State, the City and its residents have made substantial investments in the City's revitalization, including its waterfront area. Hudson's physical connection to the waterfront and its redevelopment efforts represent a priority water-dependent use which must take precedence over SLC's Project when compared to each of the CMP's forty-four coastal policies. The economic engine driving Hudson's exemplary main street redevelopment effort is historic and cultural tourism and retail, based solidly in the scenic vistas and river views that inspired this Country's first fine arts form. As a water front city, Hudson's identity and redevelopment encompass water-dependent activities that need to be considered and in fact, must take precedence over the private, one dimensional heavy industrial development proposed by SLC. The water-dependent uses supported through the City and State at Hudson's waterfront, such as the historic Promenade (or Parade Hill) Park, the City-owned waterfront park and Pavilion at the water's edge, and the soon to be redeveloped brownfield site often referred to as the Hudson Coal Tar site, represent existing water-dependent uses which must be protected and encouraged under the WRA and the CMP.

The scale and intensity of the SLC's Project will destroy these existing water-dependent uses. Diesel engine noise and fumes from HudsonMax vessels which will run continuously, 24 hours a day for one and one-half to four days during each berthing event, will result in visual obstructions as well as air pollution and noise at levels untenable for recreational and other users of the City's current water front amenities. The proposed heavy industrial Project is also not compatible with the adjacent waterfront residential use at the Hudson Terrace Apartment Complex.

Contrary to SLC's claims, the designation of cement manufacturing as a water-dependent use does not automatically entitle SLC to preferential treatment under the CMP or the Waterfront Revitalization and Coastal Resources Act ("WRA"). N.Y. Exec. Law §910. Rather, guidance to Policy 2 states that water-

dependent uses still must be compatible with adjacent uses and protect other coastal resources (Final EIS, CMP at II-6-12). Policy 2 does not take precedence over all other applicable coastal management policies of which the Project must also be consistent. The CMP does not “expressly promote[s] ...water-based industry”. (SLC October Consistency Determination at ES-1). Rather, the goal of the WRA is to “achieve a balance between economic development and preservation that will permit the beneficial use of the coastal and inland waterway resources *while preventing the loss of living marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems.*” (ECL, Art. 42, §912(1)). [Emphasis added]. Nothing in the WRA, the CMP or Policy 2 grants water-dependent uses guaranteed access to the coastal area by elevating such uses above the fundamental goal of the statute. Rather, priority consideration is relevant where non water dependent and water dependent alternative development projects are competing for approval in the coastal zone.

The Project is also inconsistent with the Village of Athens Local Waterfront Revitalization Plan (“LWRP”) and its efforts to redevelop its historic waterfront lower village. Night-time lighting impacts from the dock side facility, breasting and cement barges, attendant tug boats and HudsonMax and other ships, the facility itself and the under-lit plant plume will be severe. The noise from the docking facility and conveyor system, amplified by the reflective surface of the Hudson River, will destroy the recreational experience in the Village of Athens, use of the Hudson River from the western shore, the outdoor dining experiences at waterfront restaurant diners and various waterfront performances currently offered in Athens. The scenic vistas from the waterfront park toward the historic Hudson-Athens Lighthouse and the mostly undeveloped eastern shore of the Hudson River will be significantly diminished and in some cases obliterated by the Project. According to Athens residents, this passive recreational opportunity of viewing the Hudson available at the Village’s waterfront is the most important recreational amenity of the park.

The regional economy is also increasingly based on a diverse mix of heritage tourism, retail, specialty construction and second home ownership made possible by and directly related to the quality and cultural significance of the region's coastal resources. Riverfront cities, towns and villages all along the Hudson such as the Village of Athens the Towns of Irvington and Catskill, and the Cities of Beacon, Kingston, Newburgh and Poughkeepsie have been undergoing highly successful redevelopment in accordance with the goals of the CMP. Such redevelopment efforts have been based on preserving and protecting scenic, historic and cultural coastal resources. The introduction of this massive, heavily industrial land use will undermine regional redevelopment efforts along the coast and will have far reaching impacts on residents and visitors who will perceive this project negatively.

This region also has tremendous significance from a national cultural-geographical perspective as the birthplace not only of the Country's original fine arts movement; the Hudson River School, but also served as the birthplace for the development of American Landscape Architecture, and contains important early examples of town planning. Although the Project site is not within a SASS, scenic, cultural and historic resources of national significance surround the site and are protected by the SASS designation. This unique location is worthy of special consideration and protection, a fact that must weigh heavily in DOS's decision-making.

SLC's proposed mitigation to coastal resources fails to eliminate or even adequately compensate for the damage this Project will cause to coastal resources. Indeed, under the CMP the proposed mitigation cannot legally overcome the Project's fundamental inconsistency with any one CMP Policy.

The removal of the Atlas silos and plume nearly six miles away from Olana, does not eliminate or even mitigate the introduction of the Project's plume approximately three miles from this national treasure. Furthermore, as redesigned, the Project plume will contain significantly more moisture, and will be much more visible throughout the region than represented by SLC. In addition, the adverse Impacts to Olana will be exacerbated as a result of the

implementation of the Olana Restoration Project which will open up views designed, enjoyed and painted by Frederic E. Church.

The recreational value of SLC's proposed linear park, with a limited overlook to the Hudson River, will be minimal due to the noise, air pollution and visual obstruction and intrusions related to SLC's adjacent docking facility. In fact, as discussed below, the park design has the potential to create serious safety concerns for park users.

It is also important to note that SLC will not shutter the Catskill Facility which will continue to support the Greenport Facility through grinding of cement clinker, production of GranCem®, storage, shipping and cement kiln dust landfilling. SLC has already received permission to expand the dock facilities at Catskill to increase the shipment of GranCem®. SLC omits that information and has not fully addressed the cumulative impacts of the continued operation of the Catskill plant on the coastal resources.

The majority of SLC's remaining alleged mitigation measures consist of belatedly addressing visual blight caused by decaying and obsolete industrial detritus which has been within SLC's ability to clean up for almost three decades. Removing decayed silos and barge loaders should not be viewed as mitigation. As a matter of public policy such claimed mitigation should not be considered by DOS.

Nor should the difference between SLC's redesigned plant configuration from its prior poorly designed Project be considered mitigation in DOS' coastal consistency determination. Rather, DOS must assess SLC's current proposed Project on its face and judge it accordingly.

Introduction

Despite the unacceptable impairment to coastal resources which will result from the Greenport project, SLC mistakenly asserts that the SLC project is consistent with the State's 44 coastal policies. The proposed SLC project is of such a magnitude, with the negative impacts so widespread, that the project cannot legally meet the standards for coastal consistency for Policies No. 1, 2, 4, 18, 19, 20, 21, 23, 24, and 25. Nor will the Project comport with the fundamental purpose of the CMP and the WRA which is to protect the cultural, historic, environmental and other assets considered essential to the continued vitality of the state's coastal areas while allowing development, which is *compatible* with this goal, to occur. (Executive Law Article 42, Part 910 and 912(1) and 19 NYCRR Part 600.1(c)).

The SLC Project, even as redesigned, entails a massive industrial complex that will pervade the mid-Hudson area, blighting and degrading picturesque and nationally significant vistas to and from the Hudson River, the Catskill Mountains, the City of Hudson, Olana, the Village of Athens Waterfront, and many other areas within and adjacent to Scenic Areas of Statewide Significance ("SASS"). In addition, the Project will impair the value of hundreds of acres protected by federal, state, and local governments as well as not-for-profit land preservation groups like Scenic Hudson, Open Space Institute and the Columbia Land Conservancy. Although SLC has lowered the height of the tallest cement plant facility elements, the stack of the plant will still be visible from many view points including the City of Hudson, Village of Athens, Olana and other areas of historic and cultural significance. Notably, the plant's plume will actually be more visible as a result of the redesign due to a higher moisture content of the flue gases.

As originally designed, the plume would have been visible during 80 per cent of winter daylight hours. While not accounted for in the DEIS, the plume will be a highly visible feature in the night time sky due to plume under lighting from the City of Hudson and Project lighting, including the dock facility. The plume

would have had a range up to six and one-half miles long, and would have been a highly visible feature of the Project throughout the entire region.² As redesigned, the plume impacts appear to be far worse. While SLC has failed to provide new information on the revised cement process, it is clear that the announced changes will result in a significantly larger plume than predicted by SLC. The introduction of a vapor plume into this region has already been determined as inconsistent with the State's CMP according to DOS's decision in the Athens Generating case. See Department of State, Coastal Consistency Determination, July 14, 2000, Athens Co-generation Facility.

SLC's proposed plant redesign has not altered the Project's dock which consists of a 14-acre dock facility at the edge of the Hudson River. This riverside facility, which is located on the east side of the Hudson River adjacent to the City of Hudson waterfront and is opposite the Village of Athens, will consist of a new 450 foot long bulkhead for loading 12,000 metric ton cement barges that are 400 feet long and 72 feet wide. Five hundred feet upstream from this barge dock will be a HudsonMax berth consisting of two structures called dolphins, which are clusters of piles driven into the riverbed to provide extra mooring points for the HudsonMax ships. A HudsonMax ship is the largest ship that can safely navigate the Hudson River. It is 754 feet long, 80 feet wide and has a draft of 32 feet. (DEIS at 1-39). Cement barges will berth to load cement product three to four times a week, on average every other day and night. (February Coastal Consistency Supplement at 17). HudsonMax vessels will berth 16-22 times a year to deliver raw materials and remain at the dock from one and one-half to four days during each delivery. Twenty four hours before and after HudsonMax deliveries, a 250-foot long, by 64-foot wide breasting barge will be stationed at the HudsonMax dock to assist in staging and unloading the vessel. (October Coastal Consistency Submission at 19).

To maintain the plant's operations, stockpiles of coal/coke, gypsum, and other raw materials will be stored for periods of 24-36 hours. These stockpiles

² The interested parties continue to assert that the use of local met data to model the plume impacts would result in a more accurate and negative assessment of visual impacts from the Project plume.

may be as high as 54 feet or 4 stories high (DEIS at 1-40). To unload raw materials, a horizontal overhead conveyor system will run perpendicular to the riverbank. The conveyor system will rise to 65 feet at a 12-degree angle to an 82-foot tall (6-story) pump house and require a 65 foot tall (5-story) conveyor reversing structure. (Id. at 1-40 through 1-41). Materials will be fed into a 2 mile long tube conveyor enclosed within a steel and aluminum frame with a metal standing seam shed roof. (October Coastal Submission at 16).

Both the City and Village contain outstanding scenic, historic and cultural resources related to or situated in the coastal region which would be significantly impaired by this Project. See Exhibits A, Letter dated March 18, 2005 from Dr. Harvey K. Flad; B, Letter dated March 17, 2005 from Ruth Piwonka; C, Report dated March 15, 2005 from Peter J. Smith; D, Letter dated March 16, 2005 from Andrea Smallwood, Deputy Mayor of Village of Athens; E, Mount Merino Catalogue of Exhibitions. As Exhibits A and B demonstrate, the Project site is proposed within one of the most historically, culturally and aesthetically important regions of the Mid-Hudson Valley; a region which is nationally and internationally recognized for the quality of these resources which are *directly* related to the coastal zone. See Exhibit F, Letter dated March 18, 2005 from Linda S. Ferber, Kevin J. Avery, John Wilmerding, John K. Howat, and Barbara Nowak; Exhibit G, Letter from Kevin J. Avery; and Exhibit A.

Situated at the gateway to historic Hudson's main thoroughfare, (Warren Street), this Project threatens the enormously successful revitalization efforts which have been integral to recent waterfront improvements including the refurbished Promenade Park, construction of a new water front park gazebo, and City boat launch. See Exhibits H, Letter dated January 15, 2005 from Norman Mintz; I, Letter dated March 16, 2005 from Dr. Ann Davis; C; J, Palmer, James F. Review of Visual Changes dated March 18, 2005; K, DeWan, Terrence J., Review of Visual Impacts and Coastal Consistency dated March 16, 2005. These waterfront facilities currently host festivals, historic and cultural tours, social and school events, and family and educational activities during the summer and fall seasons during daytime and evening hours. See, Exhibit L, City

of Hudson Calendar of Events. Due to the noise from dock and conveyor operations, facility and vessel air pollution, fugitive dust emissions from the dock operations, and visual impacts, including night-time impacts from facility and dock side lighting, and under lighting of the facility plume, the Project will discourage visitors, tourists, residents, including second home owners, and commercial investors from coming to or investing in Hudson. See, Exhibits C, H, I, J, and K.

Similarly, adverse visual and noise impacts to the historic lower Village of Athens will be dramatic. See, Exhibits C and D. Much of the lower Village waterfront has a direct view of the docking facility. The night-time lighting impacts from the dock and plume will irreparably damage scenic views currently enjoyed by residents and visitors who use the Athens waterfront park. Restaurants and other businesses located along the Athens waterfront, including the historic Stewart House which produces Shakespeare on the Hudson during summer evenings, will also be dramatically impacted. See, Exhibits D; M, Letter dated March 10, 2005 from Owen Lipstein of the Stewart House; and N, Letter dated March 16, 2005 from Mr. Charles Houghton, III, ELCO, Inc.. Noise intrusion on currently quiet summer evenings will destroy the viability of evening events such as Shakespeare on the Hudson and will jeopardize many day time events. Because of the round the clock operation schedule and scale of the operation, the docking facility will be in almost constant use as loading barges will be at the lower portion of the dock (most visible to Athens) on average every other day and night, while the upper portion of the dock will berth HudsonMax ships 35% of the year.

These activities will certainly conflict with the Village's active events calendar. See, Exhibit O, Athen's Riverfront Park Schedule. For example, the annual Street Festival, attracts thousands of visitors and tourists to the Village of Athens. The Village of Athens Trustees have raised serious concerns about the continued viability of such events should the Project be built. Exhibit D.

Regulatory Authority

The Federal Coastal Zone Management Act

First and foremost, the Federal Coastal Zone Management Act (“CZMA”) of 1972 was enacted by Congress to protect coastal resources from ill conceived land use development through “the introduction of management systems permitting conscious and informed choices among various alternatives.” (S. Rep. 92-753, 92nd Cong., 2nd Sess. 1972, 1972 U.S.C.C.A.N. 4776). The Senate Report accompanying the original CZMA described the destruction of coastal resource which the law sought to avoid:

Settlement and industrialization of the coastal zone has already led to extensive degradation of highly productive estuaries and marshlands. For example, in the period 1922-1954 over one-quarter of the salt marshes in the U.S.A. were destroyed by filling, diking, draining or by construction of walls along the seaward marsh edge. In the following 10 years a further 10% of the remaining salt marsh between Maine and Delaware was destroyed...The problems of the coastal zone are characterized by burgeoning populations congregating in ever larger urban systems, creating growing demands for commercial, residential, recreational, and other development, often at the expense of natural values that include some of the most productive areas found anywhere on earth. (Id. at 4780).

The filling of South Bay is a prime example of the kind of thoughtless destruction of critically important natural resources which motivated Congress to pass the CZMA. The law’s Congressional findings, as enacted in 1972, bear out this fact. See, P.L. 92-583, Congressional Findings, Section 302, stating:

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, **have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion.**

(d) The habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, **are ecologically fragile and**

consequently extremely vulnerable to destruction by man's alterations.

(e) Important ecological, cultural, historic, and esthetic values in the coastal zone which are **essential to the well-being of all citizens are being irretrievably damaged or lost.**

(g) **Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values.**

(h) In light of competing demands and the **urgent need to protect and to give high priority to natural systems in the coastal zone**, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate. [emphasis added]

SLC's over-reliance on the water dependent use status of cement manufacturing does not comport with the language of the law and undermines the long standing goal of instituting an informed "management system" to "preserve, protect, develop and wherever possible restore or enhance, the resources of the Nation's coastal resources", giving "full consideration to ecological, cultural, historic, and esthetic values as well as the needs for "**compatible** economic development" in the coastal zone. 16 U.S.C. §1452(1). Section 1452(2)(D) provides for priority consideration of coastal-dependent uses, but *only* within the context of a state management plan that "achieve[s] wise use of the land and water resources of the coastal zone, giving full consideration to essential coastal resources as well as the needs of "**compatible** economic development" in the coastal zone. SLC's Project is anything but compatible with its surroundings or the coastal region which it will adversely affect.

Due to the scale, intensity of proposed operation, and its location amid one of the nation's most aesthetically, culturally and historically rich areas, the SLC Project in no way represents a "**compatible** economic development" activity. Historically, no industrial development along this part of the Hudson River has ever approached the scale and intensity of the SLC Project,³ and no cement manufacturing activity has taken place on the proposed SLC Project site since 1976.⁴

³ HVPC's Petition for Party Status, Exhibit F, at 11

⁴ *Id.*, at 8

The word “compatible” did not appear in the CZMA as originally enacted but was specifically added in 1990.⁵ It is “a fundamental principal of statutory construction that ‘effect must be given, if possible, to every word, clause and sentence of a statute . . . so that no part will be inoperative or superfluous, void or insignificant.’ 2A Sutherland, [internal citations omitted].” In re Surface Min. Regulation Litigation, 627 F.2d 1346, 1362 (C.A.D.C. 1980). The addition of the word “compatible” was not an insignificant or superfluous act by Congress, but indicates that Congress clearly envisioned some types of economic development so incompatible, that recognition was not warranted under the CZMA through state management plans or otherwise. The SLC Project is not compatible development and does not deserve federal or state recognition as a legitimate development activity which furthers the national interest pursuant to the CZMA.

During the ensuing three decades after the cessation of cement manufacturing, the coastal area within a five mile radius of the SLC Project has changed dramatically, shifting away from heavy industry to smaller, lighter commercial and industrial operations. Historic and cultural tourism *directly* related to the unique natural, aesthetic, and cultural values in this coastal region, has replaced large industry as the region’s economic engine.⁶

Furthermore, the SLC Project is not compatible with the local waterfront revitalization measures approved by Athens pursuant to the CZMA, and, thereby approved and in part funded by the federal government.⁷ Similarly, land conservation efforts, including substantial funding undertaken by the State independently and in conjunction with not for profit organizations such as Scenic Hudson, the Columbia Land Conservancy and the Open Space Institute would also be directly threatened by SLC’s incompatible industrial development. See, Exhibit P, Letter dated March 16, 2005 from Edward O. Sullivan, President, Scenic Hudson, Inc.

⁵see, Pub. L. 101-508 §6203(b).

⁶ see, Exhibits C; H; I; and Q, Letter dated March 16, 2005 from Ken Bowers, Planning and Real Estate Consultant.. see *a/so*, Exhibit R, Greene County Nuclear Power Plant, Final Environmental Impact Statement for the Nuclear Regulatory Commission, at 5-55 (1979); and HVPC’s Petition for Party Status, Exhibit F.

⁷ Exhibit D.

The 1980 amendments to the CZMA also “expanded upon the original language of section 303 [1452] to state more clearly the need for State coastal management programs to address the specific policy areas identified” by the Executive branch. (see, U.S. Senate Committee Report to accompany S. 2622, No. 96-783 at 3-4). According to the President’s “second Environmental Message” transmitted to the Congress in August of 1979, President Carter recognized the immense importance of the Nation’s coastal resources by declaring 1980 as the “Year of the Coast”. (Id. at 3). Specifically, President Carter sought protection of “significant natural resources such as wetlands, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife”, to “increase public access to the coast for recreational purposes”, and the preservation and restoration of “historic, cultural and aesthetic coastal resources”. (Id.) Amendments and recommendations that were the outgrowth of this message were incorporated into S.2622, the CZMA amendments which were eventually passed by Congress and enacted into law by the President.

Specifically, Congress added §1452(2)(A) “for the protection of *significant natural resources*”. (Id. at 4 and 6). As amended, §1452(2)(A) states:

The Congress finds and declares that it is the national policy –
(2) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, which programs should at least provide for-

(A) the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and wildlife and their habitat, within the coastal zone

New York’s Coastal Management Plan also recognizes and protects these significant coastal resources.

The New York Waterfront Revitalization and Coastal Resources Act

New York adopted the Waterfront Revitalization and Coastal Resources Act (“WRA”) in 1981 and received federal authorization to implement the CZMA

policies and goals in 1982. (N.Y. Exec. Law § 910). The overriding public policy goal of the WRA is:

To achieve a balance between economic development and preservation that will permit the beneficial use of coastal and inland waterway resources **while preventing the loss of living marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems.** N.Y. Exec. Law §912(1). [emphasis added]

In conformance with the CZMA, the WPA was designed to provide a comprehensive process whereby decision makers could methodically assess a range of impacts to and pressures on New York's coastal resources. However, as stated above, consideration of these often times competing impacts and pressures were to be guided by an overriding concern: preventing the loss of certain essential coastal resources.

These policies cover a range of concerns pertaining to the use and protection of natural and man-made coastal resources, but one significant declaration is "...to achieve a balance between economic development and preservation that will permit the beneficial use of coastal resources while preventing the loss of marine resources and wildlife, diminution of open space areas or public access to the waterfront, shoreline erosion, impairment of scenic beauty, or permanent adverse changes to ecological systems." **This policy sets the tone for New York State's Coastal Management Program, and the objective that State agencies' should strive to achieve in the Coastal Area.** (CMP/FEIS II-4-5 through 6) [emphasis added]

...The Policies designed to promote the use of coastal resources are summarized as follows:

- Revitalize underutilized waterfronts (Policy 1)
- Facilitate water dependent uses (Policy 2)
- Expand the State's major ports (Policy 3)
- Expand the State's commercial fishing industry (Policy 10)
- Expand public access and water related recreation (Policies 9, 19-22)
- Develop coastal energy resources (Policies 27,29)
- Redevelop the existing built environment (Policies 1, 4,5)
- Expedite permitting procedures (Policy 6)

Use of all coastal resource is, however, **constrained** by the realization that to assure a reasonable quality of life for the long term, **the coastal resources essential to society** must be carefully husbanded. This frugal use necessitates **strong protection measures for certain fragile or rapidly diminishing resources**. The resources identified as being in need of protection are as follows:

- Significant fish and wildlife habitats (Policies 7,8)
- The traditional character and purposes of small harbors (Policy 4)
- Historic and cultural resources (Policy 23)
- Exceptional scenic areas (Policy 24)
- Agricultural land (Policy 26)
- Dunes, beaches, barrier islands and other natural protective features (Policy 12)
- Water and air resources (Policies 31-33, 26-28, 40-43)
- Wetlands (Policy 44)

(FEIS/CMP II-6-2 through 4) [emphasis added]

As will be described in more detail below, the Project will place *essential coastal resources* in jeopardy in violation of WRA §912 and the CMP. As currently proposed, this Project will result in the loss of marine resources and wildlife, diminution of open space areas and public access to the waterfront, the impairment of scenic beauty and recreational use of the Hudson River, and permanent adverse changes to the ecological system of the area, an area widely acclaimed as a resource of local, regional, statewide and national prominence.

Project Review Under CZMA

Under the CMP, DOS must certify that the Project is consistent with each of the applicable Coastal Policies. If a Project is inconsistent with one Policy, it must be determined to be inconsistent with the CMP. As set forth in more detail below, no amount of mitigation or inter-Policy compensation can overcome a Project's fundamental inconsistency with one Policy.

CZMA section 1456(c)(3)(A) states that where a state has a federally approved coastal management plan, an applicant for a required federal permit or license to conduct an activity affecting the coastal zone must submit to the federal permitting agency a certification that the activity will conform to the state's

coastal management plan. The applicant must also submit such certification to the state or its designated agency together with all necessary information and data. Federal approval cannot be granted until the state either concurs with the applicant's certification or where concurrence is presumed by the State's failure to act. DOS's coastal consistency determination is issued pursuant to Section 913 of the WRA.

Contrary to SLC's contention, "the informational requirements of the CMP" and the "regulatory standards that apply to NYSDEC's administrative programs" are comparable. (see, October Coastal Consistency Certification at 3, FN 2). Ultimately, both DOS and DEC must certify that the proposed activity is consistent with the applicable coastal policies as set forth in 19 NYCRR 600.5. (see, 16 U.S.C.A. §1456(c)(3(A); 19 NYCRR 600.3(b); 6 NYCRR 617.11(e); and 19 NYCRR 600.4(a)).

Where an applicant also needs state approval to conduct an action that may have a significant effect on the environment and such action is determined to be within the state's coastal area, the permitting agency must issue findings akin to the coastal consistency determination pursuant to the same set of standards applicable to DOS. According to 19 NYCRR 600.4(a), in order for a state agency to certify coastal consistency, the agency must comply with 6 NYCRR 617. 9 (b)(5)(vi) and 6 NYCRR 617.11(e) which prohibits such agency from making a final determination on a project subject to a final EIS unless the agency has made "a written finding that the action is consistent with applicable policies set forth in 19 NYCRR 600.5." ⁸

⁸ HVPC and FOH previously submitted a letter dated November 19, 2004, as part of the review of the October 2004 St. Lawrence Cement Company's Coastal Consistency Determination concerning procedural and substantive issues involved in the SEQRA and CZM certification processes. The November 19, 2004 letter is part of the administrative record currently before DOS.

Project Review History

NYS Department of Environmental Conservation Adjudicatory Hearings

The DEC Commissioner's Second Interim Decision determined that many substantive and significant issues require adjudication before DEC. Several of the issues relate directly to impacts on coastal resources, including resources protected by the CMP. Specifically, the Commissioner upheld the ALJs' ruling concerning four CMP policies: Policy 4 (development of small harbors); Policy 23 (preservation of historic and cultural resources that have a coastal relationship); Policy 24 (protection of SASSs); and Policy 25 (protection of overall scenic quality of the coastal area). (Second Interim Decision at 102). Furthermore, the Commissioner determined that several other substantive issues related to DOS' coastal consistency approval required adjudication. Therefore, SLC's reliance on the preliminary, and now superseded, DEC staff positions to support its most recent coastal consistency determination is misplaced.

Visual Impacts:

The Project's visual impacts are important to assessing consistency with most of the coastal policies to be adjudicated through the DEC adjudicatory process. Although the reconfigured Project may have reduced the visibility of some of the Project's inland vertical elements, as will be discussed in more detail below, it is clear from SLC's most recent balloon flight that the Project will still result in significant and unmitigated adverse visual impacts on New York's coastal resources. In fact, because of process design changes proposed for the cement plant, the resultant steam plume will be far more visible than under the previous design. Exhibit S, Letter dated March 15, 2005 from Mr. Gabe Miller, Dresser & McKee.

Accordingly, SLC cannot rely on claims that "NYSDEC staff determined that the full range of visual impacts, an important component of the CMP, had been revealed and that all applicable mitigation techniques (listed in the universal list of mitigation techniques in the NYSDEC Visual Assessment Policy) had been

incorporated into the proposed action or added in effective ways.” See, October Coastal Consistency Determination at 7.

In fact, the DEC’s Administrative Law Judges (ALJ), “held that SLC’s [visual] analysis itself revealed significant impacts from the project.” SLC, Second Interim Decision, at 87. The Commissioner upheld the ALJs’ findings on this point.

Aquatic Habitat & Wildlife:

DEC’s Administrative Law Judges found SLC’s analysis of the impacts to aquatic habitat and wildlife sorely lacking. In particular, the ALJ’s found that SLC did not provide an analysis of the impacts upon short-nosed sturgeon; lacked sufficient wildlife studies to support conclusion that impacts have been adequately identified and that mitigation plans will enhance habitat; did not provide an explanation for why loss of .05 acres of SAV, previously a subject of staff concern, is acceptable; did not provide current area specific habitat and species information to support the conclusion that the park is appropriate mitigation; and failed to explain how the reduction of river water withdrawals at the Catskill facility will compensate for losses associated with proposed dredging across river at Greenport. Second Interim Decision at 71.

Although SLC claimed at the time, and appears to maintain in its October certification that its October 2001 revised wetlands mitigation plan addressed many of the issues raised by the ALJs, DEC Commissioner Crotty determined otherwise. Finding that the “issues conference record is largely devoid of any indication that such study and analysis occurred”, the Commissioner found that neither SLC nor DEC staff could rely on the ‘after the fact’ findings made in October 2001. Second Interim Decision at 77. Further, Commissioner Crotty determined that although the October 2001 plan provided an estimate of fish that might be impacted by decommissioning of Catskill, it was still unclear whether reduction should be considered compensation for fish impacts in Greenport; the record did not quantify impacts that barge operations will have on SAV beds; and that more information was needed on existing base line conditions. *Id.* Given

these findings by the DEC Commissioner, SLC may not rely upon the DEIS, or its revised wetlands mitigation plan as credible evidence to support its coastal certification. As a result, SLC has failed to satisfy its burden to demonstrate coastal consistency and DOS must deny SLC's Coastal Consistency Determination

Noise:

In her First Interim Ruling, the DEC Commissioner determined that the noise impacts from the proposed SLC Project, including those generated from the Project's waterfront related activities, must be adjudicated. See, Commissioner of Environmental Conservation's First Interim Decision, December 6, 2002. The adjudicatory hearing was held in late 2003. Throughout the adjudicatory hearing, evidence elicited from SLC's witnesses and the experts for FOH and HVPC demonstrated that the noise impact evaluation suffered from significant deficiencies which cannot be used to fairly predict the noise impacts from the Project. Yet, SLC, in its February 2005 supplemental submission to DOS, merely regurgitated its prior technically challenged support for the erroneous conclusion that the Project will not result in significant noise impacts. Attached to this submission is the post adjudicatory hearing brief submitted by HVPC and FOH, which documents the shoddy technical support relied on by SLC. Exhibit T, Friends of Hudson and Hudson Valley Preservation Coalition Joint Post-Hearing Brief dated February 10, 2004.

The adjudicatory hearing disclosed that the Project would result in significant noise impacts to receptors in the coastal zone. By its own estimation, SLC determined that the noise impacts from its waterfront related activities would unduly interfere with the use of the City of Hudson Waterfront Park. DEC staff conceded that the draft permit condition ignored these essential impacts. See, *Id.* at pp. 31-33.

In the DEC adjudicatory hearing, HVPC and FOH's noise engineer, Mr. Lewis Goodfriend, testified that the DEC draft permit condition does not impose limitations which would control noise impacts at the Park. The City of Hudson

Waterfront Park (“Park”), which opened in 2003 with the support of the State of New York, provides access to the Hudson River waterfront to residents of and visitors to the City of Hudson. Urban parks provide relaxation and respite from the stress of city life in areas where people generally do not have access to these resources. The Park is especially important as a resource for low income and minority communities in the City of Hudson.

SLC’s reliance on the City of Hudson Noise Ordinance, DEC’s draft permit issued on October 9, 2003 and the best management practices is misplaced. Neither the draft permit nor the BMP considered the evidence elicited at the adjudicatory hearing and the impacts to the Park nor did the noise impact analysis provide any evaluation of the impacts to recreational users of the Hudson River.

SLC’s February 2005 supplement to its coastal consistency determination fails to address the significant noise impacts which will result from its Project on visitors to the City of Hudson and Promenade Park, and residents and visitors to the Village of Athens.

As set forth in HVPC and FOH’s Post Hearing Brief before the Department of Environmental Conservation, Exhibit T, SLC failed to produce technically defensible support to demonstrate that the Project would not result in significant adverse noise impacts. The Interested Parties relied on the expertise and analysis of Lewis Goodfriend, one of the foremost experts in his field. Mr. Goodfriend provided an unbiased and thorough analysis of SLC’s methods and conclusions and determined that SLC had not utilized either proper methods or the noise metrics to objectively predict noise impacts. *Id.* at pp 3-7. For example, the field measurements and notes relied on by SLC’s witnesses failed to meet minimum professional standards. *Id.* at pp 9-11. Nor did DEC staff possess the requisite noise engineering expertise to judge the noise impact analysis submitted by SLC. *Id.* at pp 7-9.

SLC, with DEC’s acquiescence, permitted SLC to rely on the Leq metric. The Leq metric can be useful as one measure of noise impacts; however, it fails to provide a complete picture of either the existing ambient noise or the projected

impacts. The Leq provided an average over a twelve hour daytime and nighttime periods during which the measurements were taken. During any one or more hours, the noise levels could far exceed acceptable levels. This was shown to be the case by Mr. Goodfriend. Noise Brief pp.12-16.

Despite SLC's much ballyhooed CadNa A model, Mr. Goodfriend uncovered severe methodological flaws in its application to the Project which preclude its use to predict impacts from both the manufacturing and dock facilities. First, the model was not based on measurements taken at the Holcim facility, a cement manufacturing plant in Colorado. The model relied, in part, on other sources of data which could not be identified with any reasonable degree of engineering certainty. *Id.* at 25-26. Nor did SLC subject the CadNa A model to proper quality assurance and quality controls. *Id.* at pp 27- 28. The CadNa model presented no better evidence than the computational spreadsheet model which lacked accuracy due to the inaccuracy of measurements and shoddy technical support. *Id.* at pp. 12-16.

As a result of these significant defalcations and SLC's failure to meet its burden to demonstrate coastal consistency, DOS must deny SLC's Coastal Consistency Determination.

Air Pollution and Fugitive Emissions:

In its March 9, 2004 letter, DOS identified as issues, potential air pollution and the means of incorporating air pollution control measures which minimize visual impacts while still meeting the requirements of the Clean Air Act, including the requirement for LAER for NOx and VOCs. SLC's October 2004 application makes numerous conclusory statements regarding its air emissions and purported limits upon visible plumes without significant supporting information.

As noted in SLC's application, it is proposing significant changes in the height, location and manner of operation of its main production facility. As SLC admitted in its press conference in August 2004 and reiterated at another press conference in October 2004, it has yet to conduct air dispersion modeling for its reconfigured facility. In fact, SLC has repeatedly stated that it does not believe it

will be in a position to submit a revised Air Permit Application (APA) to DEC until sometime in the first quarter of 2005. Absent such an application with the significant information that must be included therein, it is impossible for SLC to attest, with any certainty, the accuracy of its projected impacts. Since SLC has not accurately predicted the air quality impacts and has not submitted a full engineering analysis, DOS must deny the Coastal Consistency Determination.

Essential to consideration of the impacts on the coastal zone from the Project, both direct and indirect air pollution impacts and visual impacts from the structures and the plume, is use of the appropriate meteorological data to model both air emissions and plume dispersion. Interested Parties have consistently argued that SLC improperly used data from Albany International Airport for its modeling when it had already collected more than two years of on-site meteorological data. Analysis of that data by Friends of Hudson's engineering consultants, Camp Dresser & McKee, demonstrated that the local data was significantly different from the Albany data. For example, local wind speeds in the Hudson/Greenport area are on average 50% lower than at Albany Airport and there are statistically significant differences in the wind directions. These significant differences affect the likely dispersion of pollutants and their impact on sensitive populations and historic structures. Differences in wind speed and temperature also affect the frequency, size and dispersion of the plume of the project.

New York State has utilized local meteorological data as opposed to data from the Albany airport for a project to illuminate the New York State Canal System. See, Exhibit U, Letter dated March 7, 2005 from Howard Brandston. Local data collected for the Canal System project from a local farm in Claverack was significantly different from the data collected in Albany. *Id.*

In her first Interim Decision on the Issues Ruling, Commissioner Crotty overruled the ALJs and decided that re-modeling of the air emissions was not required because DEC Staff had previously approved the modeling protocol and it would be unfair to require the applicant to undertake the expense of re-modeling at that time. While we strenuously disagree with that ruling as it

disregarded the fact that the public never had an opportunity to comment on the protocol, that ruling on that issue is now moot. Since SLC has proposed such a significant change in the project, by eliminating one stage of the pre-heater, lowering the stack height by more than 100' and relocating the facility by one-quarter of a mile, it will be required, as a matter of law under the Clean Air Act, to do new air dispersion modeling as part of its new APA. This modeling will be critically important because it will increase the amount of particulate pollutant deposited on the local area. The modeling will also be important for the visual impacts of the project due to findings by the Interested Parties' experts that these design changes will increase the moisture content of the flue gases and significantly increase the size of the plume.

As part of any new application SLC will be required to reach an agreement with DEC as to a modeling protocol. Therefore, there is no longer any rational reason why the local meteorological data cannot be used, since there can be no question that the available local data is more representative of the conditions in the area. Without such modeling data, DOS must reject the Project as inconsistent with the CMP.

The use of local meteorological data and concerns about air pollution on coastal resources is not limited to the main plant itself, but the emission sources at the waterfront and from the conveyor baghouses that stretch from the waterfront to the main plant. SLC has failed to provide information on the air emissions at the dock from both SLC's equipment and the ships and barges idling at the dock. HudsonMax ships, barge loading operations and tugs emit significant clouds of diesel emissions. These emissions present visual and health impacts to the coastal zone, especially to the adjacent City of Hudson Waterfront Park and the Village of Athens waterfront.

The scale and extent of the emissions from the ship and barge operations is illustrated by a video of a HudsonMax type ship unloading materials at the Hudson Dock. The video is included on the CD-ROM attached to this filing as Exhibit V. The approximately 3 minute video was taken by Peter Jung, President of FOH in the summer of 2002, late in the day. While the quality of the video was

not a professional undertaking, it does quite starkly demonstrate the effect of the diesel emissions as a ship is docked and engaged in loading operations. The diesel plume is quite visible coming from the ship as is the accumulated haze of the diesel emissions building up along the river valley in front of the waterfront. The video demonstrates a significant visual and health effect from the waterfront operations, an impact largely ignored by SLC.

Air impacts from SLC's operations are not limited to point source emissions but also include fugitive emissions, especially at the waterfront. Interested Parties have identified numerous deficiencies in SLC's fugitive dust management plan, especially in regard to the uncovered stockpiles of coal and gypsum at the waterfront. Furthermore, there is a lack of information on the control of fugitive dust and spillage during loading and unloading of the ships and barges. In her Second Interim Decision, Commissioner Crotty found SLC's fugitive dust management plan as improperly vague and identified that as an issue for adjudication. DOS should await the resolution of that adjudication or, at the very least, require the submission of the detailed information identified by Commissioner Crotty.

Related to air emissions from the plant, the myriad point sources, the ships and equipment at the dock and fugitive dust from stockpiles is the effect of fine particulate emissions on coastal users, at the parks and on the river. Again, in her Second Interim Decision, Commissioner Crotty found that the potential impacts of PM_{2.5} should be adjudicated. DOS cannot certify that the Project is consistent with the CMP absent this essential information. As a result, DOS must deny SLC's Coastal Consistency Determination.

COASTAL MANAGEMENT POLICIES

The New York's Coastal Management Plan ("CMP"), describes the Hudson River Valley coastal region as "an ecologically and historically important corridor which extends 150 miles from New York City to upstate New York", (CMP/FEIS at I-3), and recognizes the region as "one of the most outstanding

scenic attractions of the United States... [that] inspired one of the most significant and first truly American schools of painting.” (Id. at II-2-10).

As detailed below, through the evaluations performed by experts and other witnesses with specialized expertise and the supporting documentation, HVPC and FOH have clearly demonstrated that the Project is inconsistent with the Waterfront Revitalization and Coastal Resources Act and the CMP and many of its implementing policies. The Project does not represent either compatible or historic economic development. Rather, due to the scale and proposed unprecedented intensity of use, this Project will degrade the very attributes of the Hudson River Valley coastal region which define the region according to the CMP.

Policy 1: Restore, revitalize and redevelop deteriorated and underutilized waterfront areas for commercial, industrial, cultural, recreational and other compatible uses.

The City of Hudson and its waterfront have been intimately connected since inception of the City in 1783. A staff report of the New York State Historic Trust demonstrates the importance Hudson’s Proprietors placed on aesthetics and the City’s connection to the Hudson River:

While Hudson was founded as a financial venture, it is evident from planning features still extant that the Proprietors were concerned with beauty and the quality of the environment as well as on [sic] commercial gain. Because of careful planning by the proprietors which provided for a wide central street leading up to the bluff with its spectacular views of the Hudson, Hudson became one of the few cities along the river not to turn its back upon the river, where scenic beauty was to be enjoyed by all, not merely by a few or not at all.” (NYS Historic Trust, 1969: p. 11). Exhibit A.

The City of Hudson has undertaken impressive renewal projects since the late 1970’s. Literally hundreds of buildings have been renovated; Warren Street’s sidewalks and street architecture have been improved; and major investment in retail businesses, especially in over seventy antique shops and restaurants, has brought new life into the community. These revitalization efforts amount to an investment of over two and a half million dollars of public and private funds. Hudson’s facade restoration easement program was given a

citation for design merit as “the first extensive use of façade easements in the United States,” and the City also received awards from the New York State Association of Architects and the Federal Department of Housing and Urban Development for excellence in design of community improvements in the Historic District. Exhibit A.

In addition to these redevelopment efforts, for the past decade, Hudson has been undergoing accelerated revitalization and redevelopment which has started the integration of downtown to the City’s waterfront. See, Exhibits C; H; and I. According to Norman Mintz, noted Main Street redevelopment expert, “Warren Street [Hudson’s main street] has become one of New York State’s shining examples illustrating how a Main Street can be revitalized and become a vital economic and social center for the community and region.” Exhibit H.

Hudson’s long standing and on-going revitalization effort, many elements of which are outlined in the City’s Comprehensive Plan and the Hudson Vision Plan,⁹ have a direct relationship to Hudson’s waterfront and in fact have spurred important revitalization projects supported by federal, state and city funds for waterfront redevelopment. For example, during the last fifteen years, the City has obtained funding to refurbish Promenade Park, the oldest waterfront park in the country and to create a waterside park and gazebo which host day and evening events throughout the summer. See, Exhibit L. In addition, the Hudson Amtrak station has been faithfully restored and the renovated. Among the City’s other waterfront amenities are the Stageworks Building (a not-for-profit performance space), the public marina, New York State public boat launch and playground. With the successful completion of remediation efforts of the 2 acre Niagara Mohawk Waterfront Environmental Remediation Site located adjacent to the SLC Project, the City will have additional opportunities to expand and strengthen these revitalization efforts. Exhibit C.

Dr. Ann Davis, of Marist College’s prestigious Bureau of Economic Research, has concluded that the Project is inconsistent with the goals of Policy 1 because of its impact upon these ongoing redevelopment efforts.

⁹ Mintz

The proposed cement plant by St. Lawrence Cement threatens the commercial development that has been unfolding in Hudson in the past fifteen years. Like waterfront communities up and down the Hudson River, such as Peekskill, Cold Spring, Beacon, and Rhinebeck, 19th century river towns in the vicinity of the proposed cement plant have been revitalized by tourism and the immigration of second home residents from New York City.... In my opinion, the State's Coastal Policies will be impaired by construction of the proposed St. Lawrence Cement plant. Specifically, the SLC project will be inconsistent with Policy 1, which requires the restoration, revitalization and redevelopment of underutilized waterfront areas for commercial, industrial, cultural, recreational and other compatible uses. See, Exhibit I.

In undertaking an action, a state or federal agency must "determine if the action would contribute to or adversely affect a waterfront revitalization effort." (CMP/FEIS II-6-5). Approval of SLC's Project will result in the conversion of 14 acres of land, roughly one-third of Hudson's waterfront,¹⁰ into a heavy industrial highly polluting and disruptive land use that will certainly not "contribute" to Hudson's waterfront revitalization efforts. (CMP/FEIS II-6-5). "Rather than be a catalyst for private investment in the area, building an industrial facility of the scale and intensity proposed by St. Lawrence, will do just the opposite; chase away investors who will be negatively moved by seeing (and hearing) the effects that such a huge project will have on the existing scale and character of the waterfront." Exhibit H.

Contrary to Policy 1 guideline (c), the Project will not serve as a catalyst for private investment. Enhanced economic growth from the proposed Project and expanded dock facility will be minimal since most inputs to the plant will be mined on site, delivered by ship, or come from distant, specialized manufacturers. See, Exhibit Q. This contrasts with the continued economic growth in the City and region based, in part, on a revitalized mixed-use waterfront development or other more compatible light industrial options.

Similarly, contrary to Policy 1, guideline (e), the Project will not encourage the diversity of investments compatible with the existing redevelopment effort which has so greatly enhanced the community. Instead, the Project will impair

¹⁰ Smith

future compatible development in the surrounding waterfront area and region as such uses would not occur adjacent to a major industrial complex with its associated visual blight, noise and air pollution. Exhibit C.

Furthermore, the Project does not comport with Policy 1 guideline (h), which seeks to improve the potential for multiple uses. The proposed Project represents a large scale, heavy industrial dominating land use with virtually no potential to improve or create multiple uses at the site. The only other proposed use of the dock facility is recreating on the semi-naturalized and bermed pathway. However, as will be discussed below, this linear park represents a very limited and low quality recreational opportunity and public access to the waterfront and in fact creates public safety concerns. Exhibits C and K.

Specifically, according to Dr. Davis, due to the Project's location, its visual and environmental impacts will not only undermine Hudson's positive redevelopment efforts at the waterfront, "the high resource intensity of this "smokestack" industry will threaten the viability of the high tech and cultural tourism industries which are in close proximity to the Project." Exhibit I.

Such negative impacts will not be limited to Hudson but will adversely affect the entire regional economy. The proposed Project's substantially increased levels of shipping, which will reach unprecedented levels of intensity, will affect redevelopment of communities beyond the immediate reach of the City of Hudson which are successfully basing their redevelopment efforts on high tech enterprises and cultural tourism. Dr. Davis predicts that the Project's adverse economic impacts will reach far beyond Hudson itself, threatening the new recreational and transportation uses of the Hudson River. Exhibit I.

The attached "Business Community Petition" demonstrates the depth of concern among all sectors of the regional business community regarding the adverse impacts this Project will have on the entire area and provides evidence to support the conclusions made by Dr. Davis. Exhibit W, Statement of Values: An Open Letter from the Committee for Responsible Economic Development to Governor Pataki, Secretary of State Daniels, and the mid-Hudson Valley business community.

The Project also does not comport with Policy 1, guideline (f), which states that a proposed action “at a minimum, must not jeopardize” the existing economic base. (CMP/FEIS II-6-6). “While the proposed cement plant may be productive for the purpose of expanding the domestic production of cement, the permanent new jobs created would be few if any, and the operation of the plant is subject to cyclical factors and global price competition. The tourism assets appeal to the market of the entire northeastern United States, helping to develop the regional economic base in industries that are less subject to direct international competition, and which complement other local high tech industries.” Exhibit I.

Finally, and as will be discussed in more detail under Policy 2, the water-dependent status of cement manufacturing does not provide SLC with priority status over all other water-dependent uses or lessen SLC’s burden to establish that its Project is consistent with the remaining CMP policies. Hudson’s redevelopment efforts, including its waterfront revitalization, predates SLC’s Project proposal. Therefore, as between these two water-dependent uses, SLC’s new industrial development¹¹ must prove that it is compatible with the completed and planned redevelopment projects already in existence.

As Peter Smith has persuasively explained, the City of Hudson and its recreational and residential water-dependent uses must be given preference since SLC can be required to explore and implement an alternative means for shipment of product from the Project, such as rail. Water dependent uses that support the City and are integrated with its downtown must obviously be proximate to the central business district. New water dependent uses that enhance the City of Hudson would include marina, boat rental, waterfront promenade, wetland boardwalk, waterfowl viewing station, swimming, waterfront tourist attractions such as an amphitheater and facilities such as waterfront related museums interpreting the community as a center for fishing, whaling, sealing, boatbuilding and sail making. Exhibit C. The City’s greatest resource, its

¹¹ Contrary to SLC’s claim, the current proposal is so massive and unprecedented in terms of production schedule and size that the Project is tantamount to a new use rather than the continuation of an existing use. Furthermore, a cement plant has not operated in Hudson since 1976.

waterfront, will be degraded to a non-restorable state for future generations and the ever growing beneficial use of the coastal resources will be reversed. Exhibit C.

Many of these same arguments apply to the Village of Athens. Like Hudson, Athens has undertaken an ambitious and highly successful redevelopment of its waterfront which is also intimately linked to the Village itself. As more fully described in the Village Trustees' letter to Secretary Daniels at Exhibit D, SLC's Project conflicts with the goals and policies adopted by Athens in its DOS approved Local Waterfront Revitalization Plan (LWRP).

Even absent Athens' LWRP, the Project is inconsistent with the CMP and the coastal resources embodied by the Village of Athens. The Project will have a devastating visual impact on the Athens' waterfront during both day and evening hours. With no vegetative or other buffer to block views from Athens to the dock, enormous vessels, raw materials stock piles, or the plume, recreational users of Athens will lose the coastal resource they most appreciate; the view. Exhibit D.

According to Howard Brandston, a world-renowned lighting designer, the night-time lighting impacts from this Project will have enormous and unmitigated impacts on both Athens and Hudson. Exhibit U. Furthermore, the noise impacts will adversely affect recreational users in the Village of Athens, the City of Hudson and the revitalized recreational use of the Hudson River itself. Together, the visual and noise impacts to Athens will undermine the redevelopment efforts Athens has undertaken in conjunction with private investors and the State. As Owen Lipstein, owner of one of the largest contiguous parcels of privately owned waterfront land on the Hudson River, stated, "Had I known that this Project was to be built before I purchased my property in Athens, I would have decided to invest my resources elsewhere. As a local business person, I believe that if approved, the Project will be the negative tipping point for an area that has struggled to achieve what it is now a promising, complex, vital and diversified economic and cultural center." Exhibit M.

This sentiment is shared by a significant number of the members of the Hudson Antique Dealers Association who indicated in a survey taken in October 2000 that they would leave or would not have invested in the City of Hudson if the Project were built.

Finally, as will be discussed in more detail below, discouraging public access and use of the Hudson River by recreational users will also harm the regional economy as recent studies have documented that recreational boaters in this region account for millions of dollars worth of local spending annually. A report by the New York Sea Grant Foundation (“Sea Grant Report”) which places the value of registered boating recreation in the State in the billions of dollars, indicates that safe navigation and environmental quality are of primary importance to these consumers. See, Exhibit X, Recreational Boating Expenditures in 2003 in New York State and their Economic Impacts, New York Sea Grant.

Significant findings of the Sea Grant Report include: (1) boaters with boats registered in the State of New York, spent approximately \$2.4 billion in the state on trip related boating expenses, \$53 million of which was spent in the Mid-Hudson and Capitol Region; and (2) an additional \$2 billion was spent in state on non-trip related expenses and boat purchases, \$194 million of which was spent in the Mid-Hudson and Capitol Region. Compounding the value of recreational boaters to the local economies of the Hudson River, the report’s estimates do not account for transient, out of state boaters, who most likely have the greatest impact at waterbodies nearest other states. Id. at Executive Summary, page IV. The report’s estimates also do not account for expenditures by unregistered boaters such as kayaking or canoeing enthusiasts. Id.

The New York Sea Grant Foundation used these expenditures to estimate the broader impacts on state and regional economies through input-output analysis using a model known as “IMPLAN.” Through the analysis, the Foundation concluded that boating as a consumer-driven industry in New York in 2003 had a total economic impact of \$1.8 billion, accounted for approximately 18,700 jobs, and contributed \$728 million to labor income. Boating in the Mid-

Hudson and Capital Region accounted for \$184 million, or approximately ten percent (10%) of the total \$1.8 billion impact. Id.

This impact in the Mid-Hudson and Capitol Region is consistent with the report's statement that while "[r]ecreational boating is important in virtually all areas of New York," it is especially important nearest the marine waters surrounding New York City and Long Island, the Hudson River, and the Great Lakes-St. Lawrence River coast. Id. at pp. 1. More evidence of the significance of recreational boating in the Mid-Hudson and Capitol Region, is the report's findings that: twelve percent (12%) of boats reported by the New York State Department of Motor Vehicles are registered in counties bordering the Hudson River south of the Troy dam, Id.; and nearly all boaters boat in the region where their boat is registered. Id. at page 15 (finding that "98% of downstate boaters live in the downstate region, [and that] 96% of upstate boaters live upstate").

The report was based upon a survey of 6,000 boat owners with boats registered in New York State for the stated purpose of "pleasure use." This survey also generated responses to topics of importance to recreational boaters, most important of which were safe navigation, the establishment of boating no-discharge zones, learning about environmentally sound boating practices, enhancement/repair of current boat launching facilities, and the development of new boat launching facilities. Id. at pp. 41. Among the additional topics not expressly addressed in the questionnaire, but of significance to persons responding were increased pollution control, and the development of additional facilities for boaters. Id. at pp. 47.

Policy 2: Facilitate the siting of water-dependent uses and facilities on or adjacent to coastal waters.

The CMP anticipates and addresses competition within the coastal zone among incompatible uses.

Because certain sites are desirable locations for a number of uses, a situation often develops where incompatible activities are forced to locate next to one another. An example of this would be in port areas where heavy industrial uses may lower air, water and visual quality, and

raise surrounding noise levels, with a consequent reduction in the enjoyment of those people who are participating in nearby recreation activities...

When incompatible uses are, or are proposed to be, located adjacent to one another, the Coastal Management Program, in conjunction with other State and local programs, is faced with the task of mitigating the negative aspects. When new development is to take place, steps should be taken to ensure it will locate where adjacent uses are compatible and, preferably, supportive. (CMP/FEIS II-5-2)

Policy 2 is intended to ensure that water dependent uses acquire access to an appropriate location. While a cement plant is defined as a water dependent use, that factor alone does not guarantee that such a use is appropriate in every location or that such use should take precedence over other water dependent uses. The CMP differentiates how to evaluate and promote the development of the waterfront consistent with preservation of the essential coastal resources. A distinction is also made, as noted above, between existing and new uses. The SLC Project amounts to a new use and should be judged accordingly. There has not been any cement manufacturing at the SLC property since late 1976 and the dock has not been used to support manufacturing since that time. Other than a few shipments of road salt and other materials each year, the dock has been relatively dormant.

As proposed, SLC's Greenport Project will actually be an industrial complex, with the main industrial operation covering approximately 40 acres. The facility will have a capacity of 2 million metric tons per year, representing an increase of more than 300 percent over the SLC's current production at its other location in the Hudson Valley of 0.6 million metric tons at the Catskill plant. If built, the plant would represent the largest cement factory in New York State and will single-handedly decrease the amount of *national* cement imports by 7 percent. See, DEIS 1-12.

To accommodate this industrial complex, the existing dock will be transformed into a major shipping terminal consisting of a 14-acre facility. Water depths will need to be doubled and the current dock will be replaced bya new 450-foot dock, and a berth with a 250-foot breasting barge able to accommodate

the largest vessel that can navigate the Hudson River. Id. at 11. The new plant will operate 24 hours a day, seven days a week, generating at least 195 roundtrip truck trips each day. See, DEIS Executive Summary at 31; see also, Chapter 13 at 12, as modified and increased by SLC at the Adjudicatory Hearing on Traffic Issues. Blasting from the mining operations will increase from twice a month to three times weekly. As redesigned, the plant plume will be significantly larger due to the increased volume of flue gas re-directed from the alkali bypass and the increased moisture content of the flue gas.

Nothing in the CMP states that due to historic ownership or a long since inactive use, a waterfront site is automatically suitable and is grandfathered for the development of a shipping terminal to support an industrial cement plant. In fact the CMP states: “the real estate market, with or without local land use controls, offers little assurance that uses which require waterfront sites will, in fact, have access to the State’s coastal waters. In summary, ownership should not be the criteria for future land use or development. The essential questions in siting are: how dependent is the use, is this the appropriate location and what is the amount of access required to facilitate the use? Exhibit C.

The Hudson waterfront is not an appropriate location for SLC’s cement plant related facilities. SLC’s cement plant dock is not a water dependent use in the nature of a “waterfront village” or the currently burgeoning mixed-use economic development in the City of Hudson which owes its vitality and potential to its unique historic maritime character. The cement plant use is an isolated activity. The site is appropriate for City related and expanded facilities which are “compatible” and “supportive” of the existing waterfront redevelopment initiatives.

A more detailed discussion of Policy 2 and its applicable guidelines is provided in Exhibit C.

Policy 4: Strengthen the economic base of smaller harbor areas by encouraging the development and enhancement of those traditional uses and activities, which have provided such areas with their unique maritime identity.

The traditional identity for the City of Hudson is a unique historic maritime community surrounded in a regional setting that is steeped in history and scenic beauty. Exhibits A and C.

The waterfront and the SLC site are the focus of this historic setting. Due in part to SLC and its predecessors and despite beginning of a rebirth, the waterfront has fallen over the years into decline. One important remnant is the historic park at the foot of Warren Street overlooking the harbor called Promenade Hill. Recently, recognition of the value of the waterfront in the revitalization of the overall community has led to the revitalization of the historic train station, the development of a waterfront park, Hudson River Boat Launch and a Niagara Mohawk Waterfront Environmental Remediation Project directly adjacent to the SLC site. There is a resurgence of visitor activity and services in the central business district directly connected to the waterfront via Warren Street. A realization of the significance of the waterfront to the promotion and revitalization of the community has occurred and is reflected in the recently developed waterfront areas offering river access to pedestrians, vehicles and boats. The City's maritime identity combines the traditional waterfront commercial uses: fishing, the unloading and storage of consumer goods sail making and boat repairs with residential uses and traditional shops.

Heavy industrial uses and abuses of Hudson's waterfront began in the 19th Century. While this industrial legacy is undeniable and has certainly left its mark on the waterfront, heavy industry in the form of cement manufacturing has not been the base of the local or regional economy for almost three decades. In its place, a diverse mix of land uses in support of a vibrant economy based upon cultural tourism, retail, the performing and visual arts, restaurants, and second home ownership has taken its place.

New high tech industries have also been attracted to the region. The product choices of these new residents also help to develop new markets for notable high value agricultural products. The leading concept in planning, consistent with the Governor's Task Force on Quality Communities, centers around "traditional neighborhood development," with pedestrian friendly, mixed

use, small-scale design, and an existing infrastructure. These factors, which are present in the City of Hudson and the Village of Athens, make them prime locations for new investment. Exhibit I.

According to Dr. Davis,

These new economic activities constitute what Michael Porter at Harvard Business School calls an “industry cluster,” a concept utilized by the New York State Empire State Development Corporation as well.

Complementary economic resources co-locate to provide a stronger, more resilient economic base. The prototypical example is Silicon Valley, which continues to provide an innovative leading edge for the computer and software industries for the U.S. in highly competitive global markets. In the Hudson River Valley, the tourism and second home industry clusters are compatible with the high tech corridor which stretches from Armonk and Yorktown Heights in Westchester County, through Dutchess County, to the new State University of New York nanotech research labs in Albany. Exhibit I.

Labor force location factors for high wage, high tech industries are influenced by cultural and natural amenities. The beauty of the Hudson River and the Catskill Mountain landscapes, as well as unique cultural resources like Olana, and the multitude of State and National Register listed and eligible sites, represent invaluable assets for economic development. Because of the location of the proposed plant, the adverse visual and environmental impacts threaten these location factors and consequently the ability of the region to attract and maintain the currently vital local economies based on heritage tourism, retail and the second homeowner market. Exhibit I.

SLC has provided no reliable economic analysis to support its claim that its Project will “strengthen the economic base of the City of Hudson”. October Coastal Consistency Determination at 63. On the contrary, the report submitted to DOS by HVPC in January 2005, prepared by Abeles Phillips Shapiro, contradicts the very foundations of the Ernst and Young report relied on by SLC.

Fish, Wildlife and Wildlife Habitat Resources

Policy 9: Expand recreational use of fish and wildlife resources in coastal areas by increasing access to existing resources, supplementing existing stocks, and developing new resources. Such efforts shall be made in a manner which ensures the protection of renewable fish and wildlife resources and considers other activities dependent on them.

SLC's submission discussing the dredging, filling and planned mitigation activities is nothing more than a repeat of the material it has submitted to DEC as part of its application for a Water Quality Certification under Sec. 401 of the Clean Waters Act and permits under the New York State Freshwater Wetlands Act and Part 608 of the DEC regulations. Those materials were submitted in the course of the Issues Conference before DEC. During that review, FOH and HVPC noted the incompleteness of SLC's submission and the fact that SLC was relying primarily upon suppositions and conclusory statements without sufficient empirical information to support its conclusions. Ultimately the Administrative Law Judges and the DEC Commissioner agreed with FOH's and HVPC's position and in September 2004, DEC Commissioner Crotty ordered the issues of impacts to aquatic habitat adjudicated. That determination establishes, as a matter of fact and law, that SLC has failed to meet its burden that its proposed activity will not have an adverse impact on the aquatic resources of the Hudson River. Thus, SLC has not met its burden to demonstrate that the Project is consistent with Policy 9, and, therefore, the Coastal Consistency Determination must be denied.

SLC's plans for the Hudson River have undergone various alterations and even now the amount of area to be disturbed and reclaimed is unclear, with somewhat different numbers used in the October 2004 Application and those developed during the DEC Issues Conference. What is clear is that SLC will dredge approximately 62,000 cubic yards of river bottom affecting over 6 acres of the bed of the Hudson River. However, the amount of river bottom and the adjacent shoreline below Mean High Water may be as much as 6.85 acres. Compare, SLC October 2004 Submission Table 1 and the Second Interim Decision of the Commissioner, pp.

61. To mitigate and compensate for the destruction of the river bottom habitat, SLC proposes 0.92 acres of restored and new habitat in the Intertidal and Subtidal zones. Additionally, SLC proposes some form of undetermined restoration of 3 acres of wetlands in South Bay.

SLC's submission is essentially a combination of its June 2001 Wetlands Mitigation Plan; an August 2001 Environmental Baseline Report ; and an October 2001 Wetland Mitigation Plan. The only apparent change and additional information is some confirmation of the extent of riverbottom vegetation performed in September 2004. It is important to note that based upon the information submitted through August 2001, DEC Staff determined the record was insufficient to assess the nature of the habitat impacted by the project and DEC could not determine that the mitigation proposed was appropriate. While DEC Staff did reverse its position in October 2001 after a very brief review of the October 2001 Mitigation Plan, it did so without any explanation. It is noteworthy that in her Second Interim Decision, Commissioner Crotty discounted staff's inexplicable change in position and determined that based upon staff's earlier comments and the continued concerns raised by FOH's expert, an issue for adjudication had been raised and questions of fact existed as to whether SLC was providing appropriate mitigation.

The lack of supporting information from SLC was highlighted by DEC Staff in an August 10, 2001 letter from Michael Higgins to Phil Lochbrunner of SLC. Exhibit Y. DEC Staff highlighted the following major deficiencies: a lack of definition and assessment of the submerged aquatic habitat areas; a lack of assessment of the claim that the loss of 5 acres of deepwater habitat is replaced by dredging the area and creating even deeper habitat; lack of an assessment that the reduction in cooling water intake at Catskill and improvement in fish impingement, while beneficial will effect the same species of fish that use the area near the Hudson Dock – DEC Staff doubted that the same species would be affected; the waterfront park does not qualify as wetland mitigation or compensation since it would affect upland wildlife habitat and not compensate for the loss of aquatic habitat and the lack of information on the planned restoration of South Bay.

As noted above, SLC's October 2001 failed to substantively address the deficiencies in the mitigation plan. FOH's consultant, Dr. Erik Kiviat reviewed that submission in the context of the earlier materials and still found them sorely lacking in important detail that would allow a

reviewing agency to make the necessary regulatory findings. FOH submitted a letter to DEC dated November 6, 2001 which set forth below are a summary of Dr. Kiviat's findings:

Habitat Functions

- The October Plan submitted by SLC failed to address DEC Staff's concern with the data collected by SLC with regards to habitat function. DEC indicated that Part I of the June Plan should be refined to "include and describe the submerged aquatic habitat areas". (DEC August 10, 2001 letter, pg.1). In doing this, Staff suggested that the four habitat types listed be treated separately and not lumped as riverine and palustrine. While the October Plan structurally incorporated this suggestion, the October Plan disregards the impacts related to each individual habitat. Specifically, Staff's letter asks for information describing "the submerged aquatic habitat areas", however, besides listing the areas as DEC requested, the October Plan does not include any further qualitative data on sediment texture, depth, organic matter content and containment levels in each of these affected habitats. Also, DEC stated a concern at the Issues Conference of August 15 with the timing of the studies conducted by SLC. DEC admits that the studies conducted by SLC "kind of caught the tail end of the season for this year as far as bird and mammal species." (Issues Conference Transcript, August 15, p. 2179). However, the October Plan does not consider variations based on seasonal changes, and should assess impacts through a breeding season.
- The October Plan also assumes that the submerged aquatic habitat areas are entirely unvegetated. However, the sparse occurrence of submerged plants, and in fact even some rare species should be considered. The October Plan does not describe the submerged aquatic habitat areas except to state their acreage, comment in a brief and vague way on sediment composition, and show bathymetry on Sheet 1 of the plans. Normally among other things, one would expect quantitative data on

sediment texture and depth, organic matter content, and contaminant levels, in the areas where mitigation is proposed to occur. Also, these areas are assumed to be entirely unvegetated, it is likely there is a sparse occurrence of submerged plants possibly including rare species.

Likewise, vegetation on the shoreline is not described. Certainly there are plants and possible rare species, in, just above, and just below the intertidal zone. However, the October Plan neglects to incorporate this vegetation into an analysis of proper mitigation.

- Lastly, with regard to habitat function, the August 10th letter from DEC staff urges SLC to use existing data on Hudson River fish communities and freshwater tidal wetlands. According to the letter this includes “data on 21 wetland reference sites, Hudson River specific research on functions of Hudson River tidal wetlands, and fisheries data.” (August 10 letter Pg. 1). In fact, a recently described and globally rare species of spikerush, *eleocharis aestuum*, has been found at Hudson and could be present at the project site. See Haines 2001.¹² Also, Heartleaf Plantain grows on partly artificial substrates at some Hudson River locations and could also occur along this shoreline. However, a comprehensive inventory has not been conducted to assess the existing conditions and the presence of rare species and thus the potential impacts cannot be assessed. DEC staff stated during the Issues Conference on August 15, 2001 that “if there is a species of concern living where the wetland mitigation development . . . is proposed, . . . we may want to look for a new site or something.” Tr. p. 2178. A detailed assessment and description of each of the habitat functions impacted by the project has been glaringly omitted and must be addressed before an approval can be granted.

Mitigation Elements

¹² Haines, A. 2001. *Eleocharis aestuum* (Cyperaceae), a new tidal river shore spikerush of the eastern United States. *Novon* 11:45-49.

- With respect to the replacement of five acres of the deepwater habitat with the same area of deeper habitat, DEC specifically asked that recent benthic mapping data be taken into consideration as it indicates a more complex topography than navigation charts show. However, there is no indication these maps were considered in the subsequent submissions. Further, DEC asked for data regarding fish use of offshore habitats within the dredging area. However, the October Plan fails to discuss anything related to potential impacts the dredging may cause on fish use of the offshore habitat. The October 2004 submission states “the net result will be the restoration of 0.27 acres of existing, poor quality riverine habitat and the creation of 0.65 acres of aquatic habitat for a total of 0.92 acres.” (October 2004 pg. 82). That language is identical to the language in the October 2001 submission. There is no basis to conclude that the actions posed including removing concrete, removing industrial fill, relocating the shoreline, and planting 0.3 acres of wild celery will lead to the restoration of the habitat.
- According to SLC, the second mitigation technique relates to the reduced intake of cooling water. In August, 2001 DEC staff questioned the propriety of calling a reduction of intake of cooling water at the Catskill plant mitigation of impacts resulting from expansion at the Greenport facility. (August 10, 2001 letter, p. 2) Still, DEC requested that SLC present “data which would detail the impacts at the Catskill facility structure with regard to entrainment and impingement.” However, SLC has failed to address this concern in the October 2001 Plan or its current submission. SLC presents estimates of reduction in entrainment and impingement impacts on fish populations based on data from the proposed Athens Generating water intake. The Plan not only neglects to explain the relevance of information from a site several miles away, it appears to ignore any differences of habitats at the Athens site to Inbocht Bay. Also, the plan does not describe the modeling and methodology for generating the information describing the impacts at the Athens site.

Surely a discussion of the methodology conducted in formulating the data would be helpful in determining the relevance of information between the Athens and Catskill sites. As DEC stated in the letter of August 10, 2001^h, “[t]he species using the area to be filled are probably not the species affected by impingement and entrainment.” Without further information on specific entrainment and impingement at the Catskill facility, a determination cannot be made whether a reduction of intake of cooling water will be a significant mitigation technique.

- Both DEC and Dr. Kiviat have raised issues regarding the proposed Riverfront park. DEC’s letter plainly states that creation of the park is not mitigation. DEC requested “[d]ocumentation . . . on the species present in the park area” and an analysis of the potential impacts the development of the park may have on the wildlife in the area. (August 10 letter pg. 2). Nonetheless, the October 2004 submission continues to be devoid of the information requested by DEC. During Dr. Kiviat’s testimony at the Issues Conference on July 26, 2001, he explained that the proposal for the park “apparently will play no role in replacing lost functions and values of the habitats that will be destroyed.” (Tr. p. 1357). Dr. Kiviat has explained that certain rare species, including nesting Cooper’s hawk, nesting map turtle, and *Schweinitz flatsedge*, could be present in the area and would be harmed by the park development. In the one paragraph of the October 2004 submission which discusses the park, it ignores the possible existence of rare species in the area, and in fact, fails to discuss any potential impacts on wildlife in the area of potential park development as specifically requested by DEC and the interveners. (October 2004, p. 86). DEC, expressing concern at the Issues Conference of August 15, stated, “In [creating the park] you would basically destroy most of the wildlife habitat that is there now while providing a habitat for only the most common species. . .” (Tr. p. 2181-2182).

- SLC's proposed mitigation through the South Bay wetlands restoration project is also devoid of meaningful detail. SLC proposes to restore three acres of freshwater tidal wetlands in a previously filled part of the Hudson South Bay. In DEC's letter, staff raised doubts about the project stating, "It is unlikely that this project element will realize its stated goal." (August 10, 2001 letter, p. 3). DEC requested data on existing vegetation, wildlife, and soil contamination levels as being necessary to determine whether it was desirable to destroy the current habitat to develop a wetland. In response, SLC's October 2004 submission repeats the information from the October 2001 Plan and contains an inadequate analysis of the vegetation and wildlife at the potential site. Dr. Kiviat reviewed the data included in the prior submissions and noted that there are a number of inaccuracies contained in the report, including the misspelling of terms and animal species, an absence of data sheets and data analysis, and even omitted observations. Contrary to the specific request of DEC, the baseline study does not include any information on contaminants. Dr. Kiviat had previously observed a salt storage facility close to the proposed mitigation site, however, there is no mention of this facility or its potential impact on the soils and environment. Soils at the mitigation site are possibly polluted with sodium chloride and other salts which would significantly affect the proposed wetland redevelopment, not to mention other contaminants from spills and fills during the past industrial history of the site. Also, a limited fish survey was conducted resulting in the capture of ten individuals of six species. However, this is surely not a representative sample of the fish fauna at the site. There is no reference to data from other Hudson River fresh-tidal marsh studies, as requested by DEC, which would be helpful in a discussion of the species present at the site. In fact, after analyzing the data, Dr. Kiviat noticed that green sunfish were identified in the field study. However, green sunfish is not a typical Hudson River species. This identification may represent a mistake or an unusual occurrence, which in any event requires documentation and analysis. Most importantly, as the

discussion of the heartleaf plantain indicates, the SLC submission contains data which is outdated. SLC has previously revealed that the heartleaf plantain was found at the site during a resurvey in 2001. However, the October Plan fails to discuss the resurvey results.

Submerged Aquatic Vegetation (SAV) Impacts

DEC's August 10, 2001 letter stated that "staff remains concerned about the impacts to the SAV beds, which are a critical element in the mosaic of habitats present at the site." (Pg. 3). DEC's letter indicates a number of areas for concern including the destruction of the beds and/or destabilization of the outer edge of the beds. SLC's October 2004 submission, repeating the provisions of the October 2001 Plan states that a portion of the dredged area will be resurfaced with revetment. However, the Plan fails to discuss the impacts to the habitat in which this revetment is placed. What impacts will the resurfacing cause to fish species? Also, DEC sought information concerning "the indirect impacts of the barge traffic, including gouging and resuspension of sediment that will: a) reduce light transmission to the underwater plants, and b) perhaps result in elevated sedimentation levels in SAV beds, to the detriment of those communities." (August 10, 2001 letter; p. 4) This was not addressed in either the October 2001 Plan or the October 2004 submission. Further, the monitoring component of the plan appears to address the future of the habitat. However, it is unclear from the submission why monitoring of the constructed SAV is limited to only two years while monitoring for the reconstructed wetland is proposed for eight years. Also, it is unclear whether the monitoring component will take into consideration steps to be taken to avoid the failure of the plan.

Continuing Missing Information

While the above discussion details a number of instances where SLC's submission fails to detail the information specifically requested by DEC, there are a number of additional areas where the submission is still inadequate. In this respect, many of the criticisms presented by Dr. Kiviat in the original June 2001 Plan remain, and in fact, little has actually changed from the original plan. There are a striking number of similarities which still remain between the two plans representing omissions and significant gaps of information. For example, the lack of specific and detailed reference data and mitigation "targets" in the proposed Plan is striking. As Dr. Kiviat has explained, it is a typical approach to wetland mitigation to emphasize the need for detailed descriptions of reference habitats and detailed specifications of the habitats and communities to be created. SLC's Plan offers no indication that what is proposed will actually work, and further, that if it does not work that alternative plans are prepared to be implemented. Specific goals are not described setting what objectives are likely to be achieved and what efforts will be tried in case the goals are not achieved. Important information on both reference conditions and targets include qualitative descriptions of microtopography (elevations), soil depth, texture, and organic matter content, and vegetation species composition, density and biomass. As Dr. Kiviat explained in his testimony at the Issues Conference, "We have found in studying wetlands on the Hudson River and in other places that soil organic matter levels are extremely important in helping to define the kinds of flora and fauna that can survive and thrive in the wetland and in defining the functions and values of the freshwater tidal wetland." (Tr. p.

1356). The plan needs to identify this information and describe its impact on the proposed restoration. Also important are the seasons and methods of construction including specifically how the site is graded and planted. Further, specific information with regard to the types of plants and materials to be used (eg. Whole shoots, seeds, seedlings, tubers, etc.) and what will be the origin of the planting stock is crucial in determining the target for the proposed plan. SLC has failed to disclose the field logs representing the data collected from the site to analyze whether the data supports the conclusions made with regards to the proposed Plan.

The foregoing comments, presented to DEC in the context of the Issues Conference and subsequent briefing, demonstrated that there were significant gaps in SLC's proposal. In her Second Interim Decision, the Commissioner agreed with FOH and HVPC and specifically found that SLC's submissions lacked an actual baseline examination of the habitat types, fish and wildlife that actually exist at the site and that "without such fundamental information the present record fails to support the determination that SLC's plan will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State (See, 6 NYCRR Sec. 608.8[c])" (Second Interim Decision, pp. 77-78). That standard applied by the DEC Commissioner is analogous to the CMP No. 9 and also dictates a denial of consistency.

SLC's February 2005 Announcement To Excavate Freshwater Wetlands In The Mine

In February 2005, SLC submitted a supplemental filing with DOS regarding various issues in its CZCD. Among those was a new section dealing with wetlands. Notable about that section was SLC's announcement that intended, in conjunction with the current application for the Greenport Project, to seek state and federal permits for the complete elimination of wetlands within its current 1,222 acre mine holding. Previously, SLC had argued that since it would not be approaching those wetlands for decades, it would not seek permits at this time, but

would apply in the future. The DEC ALJ's agreed with SLC and DEC Staff and said that segmentation of the review of the wetlands impacts was appropriate given the long period before any activity was planned and the changing nature of wetland ecology.

The announced change by SLC will, by its own admission, require it to submit a new application to DEC for a Freshwater Wetlands Permit for wetland HS-100 and amend its permit application to the ACOE for a permit to fill federal jurisdictional wetlands. While the wetlands to excavated and/or filled are within the mine area and outside of the coastal zone, SLC has stated its likely intention to use the South Bay as an area for wetlands restoration to provide mitigation for the loss of NYS wetland HS-100 and the federal jurisdictional wetlands. However, SLC has not submitted any information on the impacts on the freshwater wetlands nor has it provided even a cursory explanation of its mitigation plans for South Bay and the consistency with CMP No. 9, except to make the statement that "it will be a positive benefit to the resources of the coastal zone." SLC February 2005 Supplement; Wetlands Section; pp. 4. Obviously, SLC cannot seek a blanket coastal consistency determination to cover an unspecified major wetland restoration/compensation project without any information whatsoever. Having announced its likely intention to undertake an additional major activity in the coastal zone that effects the exact same resources that are the subject of the instant application, the current application must be denied for failing to include this essential information.

Policy 18: To safeguard the vital economic, social and environmental interests of the State, and of its citizens, proposed major actions in the coastal area must give full consideration to those interests, and to the safeguards which the State has established to protect valuable coastal resource areas.

Of the 150 miles of Hudson River coast between New York City and Albany, few locations contain historic, cultural, scenic and environmental resources more important to the State of New York or the nation, than the area adjacent to and surrounding the site of the proposed Project. These resources are intimately linked to the coastal area and, as argued within the context of

Policies 1 and 4, form the base of the region's economy. These resources have also shaped the Mid-Hudson Valley's social fabric and identity.

The scenic, cultural and historic resources placed at risk by this Project are so significant that five of the country's leading scholars on 19th Century American Painting and Sculpture said that the "[l]oss of these historic cultural resources would be a national disgrace" and urged the Department of State to "carefully consider the magnitude of this loss during its coastal consistency review process". See, Exhibit F. In the letter, Kevin Avery, an Associate Curator, Department of American Paintings and Sculpture, The Metropolitan Museum of Art; Linda S. Ferber, Andrew W. Mellon Curator of American Art, Chairperson Department of American Art, Brooklyn Museum; John Wilmerding, Christopher B. Sarofim '86 Professor of American Art, Princeton University, John K. Howat, Former Lawrence A. Fleischman Chairman of the Departments of American Art, The Metropolitan Museum of Art; and Barbara Novak, Altschul Professor of Art History Emerita, Barnard College and Columbia University, characterized the area to be affected:

The area to be affected by the Greenport Project represents the heart of American nineteenth-century culture and gave birth to America's first fine arts form. Within a 10-mile radius of the proposed cement plant, dozens of scenic views and picturesque areas still exist much as they did during the nineteenth century. Many of these scenes were transferred to canvas by Hudson River painters whose works now hang in the Nation's major museums and art galleries. In particular, the landscaped views from Olana, the home and studio of Frederic Church, the leading American painter of his time, will be irreparably damaged by the intrusion of the cement plant's plume into its view shed....

Views and vistas to and from the Hudson River in the area of the proposed Project and dock facility were subjects of some of the earliest and most important American landscape images. A pair of watercolors by William Guy Wall: "Hudson" and "View near Hudson," painted in 1822, served as the basis for two of the twenty colored aquatints, engraved by John Hill, that formed the famous "Hudson River Portfolio" (published between 1821 and 1825). The Hudson River Portfolio has long been recognized as the seminal document that established a picturesque itinerary along the river from New York City to Albany and beyond; an itinerary that remains viable today. Exhibit F; see also, Exhibit Z, Hudson River Portfolio.

These individuals, writing in opposition to the Project as private citizens and renowned Art Historians and Curators represent the top scholars in their field. In addition, and also writing in this capacity on behalf of HVPC, Kevin Avery, stated:

The cultural resources at stake in the project area are truly of national and international significance. Paintings of scenes in the Hudson River Valley hang in museums throughout the United States. The aesthetics of landscape painting practiced on Hudson River Valley settings such as Hudson and Catskill significantly if indirectly influenced the design of Central Park in New York City in the 1850s. Later, Frederic Church became one of the Park's commissioners, even as he remained, along with his colleague, John Frederick Kensett, one of the founding trustees of the Metropolitan Museum. Aside from the beauty of the paintings themselves, this heritage is one reason the Met since its inception has eagerly acquired and exhibited Hudson River School paintings. Within the past twenty years, the Museum has been the site of five special exhibitions of Hudson River School art, including, in 1987, "American Paradise: The World of the Hudson River School," and, in 2003, "Hudson River School Visions: The Landscapes of Sanford R. Gifford." These two shows alone were seen by well over 400,000 people.

The cultural and historic resources threatened by this project are unique, irreplaceable and of significance to the entire country. Any visual or other impairment to these resources must be taken seriously and weighed carefully. Exhibit G.

In 2002, several hundred art historians, professors, curators, and artists from around the country signed a "Cultural Petition" opposing the Project. (See Exhibit HH, Cultural Petition). Even as redesigned, many of the concerns stated in the Petition remain valid.

The significance of these cultural and historic resources and the need to preserve them were paramount in rejecting the Greene County Nuclear Power Plant nearly three decades ago which was proposed in the same area. Paintings by Frederic Church depicting the location of the proposed nuclear power plant facility were "primary works instrumental as proof of the importance of the viewscape that would be destroyed by the construction of an industrial facility out of scale with the historical character of the landscape." Exhibits A and R.

The coastal area within the Project's viewshed also contains an unprecedented number of historic districts as well as individually listed sites of historic significance. See, Exhibits A; AA, Ruth Piwonka, List of Historic Sites; B, figure 2, Mount Merino Catalogue; and BB, Blackburn and Piwonka, A Visible Heritage.. These resources have not been adequately documented by SLC. In 2001, the New York State Office of Parks, Recreation and Historic Preservation found that a "comprehensive historic building survey has not been completed for the review of this project." Exhibit CC, Letter dated July 27, 2001 from Julian W. Adams.

The scenic and cultural attributes of this area also gave birth to the development of landscape architecture in the United States. As detailed in the letter by Dr. Harvey Flad, attached hereto as Exhibit A, early developments in landscape architecture can be directly traced to the mid-Hudson Valley region. "During the middle of the 19th century the three most important practitioners of the art – Andrew Jackson Downing, Calvert Vaux and Frederick Law Olmsted – shaped the landscapes and the views of this region's estates. "Downing had a further impact on the Hudson Valley landscape as he and his brother became pioneers in early horticulture in the valley, with many of the orchards and vineyards remaining as visible testimony to their work." Exhibit A.

The City of Hudson and Parade or Promenade Park also represent an important historic and cultural resource as examples of early town planning. According to Dr. Flad, "[v]ery few town plans during the 18th century concerned themselves with their environmental or aesthetic resources." Exhibit A. In their scholarly work, architectural historians and planners Christopher Tunnard and Henry Hope Reed, specifically called attention to the planning efforts of Hudson and could only point to three other towns that similarly took advantage of careful planning which included park areas such as Parade Hill. These towns, New Richmond, Ohio; Keokuk, Iowa; and Belleview, Missouri, were designed presumably all at least a quarter century later than Hudson, New York. Exhibit A. According to Dr. Flad, "[m]any towns platted during the late 18th and early 19th

century were built with a grid-iron stretching away from the river's edge, but none were to take into account the role of aesthetics in river frontage common ground as much as Hudson, New York. " Id. In 1878, Franklin Ellis, described Promenade Hill:

"...[Promenade Hill] is a public ground, much frequented for the purpose which its name indicates, by the people of Hudson, who have always held it in high and deserved estimation as a place of popular resort.

It is a grassed [*sic*] and graded spot of about one and a half acres, upon the summit of the high promontory which rises from the river bank, opposite the foot of Warren Street, and is the western end of the ridge on which the city is built.

It has been in use as public walk or promenade nearly or quite as long as Hudson has been a city. On the 9th of March, 1795, the Proprietors resolved by vote "that the certain place of land known by the name of the Parade, or Mall, in front of Main [former name of Warren] Street, be granted to the common council forever, as a public Walk or Mall, and for no other purpose whatsoever", by which it is made sure that it had been in use as a promenade ground for a considerable time before 1795, long enough to have acquired the name mentioned in the resolution above quoted....

The finished landscapes of Mount Merino on the one hand, and of Stockport upon the other, with the shining river between and beyond them, the village of Athens in front, and the fields and woods and slopes of Greene County stretching away to the base of the Catskills, whose summits stand in dark grandeur against the sky, - - all these are visible from a single point on Promenade Hill, from a picture which is rarely equaled, even among the famed scenery of the Hudson river." (Ellis, 1878: p. 176) Exhibit A.

More than 125 years later, the views described by Ellis from Promenade Hill are largely intact. SLC's dock facility and plant would destroy these views for the foreseeable future. See, Exhibit K, figure 6. While these views were diminished for a time due to the historic uncontrolled industrial use¹³; views from Promenade Hill are currently relatively "pure" and should be protected just as

¹³ Industrial detritus from SLC and its predecessors in interest currently mar the view at the river's edge. As stated above, removal of such industrial waste should be considered mandatory, not mitigation.

Hudson's founding members determined to protect these scenic resources in 1783, the year Hudson was founded.¹⁴ Exhibit A.

The region's economy is based soundly in the region's scenic, cultural and historic resources. Exhibit Q. Hudson's economy is strong, growing and not an isolated development. Recent studies show that "Cities along the Hudson River are transforming from communities that relied on bricks, cement and other industries, as they did in the 19th and 20th centuries, to those that thrive on culture – art museums, restaurants, historic neighborhoods and more. But the river remains the common denominator." Michael Valkys, "Cities reinvent waterfronts," Poughkeepsie Journal Oct. 10, 2004, p. 11; see also, Exhibit A.

Hudson joins a long list of other cities and villages along the Hudson River who have developed their waterfronts as amenity spaces including Irvington, Catskill, Beacon, Kingston, Newburgh and Poughkeepsie. Exhibit A.

The Historic Village of Athens has also undergone major redevelopment in the last decade as thoroughly detailed in the letter from the Athens Trustees attached hereto as Exhibit D.

Recreational Policies

Policy 19: Protect, maintain, and increase the level and types of access to public water-related recreation resources and facilities

Policy 20: Access to the publicly-owned foreshore and to lands immediately adjacent to the foreshore or the water's edge that are publicly owned shall be provided and it shall be provided in a manner compatible with adjoining uses.

Policy 21: Water dependent and water enhanced recreation will be encouraged and facilitated, and will be given priority over non-water related uses along the coast.

Policy 22: Development when located adjacent to the shore will provide for water-related recreation whenever such use is compatible with reasonably anticipated demand for such activities, and is compatible with the primary purpose of the development.

¹⁴ See, Exhibit A for a detailed description of the significance of Promenade Hill.

Despite the importance placed on public recreational access and opportunities by the CMP, SLC has presented essentially no documentation to demonstrate how the Project is consistent with the CMP and Policies 19, 20, 21 and 29 relating to public access and recreation. See, CMP at II -5- 29. The SLC Project contravenes these coastal policies by depriving the public of the opportunity for reasonable use and enjoyment of the waterfront park, the Hudson River, the Village of Athens Waterfront Park and Promenade Park in the City of Hudson. The park spaces in Hudson are particularly important because the CMP recognizes the importance of urban recreational needs in coastal areas:

In New York State, urban areas generally exhibit the greatest recreational deficiencies along with the highest use of existing facilities. Poor water quality restricted coastal access, high development costs, and many alternative demands for limited space severely restrict attempts to overcome these deficiencies. The needs of the poor, elderly, and handicapped are particularly affected. CMP at p. II-5-29.

While Policy 19 directly addresses issues involving physical access to waterfront parks, it would be a meaningless exercise if the CMP were to enhance physical access to waterfront parks which, due to noise, air pollution and fugitive dust generated by newly established industrial activities, could not be enjoyed by the public. The CMP recognizes that priority should be given to maintaining the type and level of public access to the waterfront in order to allow the public to fully utilize such resources. Further evidence of the importance placed on providing public access to urban waterfront parks can be found at CMP II-6-89.

Similarly, Policy 20 requires that access to the publicly-owned foreshore and lands immediately adjacent to the foreshore or water's edge shall be provided and be consistent with surrounding land uses. The Policy reiterates that public access to urban waterfront parks should be unimpaired in order to allow for the full use and enjoyment of such resources by urban dwellers. See, 19 N.Y.C.R.R. § 600.5 (e) (2). Policy 21 also requires that DEC encourage and facilitate water dependent recreation. Among priority areas for increasing water-related recreation opportunities are those areas where access to recreation opportunities of the coast can be provided by new or existing public

transportation services and those areas where the use of the shore is severely restricted by highways, railroads, industry or other forms of existing intensive land use or development. CMP at p. II-6-107. By funding the waterfront park, the State of New York has taken concrete steps to implement Policy 21. Public access to the waterfront in the City of Hudson represents a recreational opportunity which is sorely needed in the City.

Policy 29 requires that DOS ensure that actions, protect, maintain, and increase the level and types of access to public water-related recreation resources and facilities so that these resources and facilities may be fully utilized by all the public in accordance with reasonably anticipated public recreational needs and the protection of historic and natural resources. 19 N.Y.C.R.R. § 600.5 (e). The Project contravenes both Policies 21 and 29 due to its noise, lighting, air pollution, adverse visual impacts, and recreational boating safety concerns. The Project would contravene the CMP by depriving the public of the reasonable use and enjoyment of the waterfront park and, consequently, the coastal area.

Despite claims by SLC to the contrary, the docking facility will be in almost constant operation. October Coastal Consistency Determination at 19. As a practical matter, the level and intensity of use by SLC of its shipping facility will seriously deter public access to the waterfront on both sides of the River and will also discourage the development of future public access.

According to SLC's most recent submission, cement barges will berth to load finished cement product three to four times a week, on average every other day and night. February Coastal Consistency Supplement at 17. HudsonMax vessels will berth 16-22 times a year to deliver raw materials and remain at the dock from one and one-half to four days during each delivery. Twenty four hours before and after a HudsonMax deliveries, a 250-foot long, by 64-foot wide breasting barge will be stationed at the HudsonMax dock to assist in staging and unloading the vessel. October Coastal Consistency Submission at 19.

To maintain the plant's operations, stockpiles of coal/coke, gypsum, and other raw materials will be stored for periods of 24-36 hours. These stockpiles

may be as high as 54 feet or 4 stories high. DEIS at 1-40. To unload raw materials, a horizontal overhead conveyor system will run perpendicular to the riverbank. The conveyor system will rise to 65 feet at a 12-degree angle to an 82-foot tall (6-story) pump house and require a 65 foot tall (5-story) conveyor reversing structure. Id. at 1-40 through 1-41. Materials will be fed into a 2-mile long tube conveyor enclosed within a steel and aluminum frame with a metal standing seam shed roof (October Coastal Submission at 16) which will connect the dock facility with the upland cement complex.

This 14-acre shipping terminal will generate noise from an almost inconceivable number of sources including, heavy equipment on the dock to load and unload materials, the pneumatic loading system, and the noise from the various vessels required to ship 80% of the cement plant's product to market. According to standard industry specifications, it appears that the HudsonMax's diesel engine must be run continually during unloading operations (between one and one-half to four days) in order to power the on-board equipment necessary to move the raw material. The noise and diesel fumes associated with these events will make recreational use anywhere near the dock, including on the Hudson River, untenable.

Visual impairment will also result as views to the river will be blocked by such physical barriers as the dockside buildings and equipment, vessels, and the vegetative plantings SLC has proposed to in fact block views of its operation to users of its proposed linear park.

Fugitive dust emissions from materials loading and unloading and the nighttime lighting impacts will also result in serious impairment of the use and enjoyment of the coastal resource and will discourage recreation. Exhibit U. The DEC Commissioner has noted the inadequacy of SLC's fugitive dust control plan, the potential for unmitigated impacts and ordered adjudication of the issue.

SLC's alleged recreational access mitigation, creation of a linear waterfront park, is poorly designed and has very limited value. According to Waterfront Land Use Planner Peter Smith:

The level of access to the waterfront will not, in actuality be increased by the construction of a trail and viewing area. The visual access will be reduced due to the extensive berming and planting of the trail. At present views are generally open to the waterfront. Exhibit C.

Furthermore, as designed, the park presents potentially serious safety concerns for park users:

Linear parks can be very attractive and well used, but only if they are perceived as being safe. As designed, the waterfront green space has a number of potential problems.

Linear parks, especially in urban and industrial areas, should be designed with a second means of egress or a well-marked emergency 'exit.' Once a person enters the park there would be no alternative way to escape if they felt threatened in any way.

The picnic area is well screened by native plantings and earth berms. However, these naturalistic elements, coupled with the security fence that will surround the waterfront facility, could create potential hiding places.

Likewise, the mass plantings that are indicated on the plan could also provide opportunities to hide. The stated intention to provide a riverine wildlife habitat, which usually implies relatively dense planting masses, may be at odds with the needs of the human users for a place that feels safe and secure. Exhibit K.

Currently, public access to the waterfront in the area is fairly good and many recreational boaters use the River. Exhibit DD contains seven letters from such recreational users who are gravely concerned that their access to the River will effectively be limited by the introduction of heavy barge and ship traffic.

The safety issues in this area related to the increase in heavy shipping traffic contravene the CMP, as well as the Hudson Valley Greenway Act. The nexus between safe navigation for recreational boaters, healthy waters, and recreational boating expenditures in the State was among the primary intentions behind the state legislature's adoption of the Hudson Valley Greenway Act in 1991. Exhibit EE (1), Hudson Valley Greenway - Economic Heritage Committee Economic Development Strategy For Greenway Compact. The Hudson River Valley Greenway Communities Council, one of two organizations created in the Greenway Act to facilitate the Greenway process, works with Greenway Compact

communities by providing community planning grants and technical assistance to enable the preservation, enhancement and development of the world-renowned scenic, natural, historic, cultural and recreational resources of the Hudson River Valley, which are also consistent with economic development goals and the tradition of municipal home rule. (Id.)

The "Greenway Criteria" identified in the Hudson River Valley Greenway Act are the basis for the Greenway program, providing an overall vision for voluntary local Greenway plans and projects. The Greenway Criteria include:

1. Natural and cultural resource protection, including natural communities, open spaces, historic places, scenic areas and scenic roads;
2. Regional planning to encourage communities to work together to develop mutually beneficial regional strategies for natural and cultural resource protection, economic development, public access and heritage and environmental education;
3. Economic development that is compatible with the preservation and enhancement of natural and cultural resources, and which places special emphasis on agriculture, tourism and the revitalization of existing community centers and waterfronts;
4. Public access to the Hudson River through the creation of riverside parks and the development of the Hudson River Valley Greenway Trail System; and
5. Heritage and environmental education which promotes awareness among residents and visitors about the Valley's natural, cultural, scenic and historic resources. See, Exhibits EE(2), Hudson River Valley Greenway, Community Planning Guide; EE(3), Compact Communities; and EE(4), Greenway Map.

The heavy industrial character of the Project and the associated heavily congested small harbor area will undermine the intent and progress which State funding and technical guidance has assisted Hudson, Athens and other near by communities to revitalize and create waterfront parks, develop zoning to encourage recreational and tourism related uses, and to establish Greenway hiking and water-trails.

For example, designated Hudson Valley Greenway trails nearby the project area include Clermont State Historic Site (1.1 miles), Olana State Historic Site (5.1 miles), Greenport Conservation Area (3.5 miles) and Ramshom

Livingston Sanctuary Trails (3.0 miles). Exhibit EE(5), Designated Hudson River Greenway Trails. A watertrail is also being created in furtherance of a one million dollar grant awarded by the State of New York in 2001 to the Hudson River Valley Greenway. Exhibit EE(6), Hudson River Valley Greenway Watertrail.

Contrary to SLC's assertion that the increased ship traffic and dock structures will be in keeping with traditional maritime uses of that portion of the River, the Hudson River Valley Greenway Watertrail was established with the acknowledgement that: "[a]s the water quality of the Hudson River dramatically improved over the last quarter century, demand for outdoor recreational access to the river increased just as dramatically; [and] [o]ne of the responsibilities of the Greenway is to address that need." Id.

Working with the Hudson River Watertrail Association, the watertrail will eventually encompass campable areas at ten (10) to twelve (12) mile intervals along the River to meet the existing and specific demand of paddlers. Indeed, designated sites the length of the Hudson River, including Greene and Columbia Counties already exist. Exhibit EE(6).

Pursuant to Coastal Policy 21, a high priority is assigned to the paddlers' demand of what is obviously a "water-dependent recreational use." Yet, as demonstrated by boaters' comments submitted herewith at Exhibit DD, this demand and recreational opportunity will be eliminated and the intent of the Hudson River Valley Greenway programs undermined due to the proposed significant change in traffic, and safety considerations in navigating the Hudson portion of the River if this Project is built.

SLC's proposed waterfront park does not mitigate this harm as suggested by SLC under Coastal Policy 22. Coastal Policy 22 requires the project to "the fullest extent permitted by existing law, provide for some form of water-related recreation use..." The existing reasonable demand for public use of the Hudson area of the River is predominantly by kayakers and canoers who expect safe navigation and their environmental surroundings to be in keeping with what has become an increasingly healthy and historically protected American Heritage River. Exhibit FF, Hudson River Estuary Action Plan 2001, Executive Summary.

This expectation also exists among other recreationalists of water related recreation, including motorized boats, fishing enthusiasts, and environmental education/recreation specialists, including Clearwater and ELCO, Inc. See Exhibit N.

For profit recreational related businesses and hence users will also be adversely effected as will the regional economy as outlined above under Policies 1 and 4. For example, ELCO, Inc. whose business roots in the recreational boating industrial dates back to 1892, will also be impacted. Recently relocated to the shores of the Hudson River in Athens, ELCO is the recognized premier manufacturer of electric launches and electric drive systems. Elco's systems are regularly installed into new or existing boats from small day sailers to 35-foot excursion boats for persons who are attracted by the product's silent and clean method of propulsion. ELCO, Inc.'s President and Director, Mr. Charles Houghton, III, among many ELCO owners who recreate with their boat in the Hudson area of the River also strenuously opposes this Project. Exhibit N.

Accordingly, SLC's Coastal Consistency Determination cannot be approved due to its violation of the coastal policies related to coastal recreation and public access.

Policy 23 Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archeology or culture of the State, its communities, or the Nation.

SLC impermissibly limits its analysis under Policy 23 to the protection of the historic stock house located on the Project site and incorrectly argues that Policy is not designed to protect visual impairments of "an historic structure's viewshed". October Coastal Consistency Submission at 95. However, the plain language of Policy 23 includes the protection of "*districts, areas or sites* that are of significance in the history, architecture, archeology or culture of the State, its communities, or the Nation" in addition to "structures". The guidance for Policy No. 23, states as follows:

Among the most valuable of the State's man-made resources are those structures on [sic] areas which are of historic, archeological, or cultural

significance. The protection of these structures must involve recognition of their importance by all agencies and the ability to identify and describe them. **Protection must include concern not just with specific sites but with areas of significance, and with the area around specific sites.** While the program is concerned with the preservation of all such resources within the coastal boundary, **it will actively promote the preservation of historic and cultural resources which have a coastal relationship.** [emphasis added]

As stated above, CMP itself does not so limit Policy 23. In fact, the Policy 23, guidance (c) states that “[p]rimary considerations to be used in making judgment about compatibility should focus on the **visual and locational relationship** between the proposed action and the special character of the resource.” CMP/FEIS II-6-123 (emphasis added). Furthermore, DEC’s Second Interim Decision *upheld* the Administrative Law Judge’s “determination that the adjudication of visual impacts will include consideration of these impacts on historic resources”. Second Interim Decision, at 124.

Clearly, the CMP does not preclude an analysis of visual impairment into the viewsheds of any districts, areas, sites or structures, having historical, cultural importance. Rather, the CMP describes a “significant adverse change” as “*including but no [sic] limited to*” a list of possible threats to these resources. CMP/FEIS II-6-122 (emphasis added). Given the extent of important historical and cultural resources located in Hudson, Athens and surrounding areas and districts, including Olana, which will be impacted by this Project, SLC’s attempt to limit the applicability of Policy 23 to the stock house is not only contrary to the plain language of Policy 23, it is irrational.

As the detailed and thoroughly supported submission by Dr. Harvey Flad and the submissions of Ruth Piwonka, respectively exhibits A and B, clearly demonstrate, the *areas* and *districts* to be effected by this Project have been recognized as of national significance in the establishment of American culture. In concluding that the Project is not consistent with Policy 23, Dr. Flad stated:

My analysis of the modified plans for the proposed St. Lawrence Cement Greenport Replacement Project documents the severe impact that the enormous industrial cement plant with towering smokestack and associated plume along with the very large docking and storage facilities

would have on the Hudson and Greenport waterfront and coastal zone. There would be unmitigated and destructive impacts on scenic views that have been instrumental in the creation of a national culture as developed over three hundred years of settlement, as well as on the siting of houses important in architectural history and the designs of their landscapes, of views painted by artists of the nation's first "school" of art, and of the early town plans of Athens and Hudson that are unique in the history of urban planning. These resources are of extraordinary significance to the history and culture to "the state, its communities, [and] the nation..." Exhibit A.

Almost three decades ago, this area was the subject of intense study and debate when the Power Authority of the State of New York proposed to build the Greene County Nuclear Power Plant. Exhibit R. The NRC's Final Environmental Statement on the GCNPP described the historical, scenic and cultural context and eventually denied the permit application relying on reasoning equally applicable to the proposed Greenport project. The United States Nuclear Regulatory Commission focused attention on the area's scenic, historic, and cultural resources, especially those of Olana. Excerpts from the Final Environmental Statement related to construction of Greene County Nuclear Power Plant, Nuclear Regulatory Commission, are highly instructive regarding these impacts. Exhibit R.

The Project would also have significant visual and noise impacts on the Athens' designated historic district. Exhibits A, C and D. Accordingly, the Project will certainly not protect Athens' historic lower Village and will effectively undermine the substantial public and private investments made to enhance and restore the area and historic district.

SLC's attempt to exclude from examination under Policy 23 such historic resources as Olana because the Project site is beyond 500 feet from the perimeter of the property boundary of a historic, architectural, cultural, or archaeological resource, is simply indefensible based upon an accurate and full reading of the policy text and guidance. October Coastal Consistency Determination at 94, fn 19. Olana's viewshed represents an "area" of great national significance to the State and Nation. Olana's viewshed represents one of the most important "special character[istics] of the this resource, one that will

be adversely impacted by the negative visual intrusions of the plant and plume during both day and night hours. See Exhibit GG, 2004 Calendar of Events from Olana, indicating several evening events at Olana which could be severely impacted by the night-time under lighting of the Project Plume; see also, Exhibit U, figure 2, Anzevino Photographs.

Similarly, and as described above, Hudson's historic Central Business District is revitalizing and becoming both a local and regional destination. "The goods and services offered are becoming diverse and comprehensive targeted at a wide range of users. Historic commercial buildings are occupied and renovated. The development of the SLC site will inhibit the tourist market with resulting impacts on downtown commerce. Tourists are interested in visiting locations with a strong sense of history and culture. The impairment of the tourist experience by a highly industrialized waterfront where it is incongruous with the surrounding community will prevent the expansion of the tourism economy and undermine its current revitalization." Exhibit C.

Scenic Resources

Policy 24: Prevent impairment of scenic resources of statewide significance

Policy 25: Protect, restore or enhance natural and man-made resources which are not identified as being of statewide significance, but which contribute to the overall scenic quality of the coastal area

SLC's Greenport project is inconsistent with the essential coastal policies which are designed to protect scenic resources. The inconsistencies arise from adverse visual, noise and use impacts that are incompatible with the character of the surrounding communities and coastal areas, based on scale, architectural style, density and intensity of use. The Project will detract from views of, to and from the water, threatening the existing and projected economic bases of affected communities, and significantly impairing valuable coastal resources essential to protecting the environmental health and integrity of the coastal area.

As will be discussed below, SLC's visual impact analysis seriously underestimates the visibility of the plume and contains no verified assessment of how visual impacts will be perceived by viewers. According to Dr. James F. Palmer, expert in visual assessment impacts to landscapes, neither the DEIS or the coastal consistency determination report "the public's probable reaction to the visual change" as required. DEIS 5-4. Nor do these documents "present a clear unambiguous professional assessment as to the extent and degree of the visual impacts that would help decision makers reviewing the document." Exhibit J.

In contrast, HVPC's and FOH's experts have provided an extensive analysis of the visual impacts of the Project during both daylight and evening hours. Exhibits J, K, S, and U. Even as redesigned, the upland portion of the cement plant and its plume will be visible from many locations throughout the region. Elements of the Project and or its plume will be visible from many locations and in this regard, adversely affect an untold number of visual, cultural, and historic coastal resources and users of the resources throughout the region, as explained by Mr. DeWan, Exhibit K:

- The construction of the cement plant as currently proposed would result in a visible plant and plume that would be seen frequently throughout the historically and visually sensitive coastal landscapes of Hudson, Athens, and Greenport, New York, and along the Hudson River.
- While SLC's recent proposal to lower the base elevation and reduce the height of the facility appears to screen a portion of the plant, the steam plume will continue to be a pervasive reminder of the plant's presence on Becraft Mountain and a highly visible intrusion into the community.
- The waterfront facilities required by the cement plant would be highly contrasting, visually intrusive elements seen from many points along the Hudson River, which has been designated as an American Heritage River. The operations proposed for the waterfront would be an inappropriate juxtaposition of large-scale industrial facilities in a landscape that is largely devoid of discordant elements. The HudsonMax ships, cement barges, and the loading/unloading equipment – with their attendant noise, dust,

and lights – would create a presence on the waterfront that would be the antithesis of a human-scaled riverfront.

- The plant and steam plume would clearly be seen from several locations within both the Columbia/Greene North SASS and the Catskill-Olana SASS, and thus would not prevent the impairment of scenic resources of statewide significance. As a result, the Project would be inconsistent with Coastal Zone Management Policy 24.
- The plant and its steam plume would be visible from many memorable, culturally and historically significant landscapes that contribute to the overall scenic quality of the coastal area. As a result, the Project would be inconsistent with Coastal Zone Management Policy 25. (Exhibit “Dewan”)
- The visible portion of the plant and steam plume would detract from the experience of visiting Olana State Historic Site and would impair the state-approved plans to restore the North Meadow, Ridge Road, Crown Hill Overlook, and other landscape features and historic views created by Frederic Church. TJD&A has prepared a supplemental document that reviews the potential impacts of the plant on the views from Cosy Cottage, the North Meadow, and other sensitive viewing locations at the Olana State Historic Site. The findings of that report are incorporated into the current report by reference.

Lighting Impacts

Howard Brandston, world-renowned lighting designer, has stated unequivocally that this Project will have an enormous adverse visual impact on the nighttime enjoyment of the region’s scenic coastal resources. Exhibit U. However, without undertaking the kind of ‘mock” lighting design study contemplated by the DOS, SLC’s conclusions regarding the Project’s low lighting levels simply can not be relied upon because of the precise visual acuity of the human eye, which is able to perceive far more than is possible to demonstrate in either a photograph or photosimulation.

Even given the limitations of standard photography for assessing night time lighting impacts, photos¹⁵ taken during evening hours of the Lehigh Cement

¹⁵ The photographs were taken on January 25 and 27, 2005, between 4:30 and 7:40 in the evening, using a Canon PowerShot S400 camera with and without a telephoto lens.

Plant in Ravena, New York, attached hereto as part of Mr. Brandston's submission at Exhibit U, figure 1, demonstrate the dramatic visual night time impacts of the a plume.

Photosimulations submitted by SLC of the dock facility do not accurately demonstrate either the day or night time visual impacts which will result from the Project. For example, SLC's photosimulation of a HudsonMax ship at the Hudson dock appears almost comic strip-like when compared with the photosimulation completed by Mr. Dewan. Exhibit K, figure 6.

Plume Analysis

Furthermore, according to FOH's air emissions experts, as redesigned, the plant's plume will be far more visible than predicted. In its October 2004 submission SLC attempts to present an extensive analysis of the steam plume that will be created from the Greenport Project and argues that the plume will be of minimal size, duration and color and will somehow be a net benefit over the smaller plume currently created by its Catskill Facility. HVPC and FOH strongly disagree with that characterization as the plume is at a location and is of a nature that is markedly more noticeable than the Catskill Facility. More importantly, SLC's predictions regarding the size and frequency of the plume is highly suspect and it is very likely that the plume will be far greater than SLC has represented.

FOH has asked its environmental engineers, Camp Dresser & McKee (CDM) to review SLC's plume analysis, particularly the analysis included in Appendix D of the October submission. CDM's report and the curriculum vitae of Dr. Gabe Miller and George Siple who prepared the report are attached as Exhibit S.

Steam Plume

A primary and important aspect of CDM's analysis is the dearth of information in SLC's submission regarding the likely change in air emissions resulting from SLC's announced changes in the project. Not only has SLC reduced the base elevation of the plant, but it has removed one stage of the

preheater/precalciner, changing the emissions and efficiency of the process. It has also announced plans to reconfigure the plant so that only 10% of the kiln exhaust will be sent to the alkali bypass instead of the previously anticipated 30% of the kiln exhaust. Despite these significant changes, SLC has not conducted any emissions modeling and has not submitted a new Air Permit Application. All of SLC's analysis regarding the steam plume continues to rely upon on a facially outdated 2001 Air Permit Application (2001 APA). That alone warrants rejection of the consistency determination.

Compounded to the outdated Air Permit Application, CDM notes that SLC has not provided the explicit calculations or equations which would allow an independent analysis of SLC's conclusions. While CDM can agree with SLC's statement that a plume will exist with greater frequency in the winter, it notes that such plumes will generally be smaller and the worst case situations will occur during warmer weather due to the ability of the plume to sustain its condensation.

CDM points out that SLC's report deliberately skews the results and minimizes the impacts of the plume. SLC minimizes the perception of the significance of the plume because it averages in zero values, when the plume is small or non-existent, thus distorting the data and the overall average impact. In fact, for all weather conditions the average plume travel distance in the summer is 4847 feet and the winter is 1637 feet when zero values are excluded. Table D-3.2. The discrepancy is greater under fair to clear weather conditions and all daylight hours when the average plume travel distance is 5244 feet in the summer and 1262 feet in the winter. Yet SLC tries to hide that difference.

The foregoing is a straight analysis using SLC's own figures in Appendix D. However, steam plume analysis is a function of the temperature and moisture content of the flue gas in the main stack. CDM notes that while SLC's 2001 APA identifies a stack gas flowrate of 1,030,370 Nm³/hr at 12.4% water and 13.6% oxygen, SLC has never supplied an energy and material balance for the process so that gas flow rates, temperatures and moisture content can be verified. Without the means for independent verification, DOS and the public are forced to take on face value SLC's representations that plumes will not be a problem.

Lack of verification can result in serious problems should the project be approved. For example, in the Athens Generating case in response to concerns about that plume, the applicant adopted a dry-cooling process and represented that it would eliminate all plumes. In that case neither the intervenors nor DOS had the resources to question that representation. Subsequent events however have demonstrated that a zero plume condition is a mechanical impossibility and the public is now faced with a permanent structure with a plume. SLC must provide the necessary information so the similar mistakes are not made.

While important information is missing, certain facts are known about the process, especially the announced changes which raise significant questions about SLC's analysis and demonstrate that the steam plume will be far worse than SLC predicts. As noted earlier, SLC's August 2004 announcement stated that only 10% of the kiln exhaust will be sent to the alkali bypass instead of the previously diverted 30% of the flow. That means that more flue gas will be sent to the wet scrubber prior to the stack and consequently the water content in the main stack gas will increase significantly. Nevertheless, despite that significant change, SLC's steam plume analysis still uses the 12.4% water content from the 2001 APA, obviously a major omission. Exhibit S at pp. 2.

By going back and reviewing the 2001 APA, CDM has also identified another likely and significant error. In 2001, SLC predicted that the temperature of the flue gas at the inlet to the wet scrubber would be 212 degrees F. In 2004, SLC claimed that as a result of the redesign of the plant it would now be able to attain 90% control of SO₂. However, CDM notes to achieve such a high removal efficiency will require thorough contacting of the flue gas with the scrubbing solution to saturate the gas. CDM estimates that the flue gas exiting the wet scrubber will be saturated at 140 to 160 degrees F. The result is that the moisture content of the exiting flue gas will be approximately 25% instead of the modeled 12%. As CDM notes: "That more than doubling of the moisture content of the flue gas will have a huge impact on plume formation and significantly increase both the frequency and size of the plumes". Exhibit S at pp. 3.

Finally with respect to formation of the steam plume, CDM takes exception with SLC's claim that its planned use of selective non-catalytic reduction (SNCR) to control nitrogen oxide emissions will not result in a steam plume. CDM notes that SNCR relies upon injections of ammonia to react with oxides of nitrogen to form molecular nitrogen and water. The water formed in the chemical reaction and the water present in the aqueous ammonia can be significant. However, since SLC has not provided any material balance, CDM cannot determine if it has been accounted for in the steam plume analysis. Exhibit S at pp. 3.

Pollutant Plume

CDM notes that as part of its 2001 APA, SLC conducted a visibility impairment analysis. However, since it has failed to update its APA to reflect the major revisions to the project, it must re-do the visibility impairment analysis. Visibility impairment analysis is important since it will determine the concentrations of pollutants in the plume and the impairment may be in the form of visual range reduction (haze), atmospheric discoloration (plume perceptibility) and plume-modified visual contrast of distant objects.

CDM notes that in 2001 SLC conducted its Class II analysis on Slide Mountain, the highest peak in the Catskills which is approximately 57 km from the Project. CDM notes that the 2001 analysis did not include a sensitivity analysis and may not have represented the most conservative analysis of the visual impairments caused by the project. CDM also notes that SLC chose the most distant mountain possible and a more relevant analysis would have included a nearer peak such as Hunter Mountain which is 37 km away. These and other factors could understate the visual impairment of the Hudson River Valley from SLC's operations where pollutants and haze can lie along the floor of the valley and impair the visual aesthetics. Exhibit S at pp. 5.

While CDM only considered the plume itself and its contribution to visual impairment, what also must be added are the emissions at the waterfront, especially emissions from the HudsonMax ships and barges. Those vessels will be loading and unloading in excess of 24 hours at a time. As shown on the video

of the loading operations of a HudsonMax ship at the dock, long-term diesel emissions result in a diesel haze lying along the valley floor presenting a significant visual impairment. The potential for the dock operations to result in significant visual impairment in the Hudson River Valley in the area of the Site must not be underestimated and, absent, a thorough analysis the Coastal Consistency Determination must be denied.

NO_x Reduction and Plume Analysis

CDM's report presents an extensive analysis of the inherent plume problems associated with SLC's use of SNCR, especially compared to the available alternative of selective catalytic reduction (SCR). As noted earlier, SNCR relies upon the injection of ammonia to control nitrogen oxides and any excess ammonia ("ammonia slip") can contribute to a visible plume. In fact, CDM notes that SLC originally argued against the use of SNCR due to the likelihood of ammonia slip, but agreed with DEC that SNCR would be used so it could control NO_x.

CDM's report notes numerous instances in the 2001 APA where SLC cited numerous problems with SNCR and the potential for a visible plume. For instance:

1. "with an ammonia slip of 10 ppm or less, there is a strong potential for the formation of a detached plume resulting from the presence of chlorides and sulfates in the exhaust gas stream" (p. 6-16) and "it is not clear if this level of slip (5-10 ppm) can be maintained with the very high NO_x variability (even within several seconds) typical in a cement plant" (p. 6-17);
2. "ammonia will be absorbed in the raw mill and dust collector during compound operation,...then, under direct operation, when the raw mill is down and the dust collector has a significantly higher temperature, ammonia is released to the stack at much higher levels, further increasing the potential for a detached plume to form" (pp. 6-16 to 6-17);
3. "[B]ased on the results of the two similarly designed plants in Europe there is a high probability that the additional ammonia introduced into the gas stream from an SNCR system operated at high molar ratios will cause a detached plume and problematic opacity levels at the Greenport facility. The conclusion that a detached plume may form is also based upon the

experience in addressing this issue at cement plants in the U.S., Canada, and Europe” (p.6-19); and

4. “[I]n addition to forming ammonium sulfate, ammonia has also been observed to combine with SO₂ and SO₃ in the exhaust to form ammonium bisulfite (NH₄HSO₃) and ammonium bisulfate (NH₄HSO₄). These compounds can scale, plug ductwork, and damage process equipment and can condense out of the plume to form acid droplets” (p. 6-20).

Exhibit S at pp. 6.

It is bizarre that SLC made these representations to DEC in 2001 yet in Appendix D of its submission to DOS, SLC claims that its use of SNCR is not expected to result in a visible plume. Appendix D, p. 1. SLC does not explain how it will be able to control ammonia slip and the inherent problems with SNCR.

CDM has noted in numerous reports to DEC that there is an available alternative to SNCR that not only is significantly better in the control of NO_x, but also has a greatly reduced potential for plume formation. CDM's extensive submissions to DEC on SCR have previously been supplied to DOS and can be re-submitted if necessary. As noted in this report by CDM, makers of the SCR catalyst have been approached by a Canadian cement manufacturer who is interested in adding a SCR catalyst to a plant with an existing SNCR system to control the plant's ammonia slip and resulting plume problem caused by SNCR. Exhibit S at pp. 7).

While SLC's revisions to its project have been an attempt to reduce the visual impacts of the project, those impacts are not limited to the physical structure of the plant, but also must include the plume created by the emissions. As demonstrated by CDM, the plume analysis by SLC is highly suspect and in fact the plumes created by this project are likely to be significantly greater than represented. Considering the gross omissions in SLC's application, a coastal consistency determination must be denied.

Project Must be Consistent with Both Policy 24 and 25

SASS Guidance clearly distinguishes the viewshed of the SASS from the SASS itself; thus, both views to and from the SASS are fully protected under Policy No. 24. (SASS Guidance p. 106).

Policy No. 24's clear direction is "to prevent impairment" through appropriate modification of the project itself, not through off-site compensation strategies. Acceptable mitigation must directly prevent the impairment through direct alterations of the project itself, and the success of that proposed modification is evaluated based upon the Guidance criteria for Policy No. 24. As detailed in the Dewan Report, even as revised, the Project will have significant impacts on SASSs and many other scenic coastal resources. Exhibit K.

The Project will also violate Policy 25. The viewshed of the plant and the waterfront facilities includes a number of areas adjacent to Scenic Areas of Statewide Significance that would be negatively affected by the visible portion of the plant and its plume. These include:

- The Lower Village Historic District in Athens (proposed waterfront facility)
- The Athens waterfront (proposed waterfront facility)
- The historic farmland adjacent to Route 9H, especially north of the village of Claverack (proposed cement plant)
- The historic City Cemetery in Hudson (proposed cement plant)
- Promenade Hill in Hudson, offering views to the Hudson River and Catskill Mountains (both cement plant and waterfront facility)
- The City of Hudson, with its revitalized central business district and residential area focused on Warren Street (both cement plant/plume and waterfront facility)

While these areas are not located within SASS's, their vivid scenic character and relative intactness will be negatively impacted by this large industrial facility. The proposed and unaltered dock facilities will also result in a highly visible change to the Hudson River waterfront.

The CMP and DOS precedent is clear that both Policies 24 and 25 must be satisfied. As indicated above, the Greenport Project is inconsistent with Policy No. 25 since the Project will not protect the scenic quality of the coastal area and its location and scale will not retain existing views to and from the

shoreline. The criteria for assessing potential visual effects under Policy. 25 are identical to Policy 24 other than “*more emphasis [in Policy 25] may be needed to be placed on removal of existing elements, especially those which degrade*” (emphasis added). (CMP FEIS II-6-133). The fundamental purpose of both Policies is to preserve, protect or enhance the overall scenic experience of the coastal area.

In the “Xanadu case”, one of the few projects before DOS which involved scenic impairment of coastal resources, the DOS clearly explained the applicability of Policy No. 25 to large-scale projects in the coastal area:

The objective of Policy 25 is to ensure that the overall quality of coastal scenic resource areas and sites is protected. To achieve the aim of this policy, the State’s CMP includes both siting and design guidelines. One of the guidelines referenced in the explanation calls for ‘siting structures and other development back from shorelines or in other inconspicuous locations to maintain the attractive quality of the shoreline and to retain views to and from the shore’ (CMP, Vol. I, II-6-128). Another guideline recommends ‘using appropriate scales, forms and materials to ensure that buildings and other structures are compatible with and add interest to the landscape.’ (CMP, Vol. I, II-6-129). (See, Letter dated July 17, 1990, to Mr. Gordon Marshall, Xanadu Properties Associates from New York Secretary of State, Gail S. Shaffer, at 12).

In concluding that the Xanadu project would have been inconsistent with coastal Policy 25, the DOS said that “[t]he siting and scale of that project [Xanadu bridge] would not retain existing views to and from the shoreline nor protect the scenic quality of the coastal area” and “[i]s not consistent with Policy 25 and its guidelines. Id. at 9. The DOS also found the project inconsistent due to the “[e]xcessive scale (in height and mass) of the proposed residential tower in comparison to the existing landscape.” Id. at 12. This is precisely the case with the Greenport project.

The Greenport project will also impact thousands of acres connecting the SASSs which contribute to the overall scenic quality of the coastal area thereby implicating and violating Policy 25.

Policies 24 and 25 are not mutually exclusive.¹⁶ While the majority of activities undertaken in the coastal area typically implicate either Policy No. 24 or No. 25, because of the enormity of the Greenport Project, it will affect both SASS and non-SASS, therefore, both policies must be considered. In its SASS designation and guidance document, DOS describes the purpose and scope of CMP Policies 24 and 25:

In recognition of the scenic value of the coast, New York's Coastal Management Program (CMP) includes two policies which provide for the protection and enhancement of this unique resource. Policy 24 provides for the designation and protection of scenic areas of statewide significance; and Policy 25 requires that proposed actions located outside a designated SASS must protect, restore or enhance the overall scenic quality of the coastal area. Both policies call for agencies to determine if a proposed action would impair scenic quality. DOS SASS Document at 1 (1993).

The DOS SASS document states that the impairment of a landscape's scenic quality can occur in two principle [sic] ways:

1) through the irreversible modification or destruction of landscape features and architectural elements which contribute significantly to the scenic quality of the coast, and 2) ***through the addition of structures which reduce views or are discordant with the landscape because of their inappropriate scale, form, or construction materials.*** Id. (emphasis added)

SLC's docking facilities, including vessel traffic and dock equipment, the plant stack and its plume will reduce and or introduce discordant and inappropriate scale, form and construction materials into the region which will be visible to and from SASSs and areas adjacent to SASSs all direct violation of the CMP and DOS precedent.

¹⁶ In determining that the Athens Generating Plant project was inconsistent with CMP Policies 23, 24 and 25, DOS found that one proposal could, in fact, violate all three of these policies simultaneously. In summary, the proposal would not be consistent with CMP Policies 23, 24, and 25, because of the site specific visual effects of the plume...on the Catskill-Olana Scenic Area of Statewide Significance and other scenic and historic resources in this area..._ New York State Division of Coastal Resources Consistency Determination, Athens Generating Plant, at 6 (July 14, 2000).

Conclusion

SLC has not met its burden of proof to demonstrate that the Project is consistent with the applicable Coastal Policies or the Coastal Management Plan. For its own reasons, SLC decided to seek the CZCD from DOS in October 2004 in full realization that it had not completed the DEC permit review process, thereby forcing DOS to rule on coastal consistency. Not only is the DEC permit process not complete, but SLC has not submitted its revised application including a new Air Permit Application to address the significant project revisions it announced in August 2004. The lack of fundamental information, which is necessary to determine *inter alia* issues such as the emissions and plume created by the project, necessitates a denial of the Coastal Consistency Determination. As a matter of fact and law, it is impossible for DOS to confirm SLC's claim that it is entitled to a coastal consistency determination.

Even without the missing information it is obvious that SLC's project is not consistent with the state's coastal management program. The visual impacts of the plant, its impact on the recreational use of the waterfront and the Hudson River, its plume, the lighting and noise impacts and the unmitigated destruction of aquatic habitat cannot be reconciled with the CMPs. This area of the Hudson River Valley is a state and national treasure. The unique character has been protected against attempts to build a nuclear power plant and an electric generating facility with significant steam plumes. It is time for the Secretary of State to take the necessary step and finally declare that this area will not be

despoiled by a major industrial project which is blatantly inconsistent with the state's policies. The coastal consistency determination must be denied.

Respectfully submitted,

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