



COMMENTS ON THE
DRAFT JOINT PERMIT APPLICATION
TO THE ARMY CORPS OF ENGINEERS
FOR THE ST. LAWRENCE CEMENT-GREENPORT

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I. Introduction

Friends of Hudson (“FOH”) presents these comments on the Joint Permit Application (“the Application”) for the proposed St. Lawrence Cement (“SLC” or the “Applicant”) plant in Greenport and Hudson in Columbia County. Taken as a whole these permits represent an attempt by SLC to dramatically alter the eastern shore of the Hudson River and to renew a heavy industrial presence in that area that has been absent for more than a quarter of a century. While the Application attempts to minimize the significance of the impacts associated with the project, the fact remains that SLC has failed to meet its burden under the ACOE regulations, EPA guidance and the individual regulatory programs sufficient to approve the projects as presently configured.

It is FOH’s contention that ACOE’s analysis of the Greenport Project must include all aspects of the applicant’s project, including the proposed 14-acre shipping facility, the conveyor system to move product and raw material between the shipping facility and the cement plant, the cement plant itself, and the entire mining operation. Without the ACOE’s legally required Federal approval of the proposed shipping facility, the applicant’s entire Greenport Project is not viable. Under these circumstances and as discussed in greater detail below, ACOE’s own regulations and holdings by Federal courts in this and other jurisdictions mandate that the ACOE consider the applicant’s entire project, including the cumulative impacts of the proposed activity.

FOH believes the ACOE’s activity in permitting the Greenport Project constitutes a “major Federal action significantly affecting the quality of the human environment”, necessitating the preparation of a full Federal Environmental Impact Statement (hereinafter referred to as an “EIS”) pursuant to section 102(C), 42 U.S.C. §4332(2)(C), of the National Environmental Policy Act (hereinafter referred to as NEPA) 42 U.S.C. §4321 *et seq.*¹ Furthermore, as the comments, attached hereto as Attachments “1” through “4”, from FOH’s expert’s clearly demonstrate, the Greenport Project will result in significant adverse affects to the quality of the human environment that have not, and cannot, be adequately mitigated by the applicant.² Therefore, FOH urges the ACOE to conduct a full EIS of the applicant’s entire Greenport Project and maintains that such review will result in a permit denial for the applicant’s Greenport Project.

II Environmental and Statutory Interests of the FOH Members

¹ Even if the upland portions of the Greenport Project and the proposed shipping facility were not directly connected as they are, permitting of the shipping facility alone would constitute a major federal actions significantly affecting the quality of the human environment.

² Attachment 1 are comments on the Joint Application by FOH’s expert Dr. Erik Kiviat. Attachment 2 are Dr. Erik Kiviat’s comments to the DEIS submitted by SLC. Attachment 3 is a comment on the Economic Impact Analysis of Ernst & Young by Robert Pauls. Attachment 4 are comments submitted by FOH to the DEIS submitted by SLC.

Friends of Hudson (FOH) is a grass roots citizens organization which is a sponsored project of the Open Space Institute. FOH currently has over approximately 3,300 dues-paying members from throughout Columbia County and adjoining areas in the Mid-Hudson Valley. FOH is dedicated to preserving and protecting the environment of the City of Hudson, the Hudson River and the Hudson Valley and supports sustainable development which complements the unique beauty and historical character of the area. FOH predates the recent controversy surrounding the SLC project, however it has grown as a result of the SLC project and for the last several years has focused its efforts against the SLC proposal.

III General Comments

Generally, the Joint Application does not meet the requisite “public interest review” required under the ACOE regulations. *See* 33 C.F.R. § 320 et. seq. There are a number of deficiencies in the Application including the evaluation of the probable direct and cumulative impacts of the proposed project. Specifically, among other things, the Applicant failed to provide reasonable alternative locations and methods to accomplish the project. Further, the Application fails to demonstrate that the project does not unnecessarily alter or destroy valuable wetlands and other land and aquatic habitat. The Application does not sufficiently describe impacts to natural biological functions, including food chain production, general habitat qualities, nesting, spawning, rearing, and resting sites for aquatic or land species. Other wetland impacts not addressed include: sedimentation patterns, flushing characteristics and current migratory and other biological patterns. There is simply not enough information to determine whether or not the Applicant has considered the various impacts on the environment and whether the mitigation offered is sufficient. Without more information, ACOE should determine the project is contrary to the public interest and deny the Application.

The Application also fails to comply with EPA’s § 404(b) Guidance for Specification of Disposal Sites for dredged or fill material. As discussed more fully below, the Applicant fails to show that the fill will maintain the integrity of the Hudson River. By failing to consider practicable alternatives and clearly failing to meet the standards of 40 CFR § 230.10(a)(2), ACOE should not approve the application.

III. Specific Comments on the Application

Set forth below are the specific comments on the SLC Joint Application (“Application”). These comments are generally organized to follow the topic specific elements of the Application.

Compliance with Applicable Regulations

According to ACOE’s regulations, all factors which may be relevant to a given proposal must be considered during the public interest review. Among the relevant factors identified by the ACOE regulations are: conservation, economics, aesthetics, general environmental concerns,

wetlands, historic properties, fish and wildlife values, land use, recreation, and in general, the needs and welfare of the people. *See*, 33 C.F.R. 320.4(a)(1).

Permit applications are to be measured against three criteria: (i) the relative extent of the public and private need for the proposed structure or work; (ii) where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations or methods to accomplish the objective of the proposed structure or work; and (iii) the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited. *Id.* at 320.4(2).

Conservation

The Application attempts to track the ACOE Regulations at 33 C.F.R. § 320.4. However in addressing the Regulations, the Application merely provides a cursory recital of its compliance with the Regulations and offers little detail or explanation. For example, the Application touts the energy efficiency of the project. *See* Joint Application p. 42. According to the Application, the plant is expected to achieve 3.0 million BTUs per metric ton of clinker, which is supposed to be better than the Department of Energy's projected usage for a 2010 plant. However, the Application fails to state the DOE's projected usage number. Likewise, the Application offers no explanation of the proposed "efficient distribution and use of electrical energy." *See* Joint Application p. 42.

The Application notes the closure of the Catskill facility would greatly reduce energy consumption and increase water conservation. The Applicant has stated that the closing of the Catskill facility, a wet process manufacturing facility, and replacement with the proposed Greenport project, a dry process manufacturing facility will improve water conservation measures. However, as FOH has explained before, impacts of the Catskill closure should not be considered mitigation for the Greenport Project.

SLC argues that transportation related impacts are mitigated by the use of the existing Greenport mining facility and enhancements to the dock area. Since transportation will so heavily be focused on the use and enhancement of the shipping dock, ACOE's analysis of the Greenport Project must include all aspects of the applicant's project, including the proposed 14-acre shipping facility, the conveyor system to move product and raw material between the shipping facility and the cement plant, the cement plant itself, and the entire mining operation.

Specifically, the Applicant's traffic analysis assumes that 80% of the finished product will be shipped from the site via conveyor to the dock. If that ratio changes, there will be significant traffic problems that will result. However, the Application fails to address changes in the modes of transportation or the impact of changing market conditions.

Further, the Applicant does not consider changes in market conditions affected riverine traffic, nor traffic impacts from furnished material deliveries. The entire scope of Hudson River

traffic, back to and from the facility is not fully described.

This has been a continuing problem with SLC in the context of the on-going process before DEC. In its original application to DEC and the DEIS, SLC claimed 80% of its finished product would be shipped by truck, including an unspecified amount to the old Catskill facility for finishing and grinding. However, since that time SLC has obtained a permit to expand its operations at Catskill to adapt it into a regional distribution center for GranCem, a trademarked cementitious material manufactured at an SLC facility in Lamden, N.J. The expanded use of Catskill, whereby GranCem will be barged to Catskill, stored in silos and distributed by truck, will result in up to 6,000 new truck trips per year. That traffic will be additive to that generated by the Greenport project, but SLC has failed to update its traffic analysis despite promises to do so.

Economics

Initially, the Application attaches a study performed by Ernst and Young LLP, which purports to analyze the potential economic impacts of the project. However, the study's authors note that the impacts were based on Project assumptions provided by SLC, which were not listed in the Application. *See* Joint Application Attachment 18. Without an awareness of these assumptions, it is impossible to assess the accuracy of the E&Y results. *See* also Attachment 3.

“Several courts have struck down FONSI decisions where agencies failed to evaluate the growth-inducing effects of major federal projects in small communities. *See, e.g., Sierra Club v Marsh*, 769 F.2d 868, 877-82 (1st Cir. 1985) (cargo port and causeway connecting small island to mainland); *City of Davis v Coleman*, 521 F.2d 661,675-76 (9th Cir. 1975) (highway interchange in rural area for purpose of economic development); *Friends of the Earth*, 109 F. Supp.2d, at 40-41. *But see, Hoosier Env’l Council Inc., v US Army Corps of Eng.*, 105 F. Supp.2d 953,998 (S.D.Ind. 2000) (concluding that economic growth from rural casino project was too speculative to require NEPA analysis).” *TOMAC v Norton*, 240 F.Supp.2d 45, 50-51 (D.D.C. 2003) (in preparing an EA, BIA failed to take requisite “hard look” at project’s potential impacts on socioeconomic impacts within context of 40 C.F.R. §1508.8).

Socioeconomic concerns are especially relevant in rural communities, particularly where the economy is linked to other impacted resources sought to be protected under NEPA. *See, TOMAC, Id.*, at 51.

In the Application, SLC touts a claimed economic benefit to Columbia County and the State of New York. Such a claim is important since it must be the counter-balance to the unmitigated adverse impacts caused by the project. *See* 33 C.F.R. § 320.4(q). In theory, if the socio-economic benefits were great, they could outweigh the adverse environmental impacts

caused by the project. However, the claimed economic benefits are grossly overstated and rather than serving to support the project, demonstrate the negative impacts the project will create and highlight the high environmental price that will be paid without any corresponding economic benefit.

The Application claims that SLC is making a substantial investment in the State, local and regional economies. *See* Joint Application p. 44. Specifically, SLC claims that construction costs for the project will be over \$320 million and operating costs will be \$53 million annually. However, the Application offers no information to substantiate this claim. SLC provides no definition of its term “local” and thus raises questions about its assumptions.

Furthermore, most of the cost is associated with construction costs, however there is insufficient support for the claim that much if any of those jobs will be from Columbia County. The latest labor statistics for Columbia County show that 666 persons were employed in construction. While the project will require 813 person years of employment over the two year construction schedule it is evident that there is insufficient local skilled construction labor to meet that need, resulting in a likelihood that most jobs will be filled from outside the area, thus providing far less local employment. It also should go without saying, that construction related benefits, even if they were projected accurately are, by definition, extremely temporary, in this case lasting at most two years, and are insufficient reason to support a project with unmitigated environmental impacts.

Furthermore, with regards to job creation, there are significant discrepancies in the Application. For example, SLC states that 80% of employees at the Greenport facility will be transfer from the Catskill facility. However, there is little discussion as to whether the remaining jobs can be filled by residents of Columbia County. There is a high likelihood that Greene County residents will continue to fill jobs at the plant and there is no certainty that the jobs created in the future will be filled by residents of Columbia County.

The veracity of SLC’s claims of economic benefits are particularly challenged by its own treatment of the impacts to Greene County as a result of an essential shut-down of its Catskill operations. While SLC claims optimistic direct and indirect benefits to the Columbia County economy, it claims there will be no significant adverse impacts on fiscal conditions in Catskill with the proposed project. This despite the fact that its Catskill employment will drop from 144 to 25, it will dismantle facilities at Catskill, stop operating the Catskill kiln and presumably have far less indirect spending by employees who are now presumed to be doing all of their spending in Columbia County. Given such a dramatic shift in resources with supposed economic benefits to Columbia County, it should follow that there would be drop in Greene County. Given that SLC claims no such drop, even in the assessed valuation of its Catskill facility, it only serves to point out that the claimed economic benefits to Columbia County are illusory.

SLC’s economic analysis is completely skewed by failing to recognize the regional nature

of the economy and the interrelationship of the Greene and Columbia County economies. Considering their proximity and the ease of transportation via the Rip Van Winkle Bridge, it is completely without foundation to claim that all economic growth and employment will accrue to Columbia County. This glaring omission highlights the fundamental defect in the Ernst & Young report which completely ignored Greene County and the effect upon the region of a cessation of cement manufacturing in Catskill.

As part of the economic analysis, the Applicant is required to review the public need for the project. SLC's claim for the need for this project is very short of details and seems to provide no justification for a plant of this size or at this location. As with its alternatives analysis, SLC simply make the conclusory statement without any supporting information.

Other than claiming that there is a growing need for cement and that demand is being met by imported cement, there is no information provided establishing a critical need or what the degree of that need is. There is no doubt that other cement producers are expanding capacity throughout North America and SLC does not provide any information as to what those plans are or the trends in capacity and market demand.

The need for the project is also confused by the lack of detail as to what alternatives SLC considered with the existing Catskill plant. The Application makes vague references to the operations at Catskill. However, the discussion of why this is not a viable alternative, considering the similarity of process, location, etc., is not explained. Absent a detailed discussion exploring the alternative expanding the Catskill Facility, SLC has failed to show the need for an expansion and Greenport.

Aesthetic Impacts

In terms of the visual impact SLC seeks to hide behind the backdrop of Hudson's distant industrial past as an excuse for the desecration of a largely unspoiled aesthetic gem. In reality, the current proposal dwarfs anything from the past. Moreover, SLC has the audacity to claim it is mitigating the adverse impact of its decision, not by reducing the size or altering the location of its project, but by a partial deconstruction of the industrial detritus which it allowed to remain and decay in the area for the past quarter of a century. After having recovered from the cement industry's abandonment of Hudson and recovering its beauty despite the decay left by the industry, the County is now asked to accept an industrial presence which dwarfs what was there before in exchange for the belated partial remediation of SLC's past mess.

At the outset, FOH would like to make clear that it joins in the visual impact analysis and visual simulations presented by the Hudson Valley Preservation Coalition and The Olana Partnership. FOH has collaborated on those studies which clearly demonstrates the significant visual impact of the project. The Application states, "The proposed project would not cause significant adverse impacts to aesthetics." *See* Joint Application p. 45. However, the

Application fails to describe how the choice of locating a 406 foot tall stack and industrial structure on top of Becraft Mountain minimizes visual impacts. Clearly alternative locations are available that would decrease the visibility of the plant. However, the Application fails to discuss those alternatives and fails to provide a comparison of the impacts.

Additionally, the Applicant fails to adequately discuss the potential aesthetic impact of the new shipping terminal and conveyor system. First, the conveyor system will span over Route 9 to the proposed facility on Becraft ridge. Route 9 is an important entrance road into the City of Hudson. Without more information regarding, i.e., the hours of operation of the conveyor, the noise impacts of the conveyor, and the specific design specification, including the size of the “bridge” structures, it is impossible to know the total aesthetic impacts from the conveyor belt.

Likewise, the new shipping terminal will have significant aesthetic impacts over the current dock operation. SLC proposes the construction of a new rehabilitated and expanded docking facility. *See* Joint Application p. 23. The new shipping terminal will be maintain a HudsonMax ship, a cement barge and attendant tugs. The creation of the new shipping facility will result in the destruction of 0.20 acres of waters of the United States. *See* Joint Application p. 24. Proposed on-shore structures include a new 82-foot tall pump house and a new 75-foot tall conveyor reversing structure. While SLC maintains that the new structures are consistent with the “industrial heritage” of the area, structures such as those proposed have never existed at the Site. Simply painting these new structures a “historically accurate” color does not mitigate the potential impacts on the Hudson waterfront.

The Application does a poor job of considering the impacts to the waterfront uses by SLC’s activities. Besides, the noise and dust created by the dock activities, the berthing of HudsonMax ships will likely impact recreational boating activities immediately adjacent to SLC’s dock. Under the ACOE regulations, an Applicant is required to give a “full evaluation” of the due consideration given to the effect which the proposed structure or activity may have on historic, cultural, scenic and recreational values. *See* 33 C.F.R. § 320.4(e). However, SLC does not explain those impacts. Rather SLC simply seeks to propose some minor mitigation. SLC seeks to discount or ignore those impacts by its proposed pedestrian walkway. Obviously, those issues would not even arise if the project did not go forward. More directly and related to the issue of the deficient alternatives analysis, the sole reason for the expansion of the docking facilities and the major threat to other waterfront uses is the use of the HudsonMax ships. The sole need for those ships is associated with the delivery of coal. A proper alternative analysis would consider not only alternative fuels, bu the Catskill alternative where coal is delivered by rail, reducing waterfront impacts.

SLC states several times that the proposed project site has a history of industrial use. In an analysis of visual impacts, compatibility with existing land use is relevant only to the extent that it reduces the visual incongruity of the proposed structures. The fact that the proposed cement plant would be generally consistent with historic land use in the vicinity of the Greenport

site does not in any way mitigate the aesthetic damage the plant would cause at locations from which the previous industrial uses were not visible.

The Application makes a number of statements regarding the visible plume. The Applicant states that there will be no net plume gain because of the closure of the Catskill plant. However, the Application does not address the increase in visible plume due to the increased production at the Greenport facility in comparison to the current activities at Catskill. Also, the Applicant admits that the plume will be more visible from the Greenport facility because of the blue sky background. Thus any comparisons to the current Catskill facility plume seems inappropriate to measure the proposed visual impacts. In fact, the plume from Greenport will be six miles long emanating from a 406' tall stack compared to a much smaller plume from a 90' tall stack at Catskill.

In the minds of millions of people inside and outside the Hudson Valley, the essence of the Columbia County area is the beauty of its land forms. Industry can be a welcome element of the regional landscape if it conforms to the dimensions of the land. SLC has proposed to construct a facility on a scale larger than that of the land around it. This would do significant damage to the aesthetic qualities for which the Hudson Valley is most valued, both by residents and by travelers. SLC's own visual analysis shows that the proposed preheated tower and primary stack would be visible above the horizon at numerous locations for miles around the plant. The tower and stack would become hard focal points of otherwise soft and natural vistas, ruining their aesthetic quality and restorative power.

The proposed Greenport cement plant would have substantial visual impacts that can not be mitigated without fundamental changes in the project. This should make the need for the project an issue. SLC's statements that the cement market is "already flooded" indicates there is no public need for the proposed project.

General Environmental Concerns

FOH simply notes that it has made substantial and significant comments to the DEIS submitted by SLC regarding SEQRA applicability. FOH's comments on the DEIS are attached at Attachment 4.

Historic Properties

Under the ACOE Regulations, a full evaluation of the general public interest requires that due consideration be given to the effect which the proposed activity may have on values such as historic properties. The Applicant's scant recital of the historic properties near the proposed project is an insufficient evaluation of the impacts on these historic values. The Applicant has not addressed the numerous impacts, including, visual, noise, and air impacts that may be associated with each individual site. In addition, the Application fails to consider mitigation they

may be specific to a particular historic site. Rather, the application broadly suggests that impacts have been mitigated. This is clearly inadequate given the specific mandate of the Regulations.

Fish and Wildlife Values

Fish and wildlife species that are endangered, threatened or otherwise of concern are known to occur in the vicinity of the Greenport Project such as the endangered Shortnose Sturgeon, the threatened bald eagle and several other species of concern such as the Atlantic Sturgeon, the Blueback Herring, alewives, the American Shad, striped bass, smallmouth bass and the white catfish.

Under the ACOE Regulations, the district engineers should consult with the Regional Director of the Fish and Wildlife Service and the Regional Director of the National Marine Fisheries Service and the NYS DEC with a view to “the conservation of wildlife resources by prevention of their direct and indirect loss and damage due to the activity proposed in a permit application.” See 33 C.F.R. § 320.4(c). The Applicant has failed to show that project activity will not result in the loss and damage of important fish and wildlife values.

The Applicant fails to identify specific details with regards to the fish and wildlife populations present and those that will be potentially affected. For example, a rare, small flowered plant (*Agrimonia Paruiflora*) was discovered by Dr. Kiviat during a site visit in October 2000. See Attachment 1. However, impacts to this threatened species have not been addressed, and the plant has not been even mentioned by the Applicant. While the Application explains the dredging process, the Application fails to identify the impacts on the organisms within the dredging zone. There is no indication from the Application materials submitted that SLC considered the function of either the terrestrial or aquatic ecosystems. Further, considering the extent of the dredging proposed, a significant amount of damage will be caused to the fish and wildlife habitats inhabiting the area near the proposed dock expansion. However, these impacts are not discussed in the Application. The Application admits, “Slow moving life stages of fishes, such as eggs and larvae may be vulnerable, but most fish spawn and juveniles move out of the area well before the dredge window. . .” See Joint Application pg. 63. However, there is no evidence presented in the Application that would show this to be the case. Thus there is no basis on the facts presented for the ACOE to determine that the direct or indirect loss and damage will be prevented.

Furthermore, the Application discusses the resuspension of materials and sediment. However, the Application does not discuss in sufficient detail the impact the resuspension may cause on the fish and wildlife. Also, as highlighted numerous times by the Applicant, the proposed project area has had a long industrial history. However, along with this history of industrial activity, come a history of contamination of soil and water. Yet, the Applicant fails to address how this ambiguous contamination in conjunction with project activities will effect fish

and wildlife values.

Navigation

As a reoccurring example of deficiencies by SLC, the Application states that “extra safety measures” would be implemented to avoid potential navigational interference. *See* Joint Application at 68. There is no discussion as to what the safety measurers are or how they will protect recreational uses including the adjoining City waterfront access.

Water Quality

The Application states that the project includes the placement of 1200 cubic yards of fill material into the waters of the United States. However, the Application is vague regarding the location from which the fill material will be taken. The EPA 404(b) Guidance states, “No discharge of dredged or fill material shall be permitted if it . . . violates any applicable toxic effluent standard or prohibition . . .” *See* 40 C.F.R. § 230.10(b). If the location of the fill material is from a local source, i.e. on-site, given the historic industrial conditions of the property, it is likely the fill may be toxic or hazardous material. An analysis of the toxicity of the fill material must be included in order to comply with the EPA 404(b) Guidance.

One reason justifying the need for analysis of the toxicity of the fill material and any other impacted/disturbed areas is the long history of industrial activities at the SLC property and its neighbors. As SLC has described on numerous occasions, the project site and adjoining properties have long been used for industrial activities. These industrial activities have caused significant soil and water quality issues. SLC must examine the impacts of the project on these contaminated areas. Significantly, SLC must assess the potential exposure pathways created by SLC’s proposed “mitigation”, including construction of a public park and walkway. In addition, this analysis should examine the potential contamination of SouthBay and is necessary if any mitigation plan will be successful.

Safety

The Application states that security for the proposed park and lookout point will be provided by the City of Hudson. However, there is no indication of the man hours required to assume control and supervision of the public area and whether or not the City of Hudson is equipped to take on this responsibility.

Considerations of Property Ownership

As part of its application, SLC proposes a significant expansion of its existing dock facilities in Hudson, primarily for the purpose of being able to simultaneously handle out-going barges receiving cement and in-coming HudsonMax vessels delivering coal and other inputs. SLC

has applied to the DEC and the Army Corps of Engineers for a permit to dredge up to 80,000 cubic yards of river bottom and to fill up 51,907 square feet for construction of its dock facilities.³ Associated with the requested dock expansion, SLC has applied to the New York State Office of General Services for a Grant for Lands Underwater. Very serious issues have arisen with respect to SLC's right to request such a grant including questions about whether it even has valid title to the land it currently occupies.

Public records indicate that SLC does not likely hold title to substantial land areas along the edge of the Hudson River where the company proposes to locate its dock operations. Because of probably unauthorized fill-in of the Hudson River by SLC and/or its predecessor companies beyond boundaries defined by State authority, the locale of the proposed dock occupies a large area of land that in all probability is held in title by the People of the State of New York. In addition, the area of the waterfront that was filled in by proper authority of the State was permitted under the express condition of maintenance in perpetuity of a sizeable dock for use by the public. SLC and its immediate predecessor company failed to comply with this condition, thereby raising the prospect of a return of these lands to the People of the State of New York. The land ownership of the waterfront area would directly affect the nature of any dock operation proposed by SLC if not raising a legal question about the actual right of the company to occupy any part of the area.

The entire area of the current lands along the Hudson River now occupied by SLC's dock is landfill in the bed of the Hudson River. The issue of title ownership concerns approximately 1400 feet along the River's edge that comprises SLC's primary area for its current and proposed active dock use. Authority for a precisely defined fill-in of this area of the Hudson River, along with conditions for the fill-in, was granted by State Legislative Act, Chapter 195, Laws of 1855, and was reconfirmed and slightly revised in a subsequent State Legislative Act, Chapter 167, Laws of 1861. These two Legislative Acts redefined the size and conditions of a previous "Grant of Land Underwater" issue by the State Land Commissioner through Letter Patent to John L. Graham dated December 12, 1836. There is no other apparent State authorization that provides any other definition of this area of the Hudson River permitted to be filled in or any other definition of conditions accompanying any fill-in. The Legislative Acts provide: (a) precise measurements of the area of the Hudson River allowed to be filled in for use of commerce (b) the condition for the filling of the River that states "hereby required forever hereafter to keep open the slip or space now opened by them to the south of their furnace of a width of at least sixty feet, and extending back from the channel of said river at least two hundred and fifty feet, for the use of the public." The restrictions defined by these acts for permitted landfill and the maintenance of the required public dock were honored for generations. Additional, and apparently unauthorized, landfill running most of the entire length of these 1400 feet of the Hudson River as well as the closing of the public dock was carried out by SLC and/or its immediate predecessor company at some time after approximately 1915.

³ In the draft Water Quality Certification, Department staff have preliminarily approved a lesser included alternative which includes 60,000 cubic yards of dredging and 6,608 cubic yards (13,504 square feet) of fill.

An in-depth research project by Friends of Hudson member Don Christensen and subsequent confirmation by Robert Maclean, Esq., former counsel to OGS have revealed the problems with SLC's existing title. That research was further confirmed by the rejection by OGS of the draft survey supplied by SLC with its application for the grant of state lands, where OGS determined that the proffered survey lacked sufficient detail and supporting information to demonstrate SLC title to the existing lands and the proper delineation of the requested grant.

In the absence of a valid survey the precise extent of the possible unauthorized fill-in of the area cannot be determined. A rough approximation of the unauthorized landfill suggests an area upwards of seven acres and possibly more. All of the area of unauthorized landfill would be lands held in title by the People of the State of New York. Without proper title, SLC's proposed design and use of the waterfront as outlined in the Application cannot be considered.

The evidence of unauthorized fill by SLC and its predecessors in such a substantial area raises significant questions about the nature of the fill material and the real possibility that it was filled with industrial waste causing contamination to the lands of the People of the State of New York and the Hudson River. The Joint Permit Application to DEC and the Army Corps of Engineer does not contain sediment samples in the river, and there are no soil samples taken of the existing dock area itself and the area that was illegally filled.

In addition to the illegal and potentially dangerous fill, SLC and its predecessor's violation of the specific conditions of the Legislative grant constitute a gross violation of the public trust. SLC was required to maintain a 60 foot wide public dock area in perpetuity. That requirement constituted an early Legislative recognition that public access to the waterfront, not just by spectators but as an active waterfront was essential to the orderly development and beneficial use by all members of the community. By failing to comply with that condition, title to all lands held by SLC associated with that condition is subject to challenge and revocation. There is well established legal precedent for revoking grants of lands underwater where the grantee has failed to comply with the conditions of the grant.

Non-compliance with the condition is not simply an academic exercise, but raises significant questions with respect to SLC's offered mitigation of a pedestrian walkway around its property so that people can view the river. Regardless of how attractive SLC attempts to make such an access area, it is an inadequate substitute for the lack of public landing that it was supposed to have maintained in the first place. Before SLC seeks to mitigate the impacts of what it intends to do, it must first restore the condition it was obligated to provide as a condition of the original grant.

Coupled with SLC's violation of its existing grant, are grave concerns regarding the requested expansion of the dock area. The Hudson River Estuary Management Action Plan issued by DEC in 1996 and the 9 NYCRR Part 2, priority use of the Hudson River is to be given

to the public by use of lands still owned by the People of the State of New York and thus should preclude an extension of the grant to SLC. This is particularly relevant with the City of Hudson's plans to redevelop the waterfront and increase public access to the river.

The General Needs and the Welfare of the People

As stated previously, the record is incomplete as to the need for this facility in Greenport. As discussed below, there are a number of alternatives that will be as effective at meeting the needs of the people without unnecessarily and permanently destroying the environment.

Compliance with EPA's 404(b)(1) Guidelines

The EPA Guidelines explain that "the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered the most severe environmental impacts covered by these Guidelines." *See* 40 C.F.R. §230.1(d). Considering the importance of the wetland areas impacted by the project, SLC blatantly fails to ensure that these values remain protected. Not only has SLC performed an incomplete analysis of the current biological and ecological functions of these habitats, SLC ignores many other significant factors necessary to evaluate impacts on such a precious and fragile environment.

As explained more fully in the comments by Dr. Kiviat, SLC's Application fails to contain the necessary biological information. *See* Attachment 1. The Application completely ignores the existence of rare and challenged plant and animal species that under the Guidelines must be assessed and protected. *See* 40 C.F.R. §230.10(3)(6).

The Guidelines explicitly state, "Minimization of adverse effects on populations of plants and animals can be achieved by avoiding sites having unique habitat or other value, including habitat of threatened or endangered species." *See* 40 C.F.R. §230.75 . SLC has utterly failed to show any measurable analysis of the impacts of the project on threatened and endanger species.

Alternatives

FOH has identified reasonable alternatives which should be considered by the ACOE. These alternatives have not been adequately considered by SLC or in the DEC environmental review process. FOH requests that the ACOE keep the administrative record open on the issue of alternative proposals. Under the ACOE Regulations, "where there are unresolved conflicts as to resource use, the practicability of using reasonable *alternative locations and methods to accomplish the objective of the proposed structure or work*" will be considered. *See* 33 C.F.R. § 320.4(a)(2)(ii)(emphasis added).

Rather than meet that requirement, the Alternatives in the Application lack any substantive analysis and rely on unsupported conclusions to portray SLC's proposed project as the only reasonable alternative, despite the fact that it will result in myriad unmitigated adverse impacts.

Furthermore, SLC's alternative analysis in the Application is so inadequate, it borders on laughable.

The Second Circuit Court of Appeals has taken a broad view toward the alternatives which must be considered by an Applicant. In Bersani v. USEPA, 850 F.3d 34 (2d Cir. 1998), the Court held that the EPA's "market entry theory" which looked at the availability of alternative sites at the time the developer entered the market was applicable and consistent with both regulatory language and past practice. Bersani involved the attempt by Pyramid Companies to construct a shopping Mall in certain wetlands in Massachusetts. EPA vetoed ACEO approval because EPA found that an alternative site had been available to Pyramid at the time it entered the market to search for a site. The Court agreed with EPA and held that Pyramid failed to consider available alternatives at the time it entered into the market to build a shopping mall.

Similarly, there are essentially two alternatives that have not been considered which will clearly result in significantly less adverse impacts. The alternatives that clearly need further consideration are (1) building a plant with a smaller annual capacity; and (2) locating a new facility on the Catskill site.

A. A Smaller Alternative

The Application completely fails to reasonably consider a smaller sized alternative. While the Application ostensibly considers a 1 million mtpy plant, it skews the analysis by assuming that such a plant would have to be located in Greenport and the Catskill facility would have to keep operating. That is an absurd construct which acts as a slap in the face of the ACOE Regulations analysis and is contrary to the final scoping document that required the consideration of a smaller alternative but did not condition that alternative on maintaining Catskill in operation.

The first fatal flaw in SLC's analysis is that there is some magical need or vested right in a 2 million mtpy plant. Once again, there is no explanation for such a need. By contrast, in the early 1990's SLC initially announced plans, later withdrawn due to a change in the cement market, to construct a 1 million mtpy plant in Greenport to replace the Catskill facility. Obviously, such that was a viable option then, and the presumption is that it continues to be viable option until SLC is able to prove otherwise. Since Catskill continues to be profitable, and a 1 million mtpy plant would nearly double the output of Catskill, it would seem that the smaller plant with less impacts would be viable.

A plant at half the capacity will have, in general, half the impacts associated with the larger facility. A 1 million mtpy plant will require less limestone and rock from the Greenport mine, thus not requiring a modification of its mining permit and the three-fold increase in the extraction rate, thus reducing the impacts from blasting, noise and dust. A smaller plant would reduce air emissions by at least 50% and some emissions, assuming the alternative fuel would be gas, would be eliminated, such as SO₂.

A smaller capacity plant would have reduced stormwater impacts since the stockpiles of gypsum and GBFS would be reduced by half. By also eliminating coal, the quantity of material stored on the Hudson dock would be reduced by 80 % and the surface area exposed to precipitation would be reduced by approximately 66 %.

A smaller capacity plant would also have benefits on the visual impacts from the plant. While SLC claims, without substantiation that the height of the preheater tower would not be lowered, it does admit that the bulk of the tower would be narrowed by 35 feet, a considerable amount that should be compared in the visual analysis. Moreover, a smaller capacity plant will cause less of a vapor plume, further reducing the visual impacts.

B. The Catskill Alternative

The foregoing lead to the most realistic alternative. The construction of a new gas-fired 1 million mtpy or smaller plant on the site of the existing Catskill plant. SLC never considers this obvious alternative and instead only discounts its ability to build a 2 million mtpy plant on the site. Even that analysis is internally inconsistent.

SLC discounts the ability to rebuild at Catskill on a variety of grounds. First it claims, without any supporting information, that its mine in Catskill does not have a sufficient supply of limestone. However there is no evidence supporting that claim. SLC also claims that it would be too expensive to transport by barge or otherwise limestone from Greenport to Catskill, claiming that “it would result in significant additional costs that would measurably add to the cost of the finished cement product, making this alternative less economically attractive in a marketplace already flooded with highly competitive overseas cement products.”

That is a curious statement, since it questions the need for the project in the first place if imported cement is so available and so price competitive with domestic supplies. It also raises questions how importing cement thousands of miles remains cheaper than conveying the rock to the dock and transshipping by barge across the river. That assumes in the first place that Greenport is a necessary source of the limestone and that the existing Catskill mine or the adjacent Lehigh mine are not viable options.

SLC also argues against Catskill on the grounds that it would require greater dredging to

expand the dock than would be required at Hudson. Once again, no dimensions are provided by which that statement can be assessed. It also flies in the face of the facts. First, Catskill currently operates as a coal-fired plant with the necessary dock. It does so by accepting coal deliveries by train and shipping cement by barge and truck.⁴ Secondly, at the smaller alternative of 1 million my, there is insufficient information to assess whether the current dock would not be sufficient for those needs. The transportation dilemma has also been changed by SLC's decision to import GranCem to Catskill by barge.

Finally, SLC claims that rebuilding Catskill would force it to cease production there for at least two years causing a disruption that "would result in inadequate supply of cement for existing customers and is not a feasible business strategy for SLC." Given the world-wide capacity of Holcim and its current practice of importing cement in a cost-effective manner to compete in the marketplace, it is hard to imagine that a temporary loss of 600,000 tons of production will cause an unbearable harm. It is not uncommon in an industrial context for a large corporation to have to shut down a facility for two years or more to rebuild when the old facility is obsolete. The enormous environmental benefits of reconstruction at Catskill clearly outweigh the short term economic cost to SLC and Holcim.

Taken a whole, Catskill is clearly a better alternative. Rather than expanding industrial uses onto Beecraft Mountain where no cement kiln ever existed or into Greenport where the cement industry ceased to exist a quarter of a century ago, rebuilding Catskill would represent a true brownfield redevelopment. The most striking difference between Catskill and Greenport/Hudson is the difference in the nature of the surrounding neighborhood. The lands surrounding SLC's Catskill operation are surrounded by two other cement plants. One, Alsen Cement has not been in operation for decades. The other, Lehigh/Glens Falls operates a mine and a recently permitted slag dryer and grinding facility, although its kiln has not operated for sometime. There are few if any residences in close proximity to the Catskill plant. Within a 1 mile radius of Catskill there lives a population of approximately 454 persons. Within a 1 mile radius of the Greenport facility, approximately 14,000 people reside. Catskill already represents a buffered area which protects the populace from the worst effects of cement operations.

Catskill also represents a striking improvement in visual impacts. While FOH cannot specifically accept a particular plant for Catskill without a visual impact assessment, the fact remains that the western shore of the Hudson is already degraded by the presence of industrial activity. Redevelopment of that site would be consistent with existing land use patterns and would not add a new industrial element in the visual landscape. By contrast, Greenport will dramatically change the eastern shore of the Hudson, an area that has largely been unaffected by industrial visual impacts. It is the stated policy of this State, as embodied in Coastal Zone policies, the Hudson River Heritage Program and the Governor's Smart Growth Task Force, to limit the sprawl of development and concentrate future industrial growth in existing industrial

⁴ Presumably finished product could also be shipped out by rail, but no information on that option is provided.

areas. The Cementon area of Catskill is an existing industrial area. Greenport is not and the fact that SLC left the carcasses of its past operations to decay, does not preserve Greenport as an industrial area.

C. Coordination with Lehigh/Glens Falls

Another viable alternative is the redevelopment of Catskill in conjunction with the redevelopment of the Lehigh/Glens Falls facility. In the first instance, SLC has not stated why it could not lease the Lehigh/Glens Falls mine for limestone, assuming that the Catskill mine truly lacks sufficient capacity. As revealed in the Lehigh/Glens Falls application for a slag dryer, Lehigh and SLC already cooperate on the use of dock storage areas and thus may be willing to enter into a lease agreement for the mine.

There is another reason why Lehigh/Glens Falls is an option. That facility is a joint venture between Glens Falls Cement and Lehigh Cement. Glens Falls Cement is owned by a German company, Dyckerhoff, AG. Lehigh is owned by Heidelberger Zement. Holcim, SLC's parent corporation, owns approximately 10% of the stock of Dyckerhoff.⁵ Under the rules of the Securities and Exchange Commission, a 10% ownership of a corporation is considered a controlling ownership and as Joint Venture, each party to the venture is considered to be a controlling party. As a result, it appears that SLC through its parent may have the means to control and or negotiate a reasonable deal not only for access to the Glens Falls/Lehigh mine, but to the whole site thus facilitating its redevelopment.

Consistent with the Corps' obligation under Bersani, SLC must investigate the availability of other sites, including an existing limestone deposit immediately adjacent to its existing facility that would permit reconstruction of a cement plant at the existing site.

This scenario presents a unique situation for the Department. Consistent with State policy there is a recognition that the cement industry has a role in the Hudson Valley. Presently all the existing plants are reaching the end of their useful lives and are making plans for significant reinvestments.⁶ Given the close relationship of the cement companies and in this case the existence of joint venture involving most of the cement industry in the valley (with the exception of Blue Circle in Ravena), the Department has an obligation to look at all the reasonable alternatives that may involve a comprehensive redevelopment plan which meets the reasonable needs of the marketplace while conserving and protecting the unique character of the Hudson Valley. To do otherwise is to abdicate responsibility and to allow the cement industry to dictate the future development of the area in a piecemeal fashion. Since these are decisions that the region will have to live with for up to a 100 years, there must be a thorough alternatives analysis

⁵ A May 17, 2001 European Wire Report states that the family owners of Dyckerhoff are looking to sell their 38 % stake in the company to Holcim.

⁶ Reportedly, Lehigh/Glens Falls has approached DEC about obtaining a permit to renew operations of its cement kiln.

which explores the possibility of such a sharing of resources, before any particular project is approved.

Wetlands

Under the ACOE Regulations and EPA Guidance, wetland protection is the most important interest in regulating filling of the waters of the United States. Wetlands represent an invaluable habitat that must be highly protected from degradation. The unnecessary alteration or destruction should be discouraged as contrary to the public interest. *See* 33 C.F.R. § 320.4(3)(b). However, the Application provides virtually no biological data on the wetlands potentially impacted by the project. It is impossible for the Applicant to address potential impacts to wetlands without an analysis of the habitat to be affected.

Additionally, there are no data on wetland HS-100 adjoining and downstream from the souther portion of the existing cement mine on Becraft Mountain. As highlighted in the comments by Dr. Kiviat, the interspersion of openwater and submergent vegetation, combined with low level of human contact, indicate potentially high quality habitat for spotted turtle, ribbon snake, wood duck, and Virginia rail. *See* Attachment 1.

Further, the Applicant's proposed mitigation hardly addresses the proposed destruction. For instance, very little data is available which would allow the assessment and potential for success of the mitigation plan. The mitigation plan offers no likelihood of success and does not guarantee any alternatives. As explained in Attachment 1, the mitigation needs further study before it can truly be perceived as a benefit to the Hudson River environment.

Conclusion

The foregoing comments only touch on the numerous deficiencies of the project. Without more information, the ACOE and DEC do not have sufficient information to determine whether SLC has complied with the necessary showing under 33 C.F.R. Part 320 or the EPA 404(b) Guidance.