STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of the -

Application for a State Facility Permit for Air Pollution Control pursuant to Article 19 of the Environmental Conservation Law ("ECL") and Title 6 of the New York Compilation of Rules and Regulations ("6 NYCRR") Parts 201, et seq.; a State Pollutant Discharge Elimination System ("SPDES") Permit pursuant to ECL Article 17 and 6 NYCRR Parts 750-758; an ECL Article 15 Protection of Waters Permit; a Section 401 Water Quality Certification pursuant to 6 NYCRR Part 608; a Mined Land Reclamation Law Permit Modification pursuant to ECL Article 23 and 6 NYCRR Parts 420 to 426; and a Freshwater Wetlands Permit pursuant to ECL Article 24 and 6 NYCRR Part 663,

- by -

ST. LAWRENCE CEMENT COMPANY, LLC,

Applicant.

Permit Application No. 4-1040-00011/00001

SECOND INTERIM DECISION OF THE COMMISSIONER

September 8, 2004

TABLE OF CONTENTS

SECOND INTERIM DECISION OF THE COMMISSIONER

Introduction and Background

St. Lawrence Cement Co., LLC ("SLC" or "applicant") proposes to construct and operate a cement manufacturing facility in the Town of Greenport and City of Hudson, Columbia County, New York.

Among other government approvals, SLC must obtain from the New York State Department of Environmental Conservation ("DEC" or "Department") a state facility permit for air pollution control pursuant to Environmental Conservation Law ("ECL") article 19 and parts 201, et seq. of title 6 of the New York Compilation of Codes, Rules and Regulations ("NYCRR"); a state pollutant discharge elimination system ("SPDES") permit pursuant to ECL article 17 and 6 NYCRR parts 750-758; an ECL article 15 protection of waters permit and section 401 water quality certification (see 6 NYCRR part 608); a mined land reclamation permit modification pursuant to ECL article 23 and 6 NYCRR parts 420-426; and a freshwater wetlands permit pursuant to ECL article 24 and 6 NYCRR part 663.

SLC intends to produce 2.6 million U.S. tons of clinker per year in a manufacturing plant it plans to locate on property that it owns. In the Town of Greenport, SLC is the owner of a 1222-acre mine east of U.S. Route 9 and west of Newman Road, an

inactive conveyor trestle that extends across Route 9, and an office and laboratory west of Route 9. SLC also owns a dock on the east side of the Hudson River in the City of Hudson. SLC plans to mine limestone to make cement and to locate the cement manufacturing facility within the mine. SLC proposes to develop a new conveyor system to transport product to the docks and for receipt of raw materials at the manufacturing facility.

SLC has also expressed its intent to close its operating cement kiln in Catskill, New York and to remove remnants of the old Universal Atlas Cement plant that are located at the Hudson dock and at the Route 9 location, as well as bunker silos along the Hudson River and the stack at the Catskill plant.

The Department is lead agency pursuant to the State Environmental Quality Review Act ("SEQRA") (see ECL article 8). On April 8, 1999, Department staff determined that this facility is a Type I action that may have a significant impact on the environment. Accordingly, the Department issued a positive declaration requiring SLC to prepare a draft environmental impact statement ("DEIS"). The Department accepted the DEIS as complete and available for public review on May 2, 2001.

The Department published a combined notice of hearing and complete application and notice of determination of review -- prevention of significant deterioration ("PSD") in the May 2, 2001 Environmental Notice Bulletin. SLC published these notices

in the May 4, 2001 editions of The Independent and the Register Star. The Department accepted written comments from the public through July 2, 2001.

Legislative hearings on SLC's proposal were convened on June 20, 2001 at Columbia-Greene Community College. A preliminary issues conference was held on June 21, 2001 to identify the application, distribute the draft permits, and to discuss pending issues with respect to disclosure. The issues conference participants embarked on site visits on June 22, 2001 and August 16, 2001. The issues conference proceeded on July 18 to July 31 and August 15, 2001 to address petitions filed by Friends of Hudson ("FOH"); the Hudson Valley Preservation Coalition ("HVPC"); the Olana Partnership ("TOP"); the Town of Greenport; the City of Hudson; Massachusetts Department of Environmental Protection ("MDEP"); the Berkshire Regional Planning Commission; Columbia Hudson Partnership; the Village of Athens; the County of Columbia; the Preservation League of New York State; the National Trust for Historic Preservation; and the Natural Resources Defense Council ("NRDC").

On December 7, 2001, Administrative Law Judges ("ALJs") Helene G. Goldberger and Maria E. Villa issued their ruling identifying issues for adjudication and designating party status ("ALJs' Issues Ruling"), in addition to directives relating to the incorporation of additional permit conditions in conformance

with the ALJs' Issues Ruling and with stipulations entered into by the parties during the issues conference.

Appeals were taken from the ALJs' Issues Ruling by SLC, Department staff, FOH, HVPC, TOP, NRDC, MDEP, the Preservation League of New York State and the National Trust for Historic Preservation. Reply briefs were filed on March 15, 2002 by SLC, Department staff, FOH, TOP, HVPC and Riverkeeper, Inc. (on behalf of HVPC). Subsequently, in an August 5, 2002 Commissioner's Ruling, I authorized an additional opportunity to appeal the ALJs' Issues Rulings. On September 18, 2002, FOH filed a supplemental appeal. Correspondence was also received from HVPC, the Village of Athens and TOP. Although HVPC, the Village of Athens and TOP did not submit any supplemental appeals, the Village of Athens reiterated its position that a complete consistency review was required with respect to its Local Waterfront Revitalization Program ("LWRP") and TOP provided further comments regarding visual impacts and coastal zone policies. SLC and Department staff filed supplemental replies on October 18, 2002.

On December 6, 2002, I issued a First Interim Decision that identified, among other issues, grandfathering, noise, air impacts to Olana, and a proposed traffic contingency plan as requiring adjudication. In January 2003, SLC submitted an analysis of air quality impacts on Olana, a noise mitigation

plan, and a proposed traffic permit condition. By letter dated October 1, 2003, John W. Caffry, Esq. advised the ALJs that TOP would not be pursuing the issue of air quality impacts to Olana. Because TOP was the sole proponent of this issue, the ALJs withdrew the issue from adjudication.

The ALJs conducted adjudicatory hearings on three issues: the grandfathered status of the SLC mine; traffic; and noise. The hearing on the grandfathered status of the SLC mine was conducted on February 25 and 28 and March 4, 5 and 6, 2003. The ALJs issued a decision dated June 12, 2003 that recommended that the mine be ungrandfathered in order to fully assess the mining impacts for this application. The parties who participated in this proceeding, FOH, HVPC, SLC and staff submitted comments on the ALJs' recommended decision. I agree with the ALJs' recommendation as set forth in my determination dated today, issued herewith.

The adjudicatory hearing on traffic was held on November 12 and 13, 2003. The hearing on noise was conducted over an eight day period, on November 19-20, November 24-26, and December 10, 17 and 18, 2003. The participants in these two proceedings were FOH, HVPC, SLC and staff. The parties and the ALJs agreed that the parties would submit post-hearing briefs, but that any replies and comments would be submitted only after

the ALJs issued a recommended decision following the adjudication of any remaining issues.

This Second Interim Decision addresses the remaining issues that were raised in the appeals and supplemental appeals and identifies those issues that are to be adjudicated.[1]

Air Issues

Challenges to three of the ALJs' rulings concerning air issues were decided in the First Interim Decision: (1) use of off-site versus on-site meteorological data in air emission modeling; (2) identification of emission reduction credits ("ERCs") prior to any adjudicatory hearings; and (3) supplementation of the draft environmental impact statement ("DEIS") with respect to air quality impacts on Olana. The following addresses the remaining ALJ rulings concerning air issues that are contested by the parties on appeal.

SLC's LAER Analysis for NO_x and VOC

In its appeal, SLC challenges various of the ALJs' rulings that issues concerning SLC's lowest achievable emission rate ("LAER") analysis for nitrogen oxides ("NO_x") and volatile

[1] This Second Interim Decision addresses SLC's permit applicant as presently submitted to the Department. On August 18, 2004, SLC held a press conference in which it indicated that aspects of the project would be redesigned to address certain impacts. SLC must submit any project modifications to the Department for consideration. The modifications would then be considered in the permit review process and be subjected to all applicable reviews.

organic compounds ("VOC") are adjudicable. Department staff joins in SLC's appeals. For the reasons that follow, the ALJs' rulings are modified in part and otherwise affirmed.

Background

In its air permit application, SLC acknowledges that its proposed Greenport cement plant, which would be located in the Northeast Ozone Transport Region ("OTR"), must meet the LAER standard for emissions of the ozone precursor compounds, VOC and NO_x, pursuant to the federal New Source Review ("NSR") program (see Air Permit Application [4-27-01], IC Exh 8, at 6-1, 6-5). SLC notes that NO_x emissions are an inevitable consequence of cement manufacturing, due to the high temperatures involved and the need to remove alkali from the raw materials it plans to use (see id. at 6-6 to 6-7). Accordingly, SLC proposes to use a low NO_x burner, combustion design optimization, multi-stage combustion, and a wet scrubber in an effort to achieve LAER for NO_x emissions (see id. at 6-8 to 6-27).

SLC also proposes to use a selective non-catalytic reduction ("SNCR") system (see id. at 6-15 to 6-20). However, because of the temperatures involved, SLC claims SNCR could not be used to reduce NO_x emissions from the alkali bypass control system, which would remove alkali from the raw materials (see id. at 6-18).

With respect to VOC emissions, SLC proposes to use optimized combustion design and good combustion practices to reduce emissions of VOC (see id. at 6-5). SLC contends that its projected VOC emission rates will meet the LAER requirement for a comparably designed and permitted cement manufacturing facility (see id. at 6-4). SLC bases this assertion on its conclusion that the recently promulgated maximum achievable control technology ("MACT") standards for portland cement manufacturing -- 50 parts per million, dry volume basis ("ppmdv") at 7 percent oxygen (reported as propane) (see 40 CFR part 63, subpart LLL)-- which is the most stringent federal or state emissions rate limit for VOC identified in a state implementation plan ("SIP") or in practice, is LAER for VOC, and that its proposed maximum emissions of VOC -- 18 ppmdv at 7 percent oxygen -- would fall well within that standard (see Air Permit Application, at 6-3 to 6-4). SLC rejects the use of a regenerative thermal oxidizer ("RTO") as an additional control technology for the reduction of VOC emissions (see id.).

1. Draft Air Permit

The Department's Division of Air Resources staff reviewed SLC's application and concluded that the proposed facility would meet LAER requirements for NO_x and VOC emission (see Fact Sheet, NYSDEC Draft Air Permit [4-27-01], IC Exh 12). The draft air permit states:

> Comparing this facility's emissions of VOCs with other recently constructed facilities in this country and abroad, the VOC emissions meet the LAER requirements. This facility will accept a NO_x emission limit cap. The sulfur content of the quarry rock requires a process for removing some sulfur. This process requires that the NO_x emission limits be adjusted slightly higher than what is permitted for other facilities around the country. Controls for NO_x will be more aggressive than what is used elsewhere. The preliminary determination has been made that this facility meets the requirements of LAER for NO_x emissions

(id.). Accordingly, Department staff set proposed LAER limitations, which it concluded would not result in any national ambient air quality standard ("NAAQS") being exceeded (see id.).

For NO_x, Department staff originally proposed phased-in emission limits of 4,121 tons per year ("tpy") (3.6 lbs/ton of clinker) for the first two years, a steady reduction from 4,121 tpy to 3,718 tpy (2.8 lbs/ton of clinker) during the third year, and a 3,718 tpy limit thereafter "and until the Department determines LAER NOX limit" (Air Pollution Control Permit Conditions, id., Item 69.2, at 42; id., Item 70.2, at 45). By the time of the issues conference, however, Department staff agreed to allow a two-year period for final emission limits for NO_x. The permit also provides for a short-term emission rate of 1,454 lbs NO_x/hour, based upon a 30-day rolling average calculated each 24 hours (see id., Item 52.1, at 26). The short-term limit applies for the entire length of the permit.

The permit also provides that SLC has 12 months after first clinker production to implement the SNCR system (see id., Item 66.2, at 36). An optimization demonstration for the SNCR is to occur sometime during the second year of operation (see id., Item 67.2, at 36).

The draft permit contains no specific permit condition for VOC emission limits, although the permit Fact Sheet indicates that the limit would be 129 tpy. At the issues conference, SLC presented a table of stipulated limits that included a VOC limit of 129 tpy and 18 ppmdv total hydrocarbon content ("THC") at 7% (measured as propane-based upon compliance testing) (0.10 lb THC/ton of clinker).

In response to SLC's application, Department staff noted that due to the use of an alkali bypass control system, which involves bleeding off some of the kiln exhaust before it enters the precalciner, and the lack of NO_x controls for the bypass, 30 percent of the NO_x generated by the kiln would be uncontrolled (see Notice of Incomplete Air Permit Application [2-7-01], IC Exh 72f, at 4).

2. Intervenors' Offers of Proof

FOH's petition for full party status and its presentation at the issues conference challenged the adequacy of SLC's LAER analysis. With respect to NO_x, FOH questioned (1) the phased-in emission limits and the lack of final emission

limits, (2) the phased-in application and optimization period for SNCR, and (3) whether SNCR might be applied at various stages within the manufacturing process, including after the kiln. With respect to VOCs, FOH challenged (1) the failure to include a RTO, (2) the lack of LAER limits for VOCs in the permit, and (3) SLC's proposed limit of 0.10 lb THC/ton of clinker.

In support of its contentions, FOH introduced into the record a letter from the United States Environmental Protection Agency ("EPA") Region 2, Permitting Section, Air Program Branch, offering comments on SLC's application (see Riva Letter [6-29-01], IC Exh 55, at 2 ["EPA Letter"]). The EPA Letter concluded that with respect to NO_x, the draft permit did not constitute LAER for the proposed cement plant. The EPA Letter noted that cement plants in Europe that use SNCR have achieved NO_x emission rates of between 2.0 to 3.2 lbs NO_x/ton of clinker, averaged on a daily basis. It also noted that two cement plants in Texas that do not use SNCR have emission rates of 2.7 and 2.5 lbs NO_x/ton of clinker. Thus, the EPA Letter concluded that SLC's proposed NO_x limit was not LAER. The EPA Letter also noted that if the facility emitted NO_x at the short-term NO_x emission limit each day for an entire year, annual emissions would amount to 8,242 tpy NO_x, not 4,121 tpy (see id. at 3). Accordingly, the EPA Letter indicated that a short-term limit of 941.29 lbs/hour should be used. The EPA also indicated that SNCR is not

innovative technology and, therefore, questioned the need for the phased-in implementation and shake-down of the system.

With respect to VOC, the EPA Letter noted the lack of specific emission limits in the permit. It also noted that a cement plant in Texas is achieving 0.026 lb VOC/ton of clinker, and the VOC best available control technology ("BACT") for a plant permitted in Puerto Rico was determined to be 0.12 lb/ton of clinker. Thus, the letter questioned whether the proposed VOC limits were LAER.

At the issues conference, FOH offered testimony that SNCR is not a new technology and, as did EPA, questioned the need for phased-in limits and a shake-down period (see IC Trans [7-19-01], at 250-254). FOH also offered the testimony of its engineering consultant, Gabriel Miller, Ph.D., senior environmental scientist, Camp Dresser & McKee. Dr. Miller confirmed that other cement plants in the United States are presently operating at emission levels for NO_x that are lower than 3 lbs/ton clinker (see id. at 253). With respect to the lack of SNCR on the alkali bypass, FOH argued that SLC had not provided a technical analysis explaining why SNCR could not be used to control NO_x emissions from the bypass (see id. at 271). FOH also challenged the short-term permit limits for NO_x, noting that if SLC operated at those limits continuously, NO_x emissions would exceed the annual limits by 50 percent (see id. at 298).

With respect to VOC emissions, FOH offered the testimony of a chemical engineer, Frank C. Sapienza, P.E., Camp Dresser & McKee, who offered comments concerning the technical feasibility of using RTO in the proposed plant, and concluded that the technology could be successfully used to lower VOC emissions at the proposed facility (see id. at 334-339).

3. ALJs' Issues Ruling

In their ruling, the ALJs held that four issues concerning SLC's NO_x LAER analysis were adjudicable: (1) whether the emission limits set by Department staff in the draft permits were sufficiently stringent, (2) whether the short-term emission limits for NO_x adequately meet new source review requirements, (3) whether the phase-in period was necessary, and (4) why SNCR was not proposed for the alkali bypass (see ALJs' Issues Ruling, at 25-26, 29). The ALJs held that FOH met its burden of raising a substantive and significant issue on each of these points. The ALJs concluded that the EPA Letter raised issues concerning the adequacy of the overall and short-term emissions limits, and that no showing was made concerning the basis for the short-term limits (see id. at 25, 29). Moreover, the ALJs held that the record was not sufficient to support the long phase-in and shake-down period (see id. at 26).

With respect to the VOC LAER analysis, the ALJs held that two issues were adjudicable: (1) whether SLC met LAER for

VOCs for this facility; and (2) whether the RTO is an appropriate technology for attaining LAER (see id. at 31). In reaching this conclusion, the ALJs referred to the EPA Letter as evidence that lower VOC emissions may be achievable, and the testimony of FOH's chemical engineer concerning the feasibility of RTO technology for the proposed plant (see id. at 31-32).

On their appeals, both SLC and staff challenge all six of the ALJs' rulings.

Discussion

1. NO_x LAER Analysis

SLC argues that the ALJs erred in concluding that the phased NO_x LAER limits in the permit are adjudicable. SLC contends that the limits were arrived at after exhaustive and thorough analysis by Department staff, and that staff's determinations should be given deference. SLC argues that the phased-in limits are justified because the Greenport facility is unique and will use innovative technology. Specifically, SLC contends that the Greenport plant will be the first cement plant to include full-scale SNCR, one of the first to employ both SNCR and multi-stage combustion, and the first to apply parallel wet and dry scrubbers. SLC argues that the phased-in limits are necessary to allow for optimization and technology forcing.

SLC challenges the evidence relied on by FOH and the ALJs. SLC contends that the EPA Letter was written without the

benefit of comprehensive review of SLC's entire air permit application and should be given little weight. SLC also challenges the comparability of the European and Texas facilities to the Greenport plant. Finally, SLC argues that FOH's issues essentially go to the completeness of the application, not adjudicability.

Department staff's arguments are similar to SLC's. Staff also challenges the comparability of the European and Texas plants referred to in the EPA Letter, and relies upon the alleged uniqueness of the Greenport facility and raw materials that will be used. Staff also argues that phased-in limits are appropriate because the use of SNCR and multi-stage combustion has the potential to reduce NO_x emissions even lower than when either is used alone.

In reply, FOH argues that the alleged uniqueness of a facility cannot limit the scope of LAER review. FOH contends that the evidence it proffered, including the EPA Letter, raises substantive and significant issues concerning the phased-in limits. FOH argues that the review standard and burden of proof SLC is urging would improperly turn the issues conference into an adjudicatory hearing. FOH concludes that the ALJs correctly held that the issues raised could not be resolved at the issues conference stage.

No legal issues are raised concerning the NO_x LAER analysis. The entire dispute among the parties involves only factual questions. With respect to the factual issues raised, the ALJs properly applied the substantive and significant standard and correctly concluded that issues concerning LAER for NO_x are adjudicable (see Matter of Hyland Facility Assocs., Third Interim Decision [8-20-92], at 2; Matter of Amenia Sand and Gravel, Inc., Second Interim Decision [11-22-00]).

a. NO_x Emission Limits and Phase-in

Issues regarding the emission limits set by Department staff are raised by the offers of proof of lower emitting plants in Europe and Texas, including some plants that are achieving lower emission rates even without using SNCR. With respect to the phasing-in of those limits, FOH carried its burden at the issues conference stage by offering technical testimony showing that SNCR is not new technology, and that SLC overstates the difficulties associated with SNCR. The draft permit itself provides for a lower emission limit by the third year and, since the plant would be built in a non-attainment area and is therefore subject to LAER, the ALJs correctly concluded that whether the lower limit might be imposed and SNCR installed earlier in the process is adjudicable.

b. Short-term NO_x Emission Limits

SLC also argues that the ALJs erred in concluding that the short-term NO_x emission limits should be subject to adjudication. SLC notes that short-term limits are not required either by statute or regulation. SLC contends that the short-term limits are required to allow for the variability inherent in cement manufacturing processes. As the ALJs noted, however, the EPA letter suggests the contrary -- that the short-term limit is simply the annual limit reduced to a daily average. Again, because the Greenport plant would be built in a non-attainment area, the ALJS correctly ruled that the issue of the adequacy of the short-term limits is adjudicable.

c. SNCR Use on Alkali Bypass

SLC and Department staff both argue that the ALJs erred in concluding that the feasibility of applying SNCR to the alkali bypass is a subject for adjudication. SLC and staff contend that because of the temperatures involved, SNCR cannot be applied to the bypass. In reply, FOH contends that because 30 percent of the air stream from the kiln will be diverted to the alkali bypass and left untreated, the issue should be adjudicated.

On this issue, the ALJs' ruling must be reversed. FOH's position at the issues conference was that no technical analysis had been provided concerning the feasibility of applying SNCR to the alkali bypass. Review of the record, however,

reveals that SLC explained the problem in its application materials (see Air Permit Application, IC Exh 8, at 6-18; Response to Notice of Incomplete Air Permit, IC Exh 64, at 22). FOH made no concrete offer of proof other than vague assertions that raise a question concerning the accuracy of SLC's claim that due to the temperatures involved, SNCR cannot be used to reduce NO_x emissions from the alkali bypass. Thus, even affording substantial deference to the ALJs' issues rulings, FOH failed to carry its burden of raising a substantive and significant issue on this point. Thus, the issue concerning whether SNCR can be applied to the alkali bypass is not adjudicable.

2. VOC LAER Analysis

SLC argues that the ALJs erred in holding that the issue whether the Greenport plant will meet LAER for VOCs is adjudicable. SLC points out that the proposed limit for VOC emissions is lower than any limit in the RACT/BACT/LAER ("RBL") clearinghouse, and lower than the recently promulgated MACT standard for new, greenfield portland cement facilities. SLC contends that Department staff conducted an extensive analysis and that the analysis should be afforded substantial deference. In reply, FOH argues that SLC cannot simply rely on the assertion that its limit is lower than others. Instead, FOH argues that in keeping with the technology-forcing principle behind LAER, SLC must establish the lowest achievable emission rates. FOH

contends that the EPA letter suggests that lower rates are achievable.

a. LAER for VOC

The ALJs correctly applied the substantive and significant test in concluding that the issue of the adequacy of the VOC emission limits is adjudicable. The EPA Letter raises questions concerning the lowest achievable rate, and SLC's arguments to the contrary merely raise weight of evidence questions not properly part of the issues ruling determination.

b. RTO Technology

SLC also argues that the ALJs erred in concluding that the feasibility of incorporating RTO technology is adjudicable. SLC argues that VOC emissions will be low to begin with due to the low organic content of the raw materials, and that FOH's offer of proof was insufficient to raise an issue. The proffered testimony of FOH's chemical engineer, however, is sufficient to raise a substantive and significant issue concerning the use of RTO at the Greenport plant.

SLC argues further that the ALJ's issues ruling in Matter of Keyspan Energy (ALJ's Part 624 Issues Ruling [4-18-01], at 8) supports its argument that FOH failed to carry its burden of raising a substantive and significant issue concerning the use of RTO technology. Keyspan is distinguishable. In Keyspan, no proof was offered to support the claim that the alternative

technology would work. In this case, in contrast, FOH offered substantial proof.

Conclusion

The ALJs' issues ruling is modified to the extent of holding that the issue of SNCR for the alkali bypass is not adjudicable. The ALJs' remaining rulings concerning the adjudicability of SLC's LAER analysis are otherwise affirmed.

Fine Particulate Matter ($PM_{2.5}$)

SLC and Department staff raise several challenges to the ALJs' conclusion that issues concerning the accuracy of SLC's analysis of emissions of particulate matter smaller than 2.5 micrometers in diameter ("$PM_{2.5}$") presented in the DEIS, and the potential public health impacts associated with the projected $PM_{2.5}$ emissions are adjudicable. For the reasons that follow, the ALJs rulings on $PM_{2.5}$ are affirmed.

Background

SLC's air permit application projects potential annual emissions of particulate matter smaller than 10 micrometers in diameter ("PM_{10}") to be 358 tpy (see Air Permit Application [4-27-01], IC Exh 8, at 1-6). SLC proposes to install and operate a bag house, which SLC claims is BACT, to control particulate emissions from the main stack (see id. at 5-9), and the use of a bag house is incorporated into the draft air permit. With this control, SLC projects maximum annual PM_{10} emissions of

210 tpy at the main stack (see id. at 5-10; id., Appdx E-l0, E-20).

1. SLC's $PM_{2.5}$ Assessment

In its DEIS, SLC provided an assessment of $PM_{2.5}$ emissions and their impacts (see DEIS, IC Exh 7, Vol II, at H2-l). The DEIS noted that the EPA issued $PM_{2.5}$ NAAQS in 1997 -- a long-term annual standard of 15 micrograms per cubic meter ("$\mu g/m^3$") and a 24-hour standard of 65 $\mu g/m^3$. The DEIS also noted that those standards had been vacated by the U.S. Court of Appeals for the District of Columbia Circuit and, thus, were not in effect at the time the DEIS was prepared (see id. at H2-4).[2] The DEIS also noted that an EPA guidance memorandum provided that, until a comprehensive $PM_{2.5}$ modeling system was approved, PM_{10} analysis should be used as a surrogate for $PM_{2.5}$ analysis in meeting Clean Air Act requirements (see id. at H2-3). The DEIS went on to explain the technical and scientific uncertainty associated with EPA's proposed standard (see id. at H2-4 to H2-5).

Notwithstanding the technical and scientific difficulties identified, SLC made a "rough estimate" of the Greenport plant's contribution to ambient $PM_{2.5}$ levels, both in

[2] By the time of the issues conference, the Circuit Court's decision had been reversed by the United States Supreme Court and, therefore the NAAQS were back, and presently remain, in effect (see Whitman v American Trucking Assns., Inc., 531 US 457 [2001]).

terms of primary $PM_{2.5}$ emissions and the formation of secondary $PM_{2.5}$ from emissions of NO_x and sulfur dioxide ("SO_2"), using the following methodology. First, SLC estimated the potential increase in annual average primary $PM_{2.5}$ concentrations due to the Greenport project in the area surrounding the facility. To do so, SLC determined the proportion of $PM_{2.5}$ to PM_{10} from each particulate emission source in the facility, using a variety of published sources and assumptions. SLC concluded that, in general, $PM_{2.5}$ emissions were 30 to 60 percent of the total PM_{10} emissions (see id. at H2-6).

Next, increases in annual average ambient air concentrations near the project were calculated using the ratios discussed above and a dispersion air modeling analysis similar to that used for PM_{10} in the DEIS, including use of the same 5 years of Albany Airport National Weather Service ("NWS") station meteorological data. Based upon that modeling, SLC estimated that due to the project, a rectangular area extending 1.75 miles north and 4,000 feet east of the site would experience an increase in primary $PM_{2.5}$ of between 0.5 $\mu g/m^3$ and 2.5 $\mu g/m^3$ (see id. at H2-7; id. Fig H-1).

SLC then estimated the background $PM_{2.5}$ concentrations at the site. No $PM_{2.5}$ monitoring data was available for the area immediately adjacent to the project site. Accordingly, data from the nearest DEC $PM_{2.5}$ monitor in Albany was used to calculate the

ratio of background $PM_{2.5}$ to PM_{10}. SLC concluded that the ratio of $PM_{2.5}$ to PM_{10} was in the range of 40 to 60 percent. That ratio was then applied to background PM_{10} data from the town of Cementon (18 $\mu g/m^3$ PM_{10}), near SLC's Catskill plant (apparently, no $PM_{2.5}$ data was available from Cementon). Accordingly, SLC estimated that background $PM_{2.5}$ concentrations would range from 7 to 11 $\mu g/m^3$ in the area near the Greenport site.

SLC then calculated the total annual average concentration of primary $PM_{2.5}$ with the Greenport project by adding the projected increases attributable to the plant to the estimated background $PM_{2.5}$ concentrations. SLC concluded that the projected total average concentration of $PM_{2.5}$ with Greenport (11 $\mu g/m^3$ [maximum background] + 2.5 $\mu g/m^3$ [maximum increase from Greenport] = 13.5 $\mu g/m^3$) was expected to be below the NAAQS (15 $\mu g/m^3$), even assuming no reduction in the formation of secondary particulates (see id.).

Using the same methodology, SLC also estimated the increase in 24-hour $PM_{2.5}$ concentrations. SLC determined that the increase in 24-hour $PM_{2.5}$ concentration due to the project could be as high as 11 $\mu g/m^3$ in areas closest to the plant, and 1 $\mu g/m^3$ in areas as far away as the towns of Hudson and Athens (see id. at H2-8; id., Figs H-2, H-3). The maximum 24-hour average background concentration was estimated at approximately 22 to 34 $\mu g/m^3$. SLC concluded that the maximum predicted 24-hour $PM_{2.5}$

concentrations with the Greenport plant (11 µg/m^3 + 34 µg/m^3 = 45 µg/m^3) would not exceed the NAAQS (65 µg/m^3), again, even assuming no reduction in the formation of secondary particulates (see id.).

Next, SLC assessed, on a regional basis, the formation of secondary $PM_{2.5}$ particulates from SO_2 and NO_x emissions. SLC determined that the operation of the new facility under typical operating conditions would result in a reduction in SO_2 and NO_x emissions of approximately 2,700 and 1,200 tpy, respectively (see id. at H2-9). SLC claimed the reduction based upon its planned shutdown of its Catskill plant. The reduction in the formation of secondary $PM_{2.5}$ associated with the projected reduction in SO_2 and NO_x, SLC concluded, might offset the projected increase in primary PM_{10} emissions. Nevertheless, SLC indicated that "it is still possible that small increases in particulate concentrations could result in those areas very close to the Greenport plant" (id. at H2-10).

In conclusion, SLC stated that "[t]he SLC Greenport Project would result in some small increases in ambient particulate concentrations in the vicinity of the Greenport facility. However, due to the use of the pollution controls discussed above, the project would result in an overall decrease in the pollutant emissions that produce secondary particulate matter throughout the region. Therefore, it is expected that the

proposed project would contribute to a reduction in airborne particulate matter, especially $PM_{2.5}$ and its associated public health risk in the region" (id. at H2-l0 to H2-ll). No further assessment of the health risks associated with the projected $PM_{2.5}$ emissions, or evaluation of alternatives or mitigation measures, were offered.

2. Intervenors' Offers of Proof

In its petition for full party status, FOH criticized SLC's focus on compliance with NAAQS and argued, instead, that the State Environmental Quality Review Act (Environmental Conservation Law ["ECL"] article 8 ["SEQRA"]) mandates consideration of the potential adverse environmental impacts associated with the project, and requires mitigation, avoidance or minimization of those impacts to the maximum extent practicable (see FOH Petition [7-11-01], IC Exh 39, at 38). FOH argued that SLC's DEIS failed to discuss in any meaningful way the potential impact on public health; that the analysis of background concentrations of $PM_{2.5}$ ignored the impact of all other local sources of $PM_{2.5}$, including emissions from the Athens Generating Plant; that SLC's reliance on the regional offset of secondary $PM_{2.5}$ reductions ignored local impacts near the Greenport facility; that SLC's own data showed a substantial increase in particulate matter in residential areas near the

facility; and that the air modeling was flawed due to its reliance on Albany NWS data.[3] FOH offered the testimony of its air expert, Dr. Miller, who would testify to the foregoing and explain how the SLC air data showed a significant increase in direct deposits of $PM_{2.5}$ in surrounding areas of Hudson and Greenport.

HVPC, in addition to the points raised by FOH, offered the testimony of health experts challenging SLC's claims concerning the toxicology of $PM_{2.5}$ in concentration below the NAAQS and the impact of those concentrations on public health (see HVPC Petition [7- 11-01], IC Exh 40, at 21).

At the issues conference, SLC argued, in addition to the points made in its analysis in the DEIS, that $PM_{2.5}$ has both a toxic and non-toxic component, and that the toxic component will be reduced by the closure of the Catskill plant (see IC Trans, Vol III [7-20-01], at 591-592). SLC's experts indicated that traffic-related urban particulates are more toxic and, therefore, are of greater concern, than particulates emitted from kilns (see id. at 661-665). SLC also contended that, based upon National Oceanic and Atmospheric Administration air mass trajectory data, it could be concluded that the sensitive receptors in Hudson, a

[3] This last argument was rejected in the First Interim Decision (see First Interim Decision, at 6-10).

school and a hospital, will be upwind of the Greenport plant (see id. at 593).

In response, HVPC's expert, George D. Thurston, Sc.D., disagreed with SLC's assertion that $PM_{2.5}$ has a non-toxic component, and that impacts in the vicinity of the new facility can be reduced by closing the Catskill facility (see id. at 607-610). He noted that the smaller $PM_{2.5}$ particulates are the most toxic and the ones that emission controls are least effective in reducing (see id. at 611-612). He also testified that studies conducted after the NAAQS were adopted show health impacts at exposure levels below the NAAQS (see id. at 612-615).

The Town of Greenport and City of Hudson argued that Hudson is more urbanized than Cementon and, therefore, the Cementon data does not accurately reflect the ambient conditions in Hudson (see id. at 626-628). The Village of Athens also argued that SLC underestimated the background $PM_{2.5}$ level by failing to take into account emissions from the Athens Generating Plant, the Wormuth Foundry, the Iroquois Pipeline compressor station, and the Peckham asphalt station (see id. at 635-636).

FOH essentially reiterated the points made in its petition for party status and elaborated upon its claim that SLC's own data demonstrates significant increases in $PM_{2.5}$ concentrations at sensitive local receptors (see id. at 641-644).

Department staff's air expert, Leon Sedefian, raised concerns about both intervenors' and SLC's analysis (see id. at 649). He disagreed with SLC that Hudson is upwind of the Greenport facility, but also disputed intervenors' claim that the significant impacts would be at sensitive receptors in Hudson (see id. at 649-650). In addition, he questioned the use of Cementon PM_{10} data for purposes of analyzing $PM_{2.5}$ (see id. at 651).

3. ALJs' Issues Ruling

In their issues ruling, the ALJs held that, based upon the dispute among the experts, the question whether SLC relied on suitable data in making its assessments regarding $PM_{2.5}$ is a subject for adjudication (see ALJs' Issues Ruling, at 49). The ALJs held that, although no regulations governing $PM_{2.5}$ were in effect, given the admitted public health impacts associated with $PM_{2.5}$, an analysis of those impacts was required pursuant to SEQRA (see id. at 49). The ALJs specifically held that questions were raised concerning (1) SLC's air modeling, which relied on Albany NWS data (see id. at 52); (2) the failure to consider local emission sources such as Athens Generating and the use of Cementon data to establish ambient levels in Greenport; and (3) SLC's conclusion concerning the direction the plume from the stack will drift (see id. at 52). The ALJs also concluded that

further analysis of health impacts at concentration levels below the NAAQS was required (see id. at 52-53). The ruling stated that the health impact analysis "would be based upon an examination of the increases SLC admits will occur, and the potentially greater increases if the met[eorological] data indicates that there has been an underestimate of particulate emissions" (see id. at 53).

The ALJs noted, however, that intervenors will have the burden of demonstrating that the analysis performed by SLC underestimated the amount of $PM_{2.5}$ that will be emitted into the atmosphere, and that those emissions will likely affect public health (see id. at 53). They also noted that the record that will be developed will form the basis of the Commissioner's decision whether significant adverse local impacts will occur that will require more stringent $PM_{2.5}$ limits and, therefore, either modification of the draft permit or the denial of a permit (see id.). The ALJs rejected SLC's argument that $PM_{2.5}$ impacts are not a proper subject of SEQRA review (see id. at 53-54).

On their appeals, both SLC and Department staff challenge the ALJs' determination that SLC's $PM_{2.5}$ analysis is adjudicable.[4]

---

[4] On their appeals, several intervenors dispute the ALJs' determination that they carry a burden of proof at the hearing stage of the proceedings. That ruling is examined later in this decision (see infra at 124).

Discussion

SLC argues that $PM_{2.5}$ is not adjudicable, as a matter of law, in the present proceedings. In support of this argument, SLC relies on Matter of American Marine Rail, LLC (Commissioner's Interim Decision, Feb. 14, 2001 [hereinafter "AMR"]), in which the Commissioner held that under the facts in that case, and due to the state of $PM_{2.5}$ research, data collection, and modeling at the time, the analysis of potential $PM_{2.5}$ impacts from the project need not be included in the environmental impact statement ("EIS") (see id. at 9). SLC also relies on decisions in more recent Public Service Law article X proceedings that concluded that $PM_{2.5}$ was not adjudicable.

SLC's arguments are unpersuasive. After the Commissioner's decision in AMR, the Appellate Division, Second Department, in Matter of UPROSE v Power Auth. of State of N.Y. (285 AD2d 603 [2001]), held that the Power Authority failed to comply with SEQRA when it issued a negative declaration on the basis, among others, that the individual and cumulative impacts of $PM_{2.5}$ emissions from the proposed facility would be insignificant. The Power Authority based this determination on the assumption that all PM_{10} emissions from the proposed facility were $PM_{2.5}$. The court held that "[i]n light of the undisputed potential adverse health effects that can result from $PM_{2.5}$ emissions, we conclude that [the Power Authority] failed to take

the requisite 'hard look' at this area of environmental concern" (id. at 608). The court further held that the analysis employed by the Power Authority was not an adequate substitute for addressing the health impacts of $PM_{2.5}$ emissions (see id.). Accordingly, the court concluded that the Power Authority should have issued a positive declaration and prepared an EIS (see id.).

Similarly, in Matter of Spitzer v Farrell (294 AD2d 257 [2002], revd on other grounds 100 NY2d 186 [2003]), the Appellate Division, First Department, held that the lack of legally enforceable $PM_{2.5}$ NAAQS under the Clean Air Act did not relieve the New York City Department of Sanitation ("DOS") of its obligation to consider potential $PM_{2.5}$ impacts under SEQRA (see id. at 288-289). Accordingly, the court annulled the DOS's negative declaration, which was based in part upon the conclusion that the proposed action would not result in the violation of Clean Air Act standards for PM_{10}.

The Court of Appeals subsequently reversed the Appellate Division and dismissed the New York Civil Practice Law and Rules ("CPLR") article 78 petition (see 100 NY2d, at 191). In doing so, however, the Court did not disagree with the general proposition that potential $PM_{2.5}$ impacts are a relevant area of environmental concern under SEQRA. Rather, the Court held that DOS, which was not an expert on air quality, acted rationally in relying on EPA's determination that PM_{10} NAAQS could be used as a

surrogate to study $PM_{2.5}$ until new protocols could be calculated and implemented which, at the time of the negative declaration, EPA had not yet completed. Accordingly, the Court concluded that DOS took the requisite hard look under SEQRA. Nothing in the Court's decision, or in the decision of any other court, suggests that $PM_{2.5}$ impacts may not be reviewed as a matter of law under SEQRA.

Contrary to SLC's argument, Commissioner's decisions since UPROSE also do not support the proposition that $PM_{2.5}$ is not adjudicable as a matter of law in these proceedings. The cases cited are distinguishable because in each instance, the intervenors simply failed to tender an offer of proof sufficient to raise an adjudicable issue (see, e.g., Matter of New York Power Auth. [Charles Poletti Power Project], Commissioner's Interim Decision, Nov. 26, 2001, at 8), or failed to controvert facts found in the recommended decision (see Matter of Consolidated Edison Co., Commissioner Decision, August 16, 2001, at 5). In neither case did the Commissioner rule that $PM_{2.5}$ impacts are not adjudicable as a matter of law.

Accordingly, not only is $PM_{2.5}$ a proper subject of SEQRA review, an agency's mandate to take a "hard look" at relevant areas of environmental concern requires such an analysis. Thus, the ALJs correctly rejected SLC's argument that $PM_{2.5}$ impacts are

not adjudicable in permit hearing proceedings conducted pursuant to 6 NYCRR part 624.

SLC further argues that, even assuming $PM_{2.5}$ is adjudicable, the standards governing the analysis are the $PM_{2.5}$ NAAQS, and SEQRA cannot serve as a basis for imposing a stricter standard. SLC contends that intervenors are inappropriately seeking to use the SEQRA process to challenge EPA's standards. SLC argues that the proper forum for challenging the NAAQS is through EPA's and DEC's regulatory framework, not through adjudication. Department staff essentially adopts this point, adding that a hard look was already taken, and no further refinement of the analysis in the DEIS would aid in decision making. FOH responds that it does not advocate using SEQRA to impose more stringent NAAQS for $PM_{2.5}$, but contends that questions about $PM_{2.5}$ relating to measurements of ambient levels and assessment of impacts can be resolved under SEQRA in an adjudicatory hearing.

Intervenors do not challenge the validity of the $PM_{2.5}$ NAAQS themselves. Rather, intervenors identified specific concerns with SLC's methodology and analysis, and made sufficient offers of proof concerning health effects that directly challenge SLC's conclusion of no significant impacts. Thus, intervenors made a sufficiently project-specific offer of proof.

Moreover, to the extent it is established that SLC underestimated impacts from $PM_{2.5}$ and that such impacts will have an adverse impact on public health, in order to approve this project, SEQRA would require the Department to make a finding that, to the maximum extent practicable, those adverse environmental impacts have been minimized or avoided (see ECL 8-0109[8]). Although the minimization and avoidance of adverse environmental impacts associated with the Greenport project as a whole were considered, nothing in the record indicates that minimization and avoidance of the adverse impacts of $PM_{2.5}$ were specifically considered. The DEIS concluded that Greenport's $PM_{2.5}$ impacts were either negligible, or would result in an overall decrease in ambient $PM_{2.5}$ levels. No consideration was given to the effectiveness of PM_{10} emission control technologies for reducing $PM_{2.5}$ emissions or how such emissions might otherwise be minimized or avoided. Thus, contrary to Staff's position, adjudication of the issue could lead to further refinement of the DEIS analysis and may result in modification of the SEQRA determination or imposition of permit conditions.

Finally, both SLC and Department staff challenge the ALJs' rulings that specific factual issues concerning SLC's $PM_{2.5}$ analysis are substantive and significant and, therefore, subject to adjudication in these proceeding. Specifically, SLC contends that intervenors' offers of proof were insufficient because those

offers were only applicable to combustion sources in general, and not specific to the Greenport site or cement manufacturing. To the contrary, intervenors made site-specific offers of proof concerning background, ambient $PM_{2.5}$ conditions, and local impacts associated with the Greenport project. Moreover, intervenors effectively challenged SLC's contentions concerning toxic versus non-toxic $PM_{2.5}$ emissions.

As previously noted, SLC's failure to use on-site meteorological data has been determined not to be adjudicable (see First Interim Decision, at 6-10). Thus, to the extent intervenors challenge SLC's $PM_{2.5}$ analysis on the ground that it failed to use local versus Albany NWS data, that challenge is not adjudicable in the $PM_{2.5}$ context. However, the remaining issues concerning $PM_{2.5}$ impacts identified by the ALJs are adjudicable. Accordingly, the ALJs' issues rulings on $PM_{2.5}$ are modified to the extent indicated, and, as so modified, affirmed.

Part 231 Alternatives Analysis

In the issues ruling, the ALJs held that with respect to SLC's compliance with 6 NYCRR part 231 (New Source Review in Nonattainment Areas and Ozone Transport Regions) ("Part 231") and New Source Review under the Clean Air Act § 173, issues for adjudication existed with respect to specific technology alternatives for the control of NO_x emissions, and the use of a regenerative thermal oxidizer ("RTO") to control VOC and carbon

monoxide ("CO") emissions. They held, however, that the choice of coal instead of natural gas as fuel for SLC's facility was not an adjudicable issue with respect to SLC's NO_x LAER analysis (see ALJs' Issues Ruling, at 22-24).

With respect to SLC's compliance with the Part 231 alternative analysis requirement generally, the ALJs held that "without passing on whether the alternatives analysis is sufficient for SEQRA purposes, we find that with respect to Part 231 requirements, except for specific rulings relating to NO_x and the RTO, there are not sufficient grounds to find that this is a matter for adjudication" (id. at 33). Noting that portions of SLC's alternatives analysis is presented in the DEIS, the ALJs rejected FOH's argument that the analysis was insufficient because it was not contained in the air permit application. They also rejected FOH's argument that the analysis was conclusory and lacked sufficient information to permit an adequate comparison of alternatives. The ALJs held "[i]t appears that SLC has met the applicable regulatory requirement that an analysis be performed as there are no 'express requirements concerning the particular contents of the . . . analysis'" (id. [quoting In re Campo Landfill Project, NSR Appeals No. 95-1, USEPA Envtl Appeals Bd (June 19, 1996) (1996 WL 344522)]).

In its appeal, FOH raises three objections to the ALJs' rulings concerning SLC's Part 231 alternatives analysis. First,

FOH objects to the imposition of any "heavy burden" beyond that of establishing a "substantial and significant" issue. This issue was recently addressed in Matter of TransGas Energy Systems, LLC (Interim Decision of the Commissioner, March 12, 2004). In that case, it was clarified that at the issues conference stage, intervenors are under no heavier burden when challenging a Part 231 analysis than that imposed by the "substantive and significant" test (see id. at 16-18). Moreover, the ALJs in this case did not impose a burden beyond the substantive and significant requirement in resolving the issue.

Second, FOH argues that SEQRA standards can be applied in deciding whether SLC's Part 231 alternatives analysis is adequate. FOH contends that under SEQRA, the degree of detail required for consideration of each alternative varies and depends upon the circumstances and nature of the particular project. For very large projects, FOH asserts that a full EIS discussion of each alternative with fully detailed modeling is necessary for a comparative assessment (see FOH Appeal, at 10 [citing Gerrard, Ruzow, and Weinberg, Environmental Impact Review in New York § 5.14(3)]). FOH concludes that "[t]here is no legal or policy reason why consideration of alternatives under Part 231 should be any less than under SEQRA. Both require the 'hard look' at alternatives before a final decision is made" (id. at 11).

It has already been determined that an alternatives analysis under Part 231 is not as broad in scope as a complete SEQRA analysis. As noted in both TransGas and in Matter of Keyspan Energy Develop. Corp. (Commissioner Decision, Feb. 25, 2003), an evaluation of the adequacy of a Part 231 alternatives analysis must recognize its relation to the nonattainment new source review program and its goal of furthering attainment of NAAQS (see TransGas, at 23). As stated in TransGas:

> "[T]he purpose of the Part 231 alternatives analysis is to aid in determining whether the application as proposed furthers the goal of minimizing emissions of any nonattainment contaminants or whether available alternatives exist that better serve that goal"

(id. at 24). Accordingly, an evaluation of SLC's analysis of alternative fuels should focus on whether those alternative fuels will further avoid or minimize nonattainment pollutant impacts of the project as proposed (see id. at 24, 27).

Third, FOH argues that SLC failed to adequately assess, under Part 231-2, natural gas as an alternative to coal for fueling the cement plant. FOH offers proof, in the form of expert testimony, that significant amounts of SO_2 and mercury are emitted from coal-burning cement plants and that such emissions would be avoided if natural gas were used as the primary fuel source. FOH also contends that coal handling generates significant quantities of fugitive particulate emissions and

poses a material risk of surface water contamination due to stormwater runoff from coal piles, and argues that these concerns would be eliminated if natural gas were used.

In response, SLC argues that it did evaluate the impacts associated with various alternative fuel choices, and concluded that the use of coal and petroleum coke was environmentally more beneficial than natural gas (see DEIS, IC Exh 6, at 17-35). SLC contends that the major source of sulfur from cement plants is the raw material, and not coal, that SO_2 will be absorbed by the clinker and further reduced by pollution control technologies, and that any reduction in SO_2 emissions occasioned by the use of natural gas would be offset by an increase in NO_x emissions, which is in nonattainment in the area of the project. Similarly, with respect to mercury, SLC contends that most mercury emissions come from raw materials, not coal, that SLC's analysis of the mercury impacts of coal burning showed only a slight increase in mercury emissions over natural gas (see Air Permit Application, IC Exh 8, at E-31), and that use of stringent control technologies and kiln design features will remove 90 percent of the mercury. Finally, with respect to particulate matter, SLC maintains that use of natural gas will increase particulate matter because natural gas would require more raw materials, which is the source of particulate matter.

Department staff states that it reviewed the analysis in the DEIS examining the use of natural gas as an alternative to coal, as well as the technical documents, and concluded that SLC's choice of coal was appropriate. Staff based its conclusion on the circumstance that use of natural gas would increase NO_x emissions in a nonattainment area. Staff's analysis also revealed that use of coal would not significantly increase metal emissions. In staff's view, the gains in SO_2 and particulate matter emission levels, pollutants which are in attainment in the project area, occasioned by use of natural gas did not outweigh the increase in NO_x emissions.

FOH's argument fails to suggest that further inquiry is reasonably required and, thus, FOH fails to raise a substantive issue (see 6 NYCRR 624.4[c][2]). As the ALJs noted in their decision on whether use of natural gas as an alternative to coal was an adjudicable issue with respect to SLC's NO_x LAER analysis (see Issues Ruling, at 23), FOH's expert ultimately agreed at the issues conference that use of natural gas may be a "wash" in terms of NO_x emissions (see Issues Conference Transcript, at 229-231). Thus, FOH fails to raise a substantial fact issue concerning whether use of natural gas would result in a reduction in NO_x emissions. Moreover, FOH offered nothing to rebut SLC's contention that mercury emissions are not significantly impacted by the use of coal. Because the goal of the Part 231

alternatives analysis is to identify alternatives that better serve the goal of reaching attainment for nonattainment pollutants, FOH's offer of proof concerning NO_x emissions fails to raise an adjudicable issue concerning the adequacy of SLC's Part 231 analysis. Accordingly, the ALJs' determination that issues concerning SLC's Part 231 alternatives analysis are not adjudicable is affirmed.

PSD Limits for PM_{10} and CO

In its appeal, FOH argues that adjudicable issues exist concerning the draft permit limits for PM_{10} and CO. Specifically, FOH contends that SLC failed to properly apply the BACT standard with respect to these pollutants and, as a result, the permit limits for these two pollutants may not be adequate. FOH recognizes that because the area in which the project is located is in attainment for PM_{10} and CO, those pollutants are regulated under the federal Prevention of Significant Deterioration ("PSD") program. However, FOH argues that notwithstanding recent Commissioner decisions to the contrary, the PSD issues raised here are and should be subject to Part 624 proceedings.

Similarly, in its appeal, the Massachusetts Department of Environmental Protection ("MDEP") challenges SLC's failure to use a "top-down" BACT analysis for particulate matter. MDEP essentially raises the same argument as FOH, and takes issue with

the ALJs' determination that issues concerning federal PSD permit limits are not adjudicable in Part 624 permit hearing proceedings.

To the extent FOH and MDEP seek a re-examination of Department policy concerning whether federal PSD permit limit issues are subject to Part 624 permit hearing proceedings, the Commissioner has consistently held that federal PSD issues are not adjudicable in such proceedings (see Matter of New York Power Auth. [Charles Poletti Power Project], Interim Decision, Nov. 26, 2001, at 6 n 5; Matter of Mirant Bowline, LLC, Interim Decision, June 20, 2001, at 6; Matter of Ramapo Energy L.P., Commissioner Ruling, April 4, 2001, at 6-7). Intervenors offer no compelling reason to revisit the issue.

FOH argues that, while PSD permit provisions are not adjudicable in a state air permit proceeding process, state permit provisions remain adjudicable, regardless of the existence of a similar provision in a PSD permit (see Poletti, at 5 n 5; Bowline, at 6). Accordingly, FOH argues that the acceptability of the PM_{10} and CO emission limits in the state permit may be challenged in Part 624 proceedings. To the extent FOH's challenge to the PM_{10} and CO limits is premised upon alleged inadequacies in SLC's BACT analyses, however, the issue is not adjudicable. FOH points to no independent state statutory or regulatory provision that uses a BACT analysis to establish state

emission levels for PM_{10} and CO. Moreover, although FOH cites the CO emission limits in 6 NYCRR part 257-4, it does not raise any argument concerning SLC's ability to meet those limits.

Poletti and Bowline are distinguishable. In those cases, the intervenors argued that different PM_{10} emission rates were being established in state permits for power plant projects that all used identical electric generation equipment (General Electric 7-FA combustion turbine generators) and natural gas as a primary fuel. The Commissioner concluded that, as a matter of state policy, it was appropriate to consider the consistency of emission limits being imposed in permits for comparable facilities using the same equipment and fuel. In this case, in contrast, FOH makes no such inconsistency claim. FOH's challenge is, in essence, a challenge to SLC's federal BACT analysis and, thus, fails to raise an issue adjudicable in these Part 624 proceedings. Accordingly, the ALJs' ruling that the issues raised by intervenors concerning SLC's BACT analysis for PM_{10} and CO are not adjudicable is affirmed (see Issues Ruling, at 32, 34 [BACT analysis for CO];[5] id. at 36 [BACT analysis for PM]).

[5] The ALJs noted that the draft permit lacked CO emission limits, and that a dispute might exist between staff and SLC concerning short-term CO emission limits (see Issues Ruling, at 32, 34). The ALJs also held that if staff and SLC were unable to agree, the issue would automatically be subject to adjudication (see id. at 34). As the ALJs noted, the CO emission limits in the permit implicate state regulations -- 6 NYCRR subpart 257-4. No party raised a challenge to this determination on appeal. Thus, this portion of the ALJs' ruling remains undisturbed.

PM_{10} Air Modeling

In its supplemental appeal, FOH argues that SLC's PM_{10} modeling analysis should nevertheless be subject to adjudication. FOH points out that PM_{10} is regulated pursuant to State regulations under 6 NYCRR parts 201, 220 and 257-3. It also contends that because PM_{10} is presently used as a "surrogate" for $PM_{2.5}$, the accuracy of SLC's PM_{10} modeling is relevant to the adequacy of SLC's $PM_{2.5}$ analysis under SEQRA.

At the issues conference, as in its present supplemental appeal, FOH took the position that SLC's PM_{10} modeling used an artificially low emission factor from the sources of PM_{10}. Specifically, FOH argues that based upon SLC's own analysis of the potential emissions from the bag houses treating the entire exhaust from the main stack (see Air Permit Application, IC Exh 8, Appdx E, at E-20 [calculating total PM_{10} emission to be 208 tpy]), the potential to emit ("PTE") for PM_{10} is actually 22 percent higher than the PTE used in the screening modeling used for establishing the permit limits for PM_{10} (see id., Appdx C, at C-11 [Table C-7, showing worst case PM_{10} PTE to be 4.89 grams per second ("gps") which, assuming the plant is operating at 8,760 hours per year, results in emissions of 170 tpy]). Moreover, FOH contends that the PTE is 35 percent higher than the emission rate used in the refined modeling (see id. at

C-16 [Table C-10, showing worst case PM_{10} PTE of 4.42 gps, or 153.6 tpy]).

At the issues conference, SLC argued that the modeling reflected in Table C-7 took into account the worst case operational scenario and, thus, reflected the PTE for PM_{10}. SLC maintained that the issue was resolved because SLC stipulated to short-term limits for PM_{10} that comported with the worst case scenario modeling reflected in Table C-7, and to an annual PM_{10} emission limit of 170 tpy. Staff accepted the stipulations, but indicated that it needed to conduct a review to determine whether the worst case modeling supported the stipulated PM_{10} emission rate.

In their issues ruling, the ALJs held that:

> "This is not an issue for adjudication at this time. However, FOH has pointed out that the calculation of PM_{10} emission rates is unclear. Accordingly, we are directing staff to complete its review of the information presented by the applicant on this matter and provide its conclusions within sixty days to the ALJ and the other parties"

(Issues Ruling, at 27).

The ALJs acknowledged that particulate matter is regulated under Parts 201, 220 and 257-3, and, accordingly, the Department has a basis independent of the federal PSD program to examine the issue. The ALJs continued:

> "A review of the issues conference transcript regarding this proposed issue will reveal that staff itself considers this matter open.

> Mr. Sedefian stated thrice that the staff would have to look into whether the modeling supports the emissions rate that was ultimately derived. . . . Based upon errors that SLC made in its initial documentation . . . , the newly produced emissions rates in the stipulation and the staff's statements during the issues conference, it is apparent that further review by staff is needed, and the basis for the numbers derived for the project's particulate emissions must be clarified. While the applicant has stated its commitment to meeting the stipulated figures, without this clarification it is not certain that they are attainable"

(id. at 28 [citations to transcript omitted]).

In its supplemental appeal, FOH argues that SLC's PM_{10} modeling should be subject to adjudication. FOH contends that competent expert proof established that SLC's emission factors were artificially low. FOH notes that Department staff had not reviewed the data and, consequently, the issue is adjudicable.

Staff contends that its March 21, 2002 submission, filed pursuant to the ALJs' issues ruling directive, resolved the issue (see Exh 23C). In that submission, staff confirmed that use of the worst case scenario in Table C-7 results in an annual emission rate of 170 tpy PM_{10}. Accordingly, staff contends that no issue exists concerning the accuracy of SLC's modeling inputs. Staff also notes that PM_{10} modeling is relevant only to the federal PSD program, not to Parts 201, 220 or 257, and that the State regulations do not depend on modeling to set emission limits.

SLC agrees with staff that the State regulations are not air modeling dependent. Moreover, SLC contends that the worst case PTE was the basis for the modeling reported in Table C-7 and, therefore, the proper basis for the stipulated emission limits. Thus, SLC argues that no issue exists concerning the accuracy of its modeling.

FOH has raised a substantive and significant issue concerning SLC's PM_{10} modeling. At the very least, because PM_{10} is presently used as a surrogate for $PM_{2.5}$ under SEQRA, the accuracy of SLC's modeling is relevant to state regulations that are independent of the federal PSD program. Moreover, because $PM_{2.5}$ impacts are to be adjudicated (see supra at 20-35), questions concerning the accuracy of SLC's PM_{10} modeling are relevant to this proceeding.

Second, FOH raises a question that reasonably requires further inquiry. SLC and staff take the position that Table C-7 reports the worst-case emissions scenario. However, neither SLC nor staff explain the representations made by SLC on page E-20 of its air permit application. As noted by FOH, on page E-20, SLC stated that the bag houses used to control particulate emissions from the main stack will be designed for a maximum PM_{10} emission rate of 208 tpy. If the device used to control particulate matter will be designed to allow for 22 percent more emissions than the stipulated limit, a reasonable question is raised

concerning whether SLC will be able to meet that rate, or whether particulate impacts will actually be greater than those modeled.

Staff suggests that submissions offered after the issues ruling may be used to resolve the issue. Review of such submissions is precluded, however, by my August 5, 2002 ruling in this matter (see also Assistant Commissioner Di Stefano's August 9, 2002 memorandum to the parties). In that ruling, the parties were notified that supplemental information filed pursuant to the ALJs' direction in their issues ruling would not be reviewed to determine whether adjudicable issues exist. Rather, such determinations are to be based upon the record as it existed at the time of the ALJs' December 7, 2001 ruling. Thus, staff's March 2002 submission is not properly before me on this appeal.

In any event, staff's submission does not answer the question concerning the design of the bag house technology. It simply confirms that, assuming Table C-7 was correctly modeled, the resulting emission limit of 170 tpy PM_{10} is appropriate. Thus, an adjudicable issue is presented concerning the accuracy of SLC's PM_{10} modeling.

SO_2 Limits as State Law Issue

In its petition for party status, MDEP, in addition to its challenge to SLC's BACT analysis for particulate matter: (1) took issue with SLC's failure to use a "top-down" BACT analysis for SO_2 emissions; (2) suggested that SLC's SO_2 scrubber be

designed to meet a more stringent removal efficiency of 95 to 98 percent and, therefore, that the emission rate for SO_2 be calculated using the more stringent removal efficiency; (3) urged that a condition be included in the air permit specifying a short-term SO_2 emission limit or a condition that requires that pollution control equipment operate whenever the plant is operating, and (4) urged that the Department ensure that the lowest emission levels achievable, consistent with BACT and LAER, are imposed in order to minimize PSD increment consumption (see MDEP Petition for Party Status).

In the issues ruling, the ALJs rejected MDEP's challenge to SLC's BACT analysis for SO_2 emissions on the ground that it raised a non-adjudicable federal PSD issue (see Issues Ruling, at 36, 38). However, the ALJs did adopt MDEP's recommendation that use of a visolite monitoring system be made a part of the permit (see id.). With respect to more stringent limits for SO_2 emissions, the ALJs held that the issue was resolved by SLC's agreement to include SO_2 limits in the permit and to operate the scrubber whenever the kiln was working (see id. at 38). The ALJs held further that MDEP's general expression of concerns regarding the application of BACT and LAER did not meet the standards for adjudication and should be addressed in the responsiveness summary that becomes part of the final EIS ("FEIS") (see id. at 37).

In its appeal, MDEP argues that SLC's stipulated limits do not represent BACT for SO_2. MDEP contends that scrubbers with higher designed efficiencies are being used by at least 30 new coal-fired power plants in the United States, including one plant in New York. However, as noted above with respect to PSD permit limits for PM_{10}, because SO_2 BACT, like PM_{10} BACT, is a federal PSD issue, the ALJs' ruling that the issue is not adjudicable in these Part 624 proceedings is affirmed.

MDEP cites Matter of Mirant Bowline, LLC (Interim Decision, June 20, 2001) in support of its argument that because at least one major coal-fired "facility" operating in New York has a designed SO_2 removal efficiency of between 95 and 98 percent, and SLC's proposed SO_2 removal efficiency is 85 percent, a question of State law is raised independent of the federal PSD program. The "facility" MDEP refers to, however, is an electric power plant -- AES Cayuga LLC -- not a cement plant. MDEP does not offer proof that another cement plant using the same raw materials, fuel, and pollution control technologies has a higher designed SO_2 removal efficiency that SLC's project. MDEP's citation to Bowline is unavailing.

Finally, MDEP requests that it be notified when the Department reissues a draft air permit and any related status reports. MDEP wishes to reserve its rights to submit additional public comments on any re-issued draft permit, and to appeal the

permit to EPA's Environmental Appeals Board. MDEP's request is granted, and Department staff is directed to notify MDEP when the draft PSD permit is re-issued.

Lack of SO_2 Analysis for Coal

FOH raised a concern at the issues conference regarding the lack of proper analysis of coal composition and SLC's ability to meet, as required by 6 NYCRR 220.6, Part 225 limitations on the emission of sulfur compounds derived from fuels. The ALJs recognized this deficiency but, rather than certifying the issue for adjudication, directed SLC and staff to provide clarification on this point, and to include in those submissions information on how SLC intends to comply with the requirements of Parts 220 and 225 with respect to fuel sulfur limits and how such limits are provided for in the draft permit (see ALJs' Issues Ruling, at 39).

In their supplemental appeal, FOH contends that the ALJs should have found the issue adjudicable. In response, staff argues that, at the issues conference, SLC stipulated to, and the draft permit will incorporate, SO_2 emission limits of 850 tpy of SO_2 on a 12 month rolling total, and 225.5 pounds per hour on a 3 hour rolling average. Staff indicates that the revised draft permit will also require that the sulfur dioxide emissions shall be monitored by the use of a continuous emission monitoring system ("CEM"). Staff concludes that because the stipulated to

emission limits are well below the sulfur limitations allowed by Parts 220 and 225, those Parts will be complied with and, thus, no adjudicable issue is presented. SLC echoes staff's contentions, noting that although staff's March 21, 2002 submissions provided the clarification the ALJs requested, that clarification was based on information available before the issues conference and ruling.

The ALJs correctly ruled that FOH failed to raise an adjudicable issue and no further clarification is necessary. Section 220.6 of 6 NYCRR provides:

> "The owner or operator of a portland cement kiln may purchase and use fuel with a sulfur content exceeding the fuel sulfur limitations required by Part 225 of this Title, provided that the burning of such fuel will not result in emissions of sulfur compounds (expressed as sulfur dioxide) to the outdoor atmosphere at a rate greater than would result through the use of fuels otherwise mandated by Part 225"

(6 NYCRR 220.6[a]). Part 225, in turn, provides:

> "Equivalent emission rate. The commissioner will grant a variance from the sulfur-in-fuel limitations in this Subpart to a source owner who demonstrates, to the commissioner's satisfaction, that the fuel use thus permitted will not result in the emission of sulfur compounds (expressed as sulfur dioxide) to the outdoor atmosphere at a rate greater than would result through the use of fuels otherwise mandated. Equivalency must be calculated on the basis of pounds of sulfur dioxide per million Btu heat input"

(6 NYCRR 225-1.5[b]). Both Parts 220 and 225 contemplate either a limitation on sulfur in fuel or an equivalent emission limit for SO_2.

The pre-issues conference draft permit contains the 850 tpy SO_2 emission limit stipulated to by SLC, and the CEM requirement (see Draft Air and Water Permit, April 27, 2001, IC Exh 12, Condition 58). The draft permit also requires regular monitoring and compliance certification pursuant to 6 NYCRR 225-1.5(b). Given staff's contention that the 850 tpy SO_2 emission limit is below the emission rate that would otherwise be allowed under Part 225, it can be concluded, based upon the issues conference record, that SLC will comply with Parts 220 and 225. Because intervenors otherwise raised no adjudicable issue concerning SLC's ability to meet the SO_2 emissions limitation, a substantive and significant issue is not presented.

Fugitive Dust Management Plan

The draft air permit requires that SLC provide a comprehensive fugitive dust management plan to DEC no less than 60 days before the start of construction, and 60 days prior to the start-up of the facility. At the issues conference, FOH maintained that SLC failed to implement a variety of measures that would address material handling and fugitive dust emissions from its project. In particular, FOH argued that dockside operations will cause particulate emissions due to the material

transfer systems SLC proposes, including a clamshell crane loading system and an open hopper. FOH also stated that no provision was made for a covered and controlled conveyor system for unloading, and no information was provided on low moisture material conditions. In addition, FOH argued that SLC's September 28, 2001 revised fugitive dust management plan (see IC Exh 155) was vague and unenforceable (see Baker Letter [10-16-01], IC Exh 167).

In the issues rulings, the ALJs held that "[w]e find that this matter [of coal, coke and raw material dockside transfer and SLC's fugitive dust control plan] is not suitable for adjudication, but there remains a need for supplementation, particularly with respect to activity at the dock" (ALJs' Issues Ruling, at 46). The ALJs noted that the coal and gypsum that will be received and stored at the dock will release dust if subjected to wind and disturbance.

The ALJs rejected SLC's contention that without the final engineering plans for the project, a more specific fugitive dust management plan is premature. The ALJs held that SLC must provide more detail with respect to controls, particularly at the dock facility, so that it can be determined at this stage that statutory and regulatory standards will be met (see id. at 47).

The ALJs concluded:

> "These straightforward matters should not be subject to a hearing, and SLC does not

> contest that dust and spillage are matters that it intends to address. Nor does SLC appear to dispute many of the abatement measures suggested by FOH [and, at the issues conference, SLC stipulated to many of them]. The argument appears to center around the timing of the submission of additional detail. We find that it should be done during this process, as part of the permit and SEQRA review"

(id. at 47 [footnote omitted]). Accordingly, the ALJs directed that within sixty days of the ruling, SLC must submit a more detailed materials handling and fugitive dust plan that addresses the dock and transfer operations, that staff develop appropriately detailed permit conditions related to the outstanding concerns, and that the second revised plan and revised draft permit be distributed for review and comment to the participants who have been granted party status.

In their supplemental appeal, FOH argues that the ALJs' decision to require supplementation of SLC's fugitive dust plan, rather than identifying the issue for adjudication, was error. FOH contends that the ALJs essentially agreed with its arguments and offers of proof that SLC's September 2001 plan provided only general promises of compliance with the law and lacked specific, enforceable provisions. FOH asserts further that the lack of permit conditions controlling fugitive dust violate SEQRA, the requirements of 6 NYCRR 211.2, 220.4 and Part 212, as well as federal PSD requirements.

In response, Department staff argues that the second revised plan filed March 21, 2002 and the revised draft air permit address the ALJs' concerns. Staff also contends that FOH failed to demonstrate how SLC's plan will fail to meet regulatory requirements. Staff maintains that because no specific regulation requires preparation of a fugitive dust management plan, further supplementation is not warranted.

SLC raises the same argument: that FOH did not identify a statutory or regulatory requirement that a fugitive dust management plan be prepared. SLC contends further that FOH failed to make a fact-specific and site-specific showing that SLC's fugitive dust management plan will not be sufficiently protective. SLC asserts that the plan it submitted provides as much detail as possible at this point, and that a final plan cannot be developed until after the final engineering design for the project is complete. SLC states that FOH's concerns and suggestions will be taken into account during development of the final plan, which will be submitted to staff who, in turn, will ensure that the plan's goals and objectives are achieved.

The ALJs' ruling should be modified to the extent of holding that the issue raised by FOH is adjudicable, and as so modified, affirmed. Review of the September 2001 revised fugitive dust management plan supports the ALJs' conclusion that fugitive dust control measures, particularly at the dock facility

and for transfer of materials from ships or barges to the dock, are addressed only in general terms, and that more detailed measures can be incorporated without awaiting final engineering plans. Given the magnitude of SLC's proposed project, and the dock facility's proximity to multiple uses including recreation, the lack of specific control measures raises a reasonable question concerning whether SEQRA findings can be made and whether the applicable regulatory standards will be met (see, e.g., 6 NYCRR 211.2 [general prohibition on emissions of air contaminants which are injurious to human, plant or animal life or which unreasonably interfere with comfortable enjoyment of life or property]).

Because the standards for adjudication have been met, the matter is certified for hearing, and the development of the fugitive dust management plan and permit conditions will take place in that context.[6] This is not to say that SLC must provide its final plan during hearing and, indeed, SLC contends that it would be impossible to do so without final engineering plans. Nevertheless, the plan must be sufficiently detailed so as to provide reasonable assurances that SEQRA and any other applicable statutory and regulatory standards will be met (see Matter of

[6] Department staff's recommendation that the second revised plan and revised permit conditions submitted after the close of the issues conference record be reviewed is foreclosed by my August 5, 2002 ruling.

Hyland Facility Assocs., Decision of the Commissioner, April 13, 1995, at 5 [applicant provided reasonable assurances and demonstrated that the pollution control devices proposed would meet regulatory standards even though final plan still not complete]).[7]

Adequacy of Revised Draft Air Permit

In its supplemental appeal, FOH contends that the revised draft air permit submitted in March 2002 by Department staff did not contain all of the stipulated information or did not cure the omissions identified by the ALJs. In support of its position, FOH offers draft comments on the March 2002 revised draft air permit. FOH contends that the Commissioner should either hold that the continued deficiencies in the revised draft air permit are adjudicable or, in the alternative, remand the issue to the ALJs for the submission of formal comments and further discussion in an issues conference.

In response, staff suggests that instead of the two options proposed by FOH, the Commissioner may simply determine that the stipulations and supplemental submissions resolved this issue. SLC essentially agrees with staff, arguing that its stipulations should be encouraged and recognized.

---

[7] The lack of a specific regulatory requirement for a fugitive dust management plan does not affect the requirement that SLC provide reasonable assurances that statutory and regulatory standards will be met. SLC may provide such assurances either through development of a plan, or otherwise.

Except for the specific issues reviewed and analyzed in this decision, intervenors raise no specific challenge to the remaining ALJs' rulings holding that the air permit issues presented were resolved either by stipulation or by submission of supplemental information. Thus, intervenors fail to carry their burden. Nevertheless, the ALJs shall have the opportunity to determine whether the revised draft air permit correctly incorporated the stipulations agreed to at the issues conference, and whether the supplemental information submitted is sufficient to address the ALJs' concerns. Accordingly, the parties are directed to resolve their differences concerning incorporation of the stipulations and supplemental information into the draft air permits. Failing that, the parties are authorized to submit their comments on the revised draft air permits and supplemental information to the ALJs. The ALJs may then review that material and take whatever action they deem appropriate, including identifying in their hearing report any matters relating to the revised draft air permits and supplemental material that remain unresolved at the conclusion of the adjudicatory hearing.

Part 608 Permit Issues

On appeal, SLC and Department staff challenge the ALJs' ruling that issues concerning SLC's riverine habitat management plan submitted in support of application for an ECL article 15

dredge and fill permit are adjudicable. For the reasons that follow, the ALJs' ruling is affirmed.

Background

The proposed Greenport facility includes a dock located between the Hudson River and the CSX rail right-of-way in the City of Hudson. The 14-acre dock area is presently owned by SLC and active.

The waterfront area along the north-eastern portion of the dock area contains a bulkhead and an old stock house that is currently used to store salt. The upland is paved or hard packed. The existing shoreline adjacent to the existing dock bulkhead is composed primarily of construction debris and large slabs of concrete riprap. Crushed brick and concrete dominate the intertidal zone, while the subtidal bottom habitat is generally a mixture of cobble-sized rock and brick fragments covered with fine silt and mud.

The waterfront area to the southwest of the dock area is undeveloped shoreline. To the south of the dock area on the eastern side of the CSX right-of-way is an area known as the South Bay. South Bay contains the DEC-regulated wetland HS-2, and the bay is hydrologically connected to the Hudson River through a tidal channel that passes under a CSX railroad bridge.

As part of SLC's project, SLC proposes to refurbish and expand its existing dock facility on the Hudson River, and

connect the dock facility to its mine and cement plant by means of a modern, enclosed tube conveyor system. The dock area will receive raw materials and coal for the production of cement. Raw materials are projected to be unloaded 16 to 22 times per year. In addition, separate dock facilities will be used to load finished product onto barges. According to the DEIS, about 80 percent of the cement produced will be shipped by barge and, during peak periods, such shipments will occur two to three times per week.

SLC already possesses an ECL article 15 permit and water quality certification, and an Army Corp of Engineers permit to perform maintenance dredging at the dock. SLC's planned expansion of the dock area, however, contemplates dredging of approximately 62,000 cubic yards to accommodate the draft of the HudsonMax vessels used to deliver raw materials, and to construct the new dock facility and bulkhead for cement barge loading.

As part of its application for a DEC permit to refurbish and expand its existing dock, SLC submitted a riverine habitat management plan. In its most recent form, the plan indicates that the project's unavoidable impacts to the Hudson River include impacts to 0.26 acres of intertidal habitat associated with the placement of riprap and revetment, 0.20 acres associated with pilings and other structures, and 5.45 acres of impacts resulting from dredging activities (see

Mitigation/Restoration Plan for Impacts to Riverine Habitat Associated with the Greenport Dock Project [October 2001], IC Exh 10b, at 2). An additional 0.89 acres of revetment, which is designed to provide fish habitat, would be placed at or below the contour of the existing river bottom following dredging to resurface the bottom and stabilize the newly dredged slope (see id. at 2-3). Approximately 0.05 acres of submerged aquatic vegetation ("SAV") would also be affected by dredging operations (see id. at 4).

1. SLC's June 2001 Mitigation Plan

SLC's riverine habitat impacts mitigation plan has evolved over time. The April 2001 DEIS assessed existing conditions at the dock area based upon information and data obtained from the Department, the United States Geological Survey, the United States Fish and Wildlife Service and other federal and State agencies (see DEIS, Vol I, IC Exh 6, at 11-1). In addition, benthic sampling was conducted along the SLC dock area (see id.). Because impacts from the dock construction as originally proposed would result in the loss of existing estuarine, intertidal, unconsolidated shore, as well as regularly flooded habitat, the DEIS indicated that mitigative measures would be required (see id. at 11-20). However, other than offering to study potential mitigation sites, no specific mitigation was proposed in the DEIS (see id. at 11-21). The DEIS

concluded that dock operations and the conduct of water-borne transportation would not result in any significant adverse impacts to local fish and wildlife populations, including short-nose sturgeon (see id. at 11-21 to 11-24).

In June 2001, during the issues conference, SLC submitted a revised mitigation plan (see Wetlands Mitigation Plan for Impacts to Riverine Habitat Associated with the Greenport Dock Project [June 2001], IC Exh 10a). Based upon unspecified field studies, the June 2001 plan identified four wetland and deepwater habitat types on the project site: palustrine emergent wetlands, palustrine scrub-scrub/forested wetlands, tidal riverine wetland rocky bottom habitat, and tidal riverine deepwater unconsolidated bottom habitat (see id. at 2). No fish or wildlife surveys are mentioned or discussed. To compensate for the fill and dredging associated with the dock expansion, SLC proposed to investigate improvement of the flow of water into the South Bay and to restore 3.0 acres of tidal riverine wetland habitat that had been filled in South Bay (see id. at 9). Additional proposed mitigation included increasing deepwater habitat for short-nose and Atlantic sturgeon by dredging 5.10 acres of tidal riverine deepwater unconsolidated bottom habitat to provide safe vessel access to the docks, decreasing the intake of water from the Hudson River at the Catskill facility, thereby reducing fish impingement/entrainment at that site, and the

development of a waterfront public park south of the dock site (see id. at 8-9).

2. Department Staff's August 2001 Comments

The parties were afforded the opportunity to review and comment on SLC's June 2001 plan. After conducting a site visit in August 2001, Department Staff submitted detailed comments on the June 2001 plan (see Staff Comments on Wetland Mitigation [8-10-02], IC Exh 114). Staff noted that excavation and fill would affect deepwater fish habitat, and that neither Staff nor SLC could identify mitigation measures that would provide in-kind replacement of the functions of the lost habitat (see id. at 1). According to staff, although the wetland mitigation proposed seemed reasonable, additional information was required to enable both staff and SLC to evaluate the plan's ability to compensate for lost habitat (see id.).

With respect to the June 2001 plan's description of habitat function, Staff indicated that the plan should be refined to include and describe submerged aquatic habitat areas and existing data on Hudson River fish communities and freshwater tidal wetlands, including data on 21 wetland reference sites, Hudson River specific research on functions of Hudson River tidal wetlands, and fisheries data. Staff stated that these sources would contribute to a more detailed assessment and description of impacts on habitat functions.

Staff also raised concerns about various elements of mitigation proposed in the June 2001 plan: (1) staff questioned whether the proposed mitigation was really in the nature of compensation for lost habitat; (2) staff questioned whether the replacement of 5 acres of deepwater habitat with the same area of even deeper habitat was "neutral or otherwise" (id. at 2); (3) staff questioned whether data was available concerning fish use of offshore habitats within the dredging area, noting that it would be important to evaluate such information (see id.); (4) staff questioned whether a reduction of cooling water intake at the Catskill facility was mitigation, noting that no data was supplied detailing the present impacts of fish entrainment and impingement at the Catskill facility, including the fish species involved at both the Catskill and Greenport locations; (5) staff indicated that further field study, impact modeling, and plan development were required regarding the improved hydrological connection between the Hudson River and South Bay, and the restoration of wetlands in South Bay (see id. at 2-3); and (6) staff raised concerns about the direct impacts of dredging and the indirect impacts of barge traffic upon SAV beds in the project area (see id. at 3-4), but indicated that the construction of a T-dock further out into the river might lessen those impacts.

3. SLC's August 2001 Field Study and Continuation of the Issues Conference

In late July-early August 2001, SLC conducted a field study in the area of the proposed wetland restoration site in South Bay. Later in August 2001, SLC submitted a report entitled "Environmental Baseline Assessment Report" (IC Exh 118), which detailed the information gathered on soils, wildlife, plants and fish in the South Bay mitigation area. The August 2001 report also discussed a 1999 Black Bass Study conducted by Lawler, Matusky & Skelly Engineers LLP ("LMS"), which discussed fish sampling along several shoreline areas of the main stem of the Hudson River between Troy and Kingston. Included in the areas sampled in the LMS study were the inlet of South Bay, and along the eastern shoreline of the Hudson River north of South Bay. Species observed or collected included Large-mouth and Small-mouth Bass, Common Carp, American eel, Striped Bass, White Perch, Blueback Herring, Redbreast Sunfish, and other sunfish species (see id. at 11).

The issues conference continued on August 15, 2001 (see IC Trans [8-15-01], Vol 11). Staff indicated that although SLC's mitigation/compensation plan appeared to avoid or otherwise minimize impacts to the greatest extent possible, questions remained about various aspects of the plan (see id. at 2175). In particular, Staff raised concerns about impacts on SAV beds, both as a result of dredging and as a result of the operation of

barges, the lack of information concerning existing conditions and fish populations in both the river and the proposed wetland restoration area, the effect of dredging on habitat diversity, and the effect of the proposed park development on wildlife habitat.

4. SLC's October 2001 Mitigation Plan

In October 2001, SLC submitted a second revised mitigation plan (see Mitigation/Restoration Plan for Impacts to Riverine Habitat Associated with the Greenport Dock Project [October 2001], IC Exh 10b). SLC agreed to accept Staff's recommendation that a T-dock configuration be adopted in the southwestern portion of the dock area to minimize impacts to the SAV beds, although 0.05 acres of SAV beds would still be dredged under the revised plan (see id. at 4). SLC proposed to enlarge the cove between the T-dock and the shoreline to create or restore a total of 0.92 acres of riverine habitat (see General Locations of Proposed Project Impacts, attached [cove is located in area designated "General Location of Riverine Habitat Mitigation]). About 0.3 acres of wild celery would be planted in the newly created shallow-water riverine habitat in three 1/10th acre plots. SLC also proposed a monitoring and reporting program to ensure that the creation/restoration of the cove is successful.

In addition to creation and restoration of riverine habitat in the cove, SLC incorporated design features to maximize habitat benefits. In particular, SLC proposed to use rough exterior, large diameter quarry stone revetment which, it contended, is more desirable for fish and invertebrate habitat than smooth, tightly packed stone revetment (see id. at 6).

As additional compensation for lost habitat, SLC retained its proposal to restore 3.0 acres of wetland in South Bay. SLC also retained the proposal to develop a public park, but modified the proposal to leave the park in a natural condition. SLC also retained its plan to reduce the intake of river water from the Catskill facility from 2.5 million gallons per day to 15,000 gallons per day. Based upon information presented in the Athens Generating Station Public Service Law article X proceeding, SLC provided an estimate of the number and species of fish that would be saved by the reduction in intake (see id. at 12-13).

5. Comments on the October 2001 Plan

In a one-page letter dated October 24, 2001, Staff indicated that SLC's revised plan provided sufficient detail, and that the proposed plan avoided impacts where possible and, where impacts were unavoidable, mitigated such impacts to the maximum extent possible. Staff also concluded that SLC's plan provided

significant compensation for the riverine impacts through the restoration of the South Bay wetland.

Intervenors FOH and Riverkeeper took the position that the October 2001 plan failed to sufficiently examine existing conditions with respect to fisheries data and other material related to habitat function, and did not explain the connection between the reduction of river water use at the Catskill facility and the mitigation of impacts at the Greenport location. Riverkeeper also questioned whether the habitat offered in mitigation would actually replace the lost habitat. Riverkeeper further argued that the October 2001 plan failed to examine the impacts vessel traffic will have on existing and newly created SAV beds, lacked sufficient detail about plantings in the South Bay wetland restoration area, and lacked a basis for the conclusion that impacts from dredging will be only temporary and will result in no net loss of subtidal habitat. FOH also raised concerns about potential destruction of wildlife habitat caused by the creation of the park, and argued that the South Bay mitigation plan contained inaccuracies and lacked supporting data.

In a November 2001 letter from SLC to Riverkeeper, SLC took the position that its October 2001 plan not only avoided and minimized impacts to the maximum extent practicable, but that its design changes and proposed creation of shallow water shoreline

habitat more than compensated for any loss of habitat (see Letter from T. West to A. Waters [11-6-01], IC Exh 173). Although SLC indicated that restoration of the wetland in South Bay was no longer necessary, given the mitigation and restoration proposed for riverine habitat, SLC retained the proposal in its plans (see id. at 4). However, SLC stated that it "reserves the right to withdraw the proposed South Bay mitigation site if this issue is adjudicated" (id. at 4 n 1).

6. ALJs' Issues Ruling

In their issues ruling, the ALJs held that, based upon the differences in expert opinion between FOH, Riverkeeper and SLC concerning whether the mitigation and compensation proposed by SLC will substitute for habitat destroyed for the project, an adjudicable issue existed (see ALJs' Issues Ruling, at 96). The ALJs stated that, "While the applicant has expressed the view that details regarding the mitigation project can be developed at a later stage, where there is fundamental doubt about whether this proposal will mitigate the damage to habitat that is inevitable due to the dredging and fill operations of SLC, the Department cannot issue a Part 608 permit without further investigation" (id.). The ALJs noted that the situation was complicated by the apparent change in position by Department Staff as evidenced by its August 10 and October 24 letters (see id.).

The specific concerns identified by the ALJs included the lack of any analysis of the impacts upon short-nosed sturgeon; the lack of sufficient wildlife studies to support the conclusion that impacts have been adequately identified and that the mitigation plan will enhance habitat; lack of an explanation for why the destruction of 0.05 acres of SAV, which was previously a subject of staff concern, is now acceptable; lack of a staff response to the October 2001 park proposal, and the lack of information concerning current habitat and species supported in the area to support the conclusion that the park is appropriate mitigation; and SLC's failure to explain how the reduction of river water withdrawals at the Catskill facility will compensate for losses associated with the proposed dredging across the river at Greenport (see id. at 96-97). In conclusion, the ALJs held:

> "Overall, as expressed by staff and some of the intervenors, SLC's proposals to move the dock to minimize impacts on SAV beds and to enhance and create new habitat with monitoring and reporting requirements appear very positive. The disagreement as to the adequacy of mitigation between the intervenors' experts and the applicant, and possibly staff, must be resolved in order to determine whether the requirements of Part 608 and Article 15 have been met"

(id. at 98).

On their appeals, both SLC and Staff challenge the ALJs determination that issues concerning the adequacy of SLC's mitigation plan are adjudicable.

Discussion

ECL article 15 provides that no person shall excavate or place fill below the mean high water level in any navigable waters of the state, or in marshes, estuaries, tidal marshes or wetlands that are adjacent to and contiguous at any point to any of the navigable waters of the state and that are inundated at mean high water level or tide, without a permit (see ECL 15-0505[1]). Before granting a permit, the Department must ascertain the probable effect of the excavation or fill on the use of such waters for navigation, the health, safety and welfare of the people of the state, and the effect on the natural resources of the state, including soil, forests, water, fish, and aquatic resources therein, likely to result from the proposed project or work (see ECL 15-0505[3]).

Pursuant to Department regulations, in determining whether to issue an Article 15 excavation or fill permit (see 6 NYCRR 608.5), the Department's review of the environmental impacts of a proposed alteration to a water resource includes consideration, among other things, of the effects on aquatic, wetland and terrestrial habitats; unique and significant habitats; rare, threatened and endangered species habitats; water

quality; water course and waterbody integrity, including such criteria as erosion, turbidity, and sedimentation; and hydrology (see 6 NYCRR 608.7[b]). The standard for the issuance of an Article 15 permit is whether the proposal is in the public interest, in that "(a) the proposal is reasonable and necessary; (b) the proposal will not endanger the health, safety or welfare of the people of the State of New York; and (c) the proposal will not cause unreasonable, uncontrolled, or unnecessary damage to the natural resources of the State, including soil, forests, water, fish, shellfish, crustaceans and aquatic and land-related environment" (6 NYCRR 608.8).

SLC argues that the ALJs erred in concluding that the adequacy of its October 2001 plan is adjudicable. SLC contends that the project as presently proposed meets the standards enunciated in 6 NYCRR 608.8(c), and that nothing proposed for adjudication by intervenors will assist the Commissioner's decision making. SLC argues further that any concerns about lack of clarity in the October 2001 plan are resolved by staff's October 2001 approval, as well as the draft permit condition requiring the submission of an acceptable mitigation plan, approved by Staff, to offset the placement of fill and the excavation of sediment (see Draft Permit, Condition 17, IC Exh 12[a][i]).

In addition, SLC asserts that draft permit conditions, and the positive restoration and mitigation proposed, more than compensate for modest project-related impacts. In particular, SLC points to the permit condition limiting construction operations to times of the year when sturgeon are not present, the redesign of the dock to minimize impacts of dredging, the planting of 0.30 acres of water celery to compensate for the dredging of 0.05 acres of SAV, and the redesign of the proposed park. SLC advocates deference to staff's determination, arguing that adjudication cannot be used to refine the mitigation proposal, that intervenors' allegations of missing information do not raise adjudicable issues because the lack of that data would not lead to permit denial or modification, and that any refinement of the mitigation plan should be committed to Department staff and the Army Corp of Engineers.

Department staff's position is similar. On its appeal, staff explains the basis for its October 2001 approval. According to staff, the dredging impacts have been clarified and reduced under the October 2001 plan. The plan shows a reduction in area dredged, the area has been moved further off-shore, and the design of the revetment may improve fish habitat. Staff also contends that the fill amount and impacts on SAV beds have been minimized. Staff asserts that although it was initially concerned about claimed benefits of increasing deep water habitat

at the expense of shallow water habitat, that concern has been alleviated by the plan to create new shallow water habitat, and the movement of the T-dock to avoid known SAV beds to the south. According to staff, the impacts from the withdrawal of water at the Catskill facility have been quantified, and the South Bay restoration plan has been expanded upon, with further details to be presented for Departmental approval. Finally, staff concludes that the park design has been improved. Accordingly, staff contends that the gains from the plan offset potential for harm associated with the proposed riverfront activities.

In reply, FOH argues that the ALJs correctly identified this issue as adjudicable. FOH points to a lack of specific and detailed baseline data concerning existing conditions and mitigation targets in the plan, and the lack of specific mitigation plans, including construction seasons and methods, site design, and types of plants and materials to be used. According to FOH, the plan lacks sufficient information to determine whether the restoration of the wetland in South Bay, the park, and reduction of river water intakes at the Catskill facility constitute mitigation. Finally, FOH contends that Staff's October 2001 approval is unreliable because it offers no explanation for staff's change in position.

Riverkeeper's appeal raises many of the same concerns as FOH. Riverkeeper also notes that staff's concern about the

impacts of barge traffic on SAV beds has not been addressed by the October 2001 plan, and that no analysis has been offered concerning the impacts to the habitat of endangered short-nose sturgeon.

I agree with the ALJs that a substantive and significant issue is presented concerning whether SLC's project as proposed meets the standards of 6 NYCRR 608.8. I base this conclusion on the offers of proof submitted by intervenors and staff's position.

As an initial matter, staff's attempt to provide an explanation for its October 2001 approval at this juncture is untimely. Just as attempts by intervenors to raise new offers of proof on appeals from an ALJ's issues ruling are generally rejected, staff should not offer, for the first time on appeal, rationales for its determinations (see Matter of Town of Brookhaven, Interim Decision of the Commissioner, July 27, 1995, at 5 [attempt by intervenor to raise new offer of proof on appeal rejected]; see also Matter of Village of Freeport, Decision of Commissioner, Nov. 26, 2003, at 7 [attempt by applicant to raise issue of SEQRA compliance for the first time in comments on ALJ's recommended decision rejected]; Matter of Saratoga County Landfill, Second Interim Decision of the Commissioner, Oct. 3, 1995, at 2 [factual record needs to be evaluated as it was when the ALJ made his ruling; new information submitted by the parties

with its appeal from the ALJ's ruling cannot be substantively evaluated on appeal]).

This is not to say that, in circumstances such as this, where staff's review of a project is on-going and evolving, staff may not change its stance about a proposed project (see Matter of Peckham Materials Corp., Second Interim Decision of the Commissioner, March 15, 1993, at 3). However, staff must provide a basis for its change in position, and intervenors should be afforded an opportunity to contest that position with contrary evidence and argument (see id.). To allow staff to provide its rationale for the first time on appeal deprives the parties and the ALJ of the opportunity to test staff's conclusions in an orderly manner.

In addition, intervenors and the ALJs identified significant flaws in SLC's October 2001 plan. Although SLC claims the plan is based upon substantial study and analysis, the issues conference record is largely devoid of any indication that such study and analysis occurred. Specifically, although the plan provides a generic description of the types of riverine habitat that might be impacted by the project, the record does not include any reference to any baseline examination of the habitat types, fish and wildlife that actually exist at the site other than the identification of several SAV beds in the area. 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 608.8[c]). Accordingly, it cannot be determined that the plan avoids or adequately mitigates or compensates for impacts from the proposed dredging and filling.

Moreover, although the October 2001 plan provides an estimate of the fish that might be impacted by a reduction of river water intake at the Catskill facility, nothing in the plan indicates whether reduction of fish impacts in Catskill should be considered compensation for the fish impacts in Greenport. The record also does not quantify the impacts that barge operations will have upon SAV beds, a concern staff expressly raised in its August 2001 comments. The project modifications incorporated into the October 2001 plan may be positive. However, without information concerning existing conditions, the basis for staff's conclusion that the October 2001 plan is acceptable is not supported by the record. Thus, the ALJs correctly identified a substantive and significant issue for adjudication. Accordingly, the ALJs' ruling certifying SLC's riverine habitat management plan for adjudication is affirmed.

SEQRA Issues

Five of the SEQRA issues raised by the parties on their appeals from the ALJs' issues rulings were addressed in the First

Interim Decision: (1) grandfathering of SLC's mining operation, (2) noise impacts, (3) traffic impacts, (4) economic impacts, and (5) SLC's alternatives analysis under SEQRA. This decision addresses the remaining SEQRA issues raised by the parties.

Visual Impacts

On their appeals, SLC and Department staff challenge the ALJs' determination that issues concerning the visual impact of SLC's project are adjudicable. For the reasons that follow, the ALJs' ruling is affirmed.

Background

As previously noted, the proposed Greenport facility would consist of a 1,222-acre cement plant and mine located in the Town of Greenport east of US Highway 9, a pre-existing 547-acre conveyor trestle system that passes through both the Town of Greenport and the City of Hudson, and a dock located between the Hudson River and the CSX rail right-of-way in the City of Hudson.

Key features of the new plant include, among other structures, a pre-heater tower, a main stack, eight blending silos, a kiln and clinker cooler, two clinker silos, and eight cement silos.

As part of its project, SLC also proposes to refurbish and expand the existing dock facility on the Hudson River, and connect the dock facility to the mine and cement plant by means of a modern, enclosed tube conveyor system. The conveyor system

would cross US Route 9 over an existing trestle, and cross NYS Route 9G and the CSX railroad tracks by new elevated trestles.

SLC also proposes to decommission and remove several existing major industrial structures. At the Greenport facility, SLC proposes to remove several components of the inactive Universal Atlas plant, including a bank of silos and a stack. At the dock, SLC plans to remove a dock tank and barge loader. At the Catskill facility, SLC proposes to remove six bunker silos on the jetty in the Hudson River, and to close the kiln, thereby eliminating its steam vapor plume.

To assess the visual impacts of the project and its mitigation and offset plans, SLC engaged experts from Saratoga Associates to conduct an investigation. The results of the study and SLC's conclusions concerning the project's visual impacts were presented in section 5.0 of the DEIS (April 27, 2001, IC Exh 6). According to SLC, the investigation undertaken is consistent with the Department's guidance, Assessing and Mitigating Visual Impacts (Division of Envtl. Permits, July 31, 2000) (hereinafter "Visual Impacts Guidance"), and accepted methodology.

1. DEIS Visual Assessment

The visual analysis examined 191 locations within the visual study area. Eighty-one Of those locations would have a partial view of the proposed project. An additional six sites would have a view of the dock area only.

The visual study area included a five-mile radius around the proposed plant, conveyor, and dock (see id. at 5-4). In addition, resources of high cultural or scenic importance located beyond the five-mile radius were evaluated, including a scenic overlook on the Taconic Parkway near Philmont, Lake Taghkanic State Park, Martin Van Buren National Historic Site, Clermont State Park and Historic Site, and the Catskill Escarpment Trail. The study concluded that intervening topography and vegetation would substantially screen views of the project from all of these resources, except along portions of the Catskill Escarpment Trail and from the scenic overlook on the Taconic Parkway. Accordingly, those two sites were also included in the analysis.

The DEIS characterized the existing regional topography as a "gently rolling landscape with several major hills rising above" the Hudson Valley floor (see id. at 5-5). The dominant water feature in the area is the Hudson River itself (see id.). The DEIS notes that the larger population centers -- City of Hudson, Village of Catskill, Village of Athens, and the hamlet of Claverack -- each have active National Register Historic Districts (see id. at 5-6). It also notes that Columbia and Greene Counties have both strongly rural agricultural characters and strong industrial presences (see id.). The DEIS references the mid-Hudson Valley's role as the setting for the Hudson River

School of artists, including Thomas Cole and Frederic Church, and the geographic center of the American Romantic Movement, a cultural movement that took place during the first half of the 19th Century (see id. at 5-11). It also recognizes the region as a significant resource for tourism and recreation, and notes that portions of the landscape are included within Scenic Areas of State-Wide Significance ("SASS") as designated by the New York State Coastal Zone Management Program ("CMP") -- the Catskill-Olana SASS and the Columbia-Greene North SASS (see id. at 5-17, 5-41).

The DEIS concludes that "[t]he height and mass of the proposed cement plant would be disproportionate in scale to other elements of the regional landscape. The proposed cement plant would be a highly dominant visual element" (id. at 5-57). Although the majority of the plant's elements would be screened by surrounding landforms and vegetation, "[t]aller facility components that would be commonly visible include the upper portions of the preheater, cement silos, blending silos and clinker silos" (id. at 5-56 to 5-57). Moreover, under meteorological conditions favoring plume formation, a plume would be visible. The plume is predicted to be visible during daylight hours 39 percent of the time on an annual average (winter 84 percent; spring 31 percent; summer 4 percent; fall 52 percent) (see id. at 5-59). For approximately 90 percent of the hours a

plume is visible, the plume would have a height-plus-length shorter than 1,968 feet (see id. at 5-27).

Visual impacts from the conveyor are essentially limited to views by motorists approaching and passing under the structure (see id. at 5-59). The dock area impacts depend upon loading, unloading, and stockpiling activities at the docks (see id. at 5-59 to 5-61).

The DEIS includes viewshed maps of the Greenport facility and vapor plume, the dock area, and the conveyor. It also includes a series of photo-simulations depicting existing and proposed conditions from several hundred locations (see id., IC Exh 7, Appdx B). The viewshed maps and photo-simulations confirm the conclusions in the DEIS. The viewsheds reveal that the Greenport facility will be visible, under a worst case scenario, from almost everywhere within a five-mile radius from the facility and, with existing vegetation taken into account, from a significant number of locations within that area (see id., IC Exh 6, Figs. 5-6 to 5-7). The dock area and conveyor will also be visible, but to a lesser degree (see id., Figs. 5-8 to 5-11). The photo-simulations confirm that the top of Greenport facility will potentially be visible from a significant number of locations within the study area.

The DEIS proposes the following measures to minimize or avoid potential visual impacts:

- Relocation of the cement manufacturing plant from the site of the former Universal Atlas cement plant to the mine area to maximize use of surrounding topography and vegetation to screen the facility from sensitive receptors to the southwest, west and northwest of the project site, including the Village of Athens, the Hudson River and Olana.

- Screening of exposed low level operations and facilities at the plant and dock area through layout design, and earthen berms and extensive landscape planting.

- Use of camouflage, disguise or architectural enhancements for the main plant, including use of non-reflective blue, gray, and white coloring.

- Architectural enhancement of the dock area structures to be consistent with the industrial heritage of the Hudson River.

- Lowering the profile and downsizing elements of the plant, including use of alternative clinker silo design.

- Elimination of highly visible industrial structures on the Hudson River waterfront.

- Avoidance of use of highly reflective materials.

- Use of state-of-the-art conveyor technology that more closely follows existing topography.

- Development of protocols to reduce facility lighting.

- Implementing a policy of strict site maintenance.

(see id. at 5-63 to 5-68).

Recognizing that the visibility of several major project components cannot be avoided or completely mitigated, SLC proposed the following offsets:

- Removal of structures and stockpiles at the former Universal Atlas site, the Greenport dock area, and the Catskill facility.

- Closing the Catskill kiln and, thereby, eliminating its plume, which is visible within the Olana southwest (mansion) and Hudson River viewsheds.

- Development of a pedestrian park at the dock to provide public access to the Hudson River and scenic views of the Hudson-Athens Lighthouse and the Catskill Mountains.

(see id. at 5-68 to 5-69).

By the time of the issues conference, and as a result of negotiations between SLC and Columbia County, SLC also proposed, as a further mitigation or offset measure, to decommission the Greenport facility at the end of its useful life and remove structures other than those used for mining operations (see Issues Conference Transcript [7-24-01], Vol 5, at 959-962). The decommissioning and demolition requirement was incorporated into the draft permit (see Draft Permit, IC Exh 12[a][i], Special Condition 16).

2. Intervenors' Offers of Proof

At the issues conference, intervenors raised numerous issues concerning SLC's visual impact analysis. HVPC argued that the DEIS did not address impacts to Olana and that the project will visually intrude upon views from Olana and the Catskill-Olana SASS, and from many points along the Hudson, including the City of Hudson and the Columbia/Green North SASS. HVPC also

contended that the project is inconsistent with coastal zone policies, and will have a significant adverse impact on listed and potential candidates for listing on the National and State Registers of Historic Places. According to HVPC, the simulations in the DEIS were insufficient, and the DEIS underestimates the project's visual impacts.

The Olana Partnership ("TOP") emphasized the impacts on Olana, and argued that the project would be highly visible from Cosy Cottage on the Olana site, as well as from the planned restoration of the carriage road known as "Ridge Road." FOH emphasized the project's incongruity with the historic, natural, residential, and agricultural setting of the project site, and argued that the negative visual impacts of the proposed cement plant far outweighed the positive impacts of the proposed changes at the former Universal Atlas cement plant, the Greenport dock, and the Catskill facility. The Village of Athens expressed its concerns about the negative visual impact the project would have on the Athens Riverfront Park and the Hudson-Athens lighthouse, and the Village's plans to refurbish its historic ferry slip and Riverfront Park.

In support of their challenge, HVPC and TOP offered the expert testimony of Terrance J. DeWan, American Society of Landscape Architects ("ASLA"). He offered to testify that, in his expert opinion, the visual impacts from the facility would be

worse than those projected in the DEIS, and that the mitigation and offsets advanced by SLC would be less significant than that projected in the DEIS. FOH offered the expert testimony of Mack Rugg of Camp Dresser and McKee, who would provide site specific visual impact analyses from key viewpoints set forth in the DEIS.

3. ALJs' Issues Ruling

In their issues ruling, the ALJs held that an adjudicable issue was raised concerning whether SLC mitigated or offset the visual impacts of the project sufficient to merit permit issuance (see ALJs' Issues Ruling, at 99). The ALJs determined that SLC's visual analysis employed an accepted methodology that was consistent with the Department's Visual Impacts Guidance (see id. at 101). However, the ALJs held that SLC's analysis itself revealed significant impacts from the project (see id.). The ALJs noted that SLC maintains that its mitigation and offset proposals are adequate to overcome the impacts (see id. at 102). They also noted that intervenors' experts concluded that the mitigation was insufficient, and proposed to assess the adequacy of the mitigation and identify viewer groups affected by the project and the offsets (see id. at 103). In addition, the ALJs acknowledged the conclusion drawn by intervenors' experts that the project is incompatible with the existing landscape and land uses, and substantially intrudes on significant visual receptors (see id.).

The ALJs' ruling discussed the project's potential impacts on Olana, and intervenors' concerns about SLC's planned elimination of the Becraft Mountain ridge. The ALJs concluded:

> we find that the issue to be adjudicated concerning visual impacts is whether the mitigation and offsets provided by the applicant are sufficient such that the Commissioner could ultimately find that there are no significant adverse visual impacts from this facility on the scenic resources of the area. To develop the record, the intervenors will have the burden of advancing proof that the mitigation offered will not sufficiently mitigate the impacts particularly with respect to the viewshed concerning (1) Olana, (2) the relevant SASSs, (3) the Village of Athens waterfront[, (4)] other historic sites that are registered or eligible for such listing in accordance with [Parks, Recreation and Historic Preservation Law] § 14.09, and [(5)] identifiable community resources. As the Hearing Examiners in Athens recognized in their Recommended Decision, visual impacts on historic resources are those that detract from the historic designation and significance of those structures. R.D., pp. 49-51. Thus, the parties will have an opportunity at hearing to demonstrate how the viewer groups will be affected by the project's impacts on those resources

(id. at 105-106).

Discussion

1. Becraft Mountain

On its appeal, SLC argues that impacts on Becraft Mountain cannot be used as a basis for concluding that the visual impacts of the project are adjudicable. SLC contends that the mining of Becraft Mountain is allowed under existing

authorizations, including SLC's mined land use plan ("MLUP") and the Department consent order and, thus, is grandfathered under SEQRA. In any event, SLC agrees to stipulate to a permit condition to leave Becraft Mountain intact if the project goes forward (see Applicant's Brief on App [1-31-02], at 177 n 98).

In both their submissions in reply to the appeal, and in supplemental submissions filed in response to the Commissioner's August 5, 2002 ruling, intervenors agree that the Becraft Mountain ridge issue has been resolved by SLC's stipulation, and urge that the relevant permit condition be incorporated. In its submission filed in response to the Commissioner's August 5, 2002 ruling, staff also agrees that the Becraft Mountain ridge issue is resolved by the stipulation.

Accordingly, it may be concluded that the issue of the visual impacts associated with the removal of Becraft Mountain ridge have been resolved. An appropriate permit condition should be drafted and submitted to the ALJs for review.

2. Applicable Standard of Review

SLC argues that the ALJs erred in concluding that significant net adverse visual impacts result from the project. SLC contends that the ALJs failed to properly consider the project in total, that is, fully take into account all project components, and mitigation and offset measures. SLC takes the position that if the ALJs had done so, they would have concluded

that no significant net adverse visual impacts remain and, thus, no adjudicable issue is presented. SLC further asserts that even assuming the project results in significant residual adverse visual impacts, the ALJs erred in applying a "no significant environmental impact" standard. Instead, SLC argues that the ALJs should have considered environmental factors and mitigation "to the maximum extent practicable," "consistent with social, economic and other essential considerations."

SLC's argument is misplaced. A fair reading of the ALJs' ruling reveals that they reached no conclusions concerning the net adverse visual impacts arising from the project. Indeed, to do so would not be appropriate at the issues conference stage of the proceedings. Instead, the ALJs were engaged in identifying and evaluating issues, as they are required to do, and were determining whether intervenors raised issues for adjudication.

Part 624 provides that, where the Department is the lead agency and has required the preparation of a DEIS, the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the Department to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the generally applicable standards for adjudicable issues (see 6 NYCRR 624.4[c][6]). Those generally applicable standards provide that where, as here, the issue presented for adjudication is

proposed by a potential party, the issue must be both substantive and significant (see 6 NYCRR 624.4[c][1][iii]). Moreover, where, as in this case, Department staff has reviewed an application and concluded that it meets statutory and regulatory standards, the burden is on the proponent to demonstrate that an issue is both substantive and significant (see 6 NYCRR 624.4.[c][4]).

Given the issues conference stage of these proceedings, the ALJs correctly inquired whether intervenors carried their burden of raising adjudicable issues concerning the adequacy and accuracy of SLC's visual impacts analysis. That inquiry included evaluating whether intervenors joined issue concerning the scope and significance of the impacts identified and mitigation measures offered in the DEIS (see 6 NYCRR 617.9[b][5]). Having concluded that they did, the ALJs properly certified issues for adjudication. The ALJs were correct in declining to apply the SEQRA balancing standard urged by SLC, a standard that should not be applied until the post-adjudication stage of the proceeding (see 6 NYCRR 617.11[d] [weighing and balancing of relevant environmental impacts with social, economic, and other consideration to be based upon final EIS]; 6 NYCRR 624.13[c] [where a DEIS has been the subject of a hearing, the ALJ's hearing report together with the DEIS will constitute the final EIS]).

3. ALJs' Determination of Adjudicability

SLC contends that because intervenors fail to offer additional mitigation measures, and because other offset measures agreed to by SLC can be enforced through permit conditions or are not part of the "action," no factual issues remain for adjudication. All that remains, in SLC's view, is the discretionary determination by the Commissioner whether the impacts from the project are acceptable under SEQRA. SLC contends that the net visual impacts from the project can be assessed from the record, and present no impediment to permit approval. Staff makes a similar argument: that the visual impacts from the project have been mitigated to the maximum extent practicable, and the Commissioner can make the necessary SEQRA findings on the present record.

In reply, HVPC offers expert testimony that the DEIS undervalues the significance of the visual impacts of the project upon the region and the resources therein, and overvalues the significance of the mitigation and offsets proposed. In addition to expert testimony, HVPC would proffer supplemental visual studies, surveys, and photo-simulations that HVPC argues will show the full extent of the proposed cement plant's impact on the community, specific user groups, and historic and scenic resources.

In their reply, TOP takes the position that an adjudicable issue may be joined on the basis of a difference in expert opinion. TOP asserts that in this case, significant differences of expert opinion exist with respect to numerous issues, including the sufficiency of Catskill and Greenport facility offsets, whether elimination of the Catskill plume offsets a new Greenport plume, the extent to which the entire Olana viewshed is visually significant, the extent to which the plant will be visible, the severity of the visual impacts, the effectiveness of the proposed mitigation, and the plant's compatibility with the surrounding area.

Applying the applicable standards, the ALJs correctly ruled that issues concerning the project's visual impacts and whether those impacts have been sufficiently mitigated to warrant permit approval are adjudicable. In this case, intervenors offer expert testimony to support their proposed issues. New York law recognizes that where expert opinion would help to clarify an issue calling for professional or technical knowledge, possessed by an expert and beyond the ken of the typical finder of fact, such expert opinion may be allowed into a hearing record and relied upon by the finder of fact (see Prince, Richardson on Evidence § 7-301, at 456-458 [11th ed, Farrell], and cases cited therein). Commissioner decisions have recognized and adopted this principle:

> "offers of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues. Moreover, the issues conference is not the point at which an intervenor should be deciding that it will have to locate an expert to substantiate the allegations made at the conference. The assertions should arise from the opinions of the expert or other qualified witnesses"

(Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2 [emphasis added]).

This is not to say that all offers of expert testimony contrary to the application are "necessarily adequate in and of themselves to raise an issue for adjudication. This is especially true where the basis for the contrary expert opinion is not identified or where it is apparent that the expert opinion has not taken into account all proposed project mitigation" (see Matter of Jay Giardina, Interim Decision of the Commissioner, Sept. 21, 1990, at 2-3). Rather, the proposed expert testimony must raise the reasonable likelihood that adjudication would result in amended permit conditions or project denial (see id. [citing 6 NYCRR 624.6(c)]). Accordingly:

> "In determining whether adjudication is warranted, an ALJ must keep in mind the relevance of the disputed materials to the ultimate permit decision (In the Matter of Hydra-Co. Generations Inc., Interim Decision of the Commissioner, April 1, 1988). It is inappropriate to use the adjudicatory process to refine an analysis of project impacts where there is no likelihood that additional mitigation is available unless the intervening party can demonstrate that the impact may violate a legal standard that would require permit denial (In the Matter of New York City Department of Environmental Protection, Third Interim Decision, October 6, 1988). Therefore, as part of its burden at the issues conference, an intervening party must identify the additional mitigation it seeks or alternatively the legal standard which it contends is not met.
>
> "As a corollary to this principle, it follows that when making an issues ruling an ALJ must take into account mitigating conditions proposed by the Staff in the draft permit as well as those that the applicant has made part of the project itself. It is the intervening party's burden to show why such mitigation may be inadequate"

(id.). If an intervenor's offer of proof satisfies this burden, an issue, based upon expert testimony, may be certified.

The Department's Visual Impacts Guidance also recognizes the role of expert analysis in the assessment of visual impacts under SEQRA. It expressly notes that judgments concerning the quality of a project's design or its effect on the aesthetics of listed resources require a qualified expert (see Visual Impacts Guidance, at 8). Such qualifications "normally include academic or other accepted credentials in architecture or

landscape architecture" (id.). Indeed, the visual impacts assessment in SLC's DEIS contains the opinion of its experts, upon which SLC urges the Commissioner to rely in making the required SEQRA findings.

Here, intervenors' offer of proof raised substantive and significant issues warranting adjudication. Because a project's unmitigated visual impacts may provide a basis for permit denial, major modification to a project, or the imposition of significant permit conditions under SEQRA (see Matter of Lane Constr. Corp. v Cahill, 270 AD2d 609 [3d Dept], lv denied 95 NY2d 765 [2000], confirming Matter of Lane Constr. Co., Decision of the Deputy Commissioner, June 26, 1998), the issue is significant (see 6 NYCRR 624.4[c][3]). As noted by intervenors' expert, the factual basis for his opinion is SLC's DEIS itself. Based upon that DEIS, as well as supplemental information to be provided by intervenors, intervenors' expert offers to testify that the impacts associated with the project are more significant than those alleged in the DEIS, and that the proposed mitigation and offsets are less effective than those claimed by SLC. This proposed testimony runs counter to the expert opinion expressed by SLC's experts in its DEIS. Thus, an adjudicable issue has been raised.

SLC asserts that because the visual assessment in the DEIS is consistent with the Department's Visual Impacts Guidance,

SEQRA requirements have been satisfied and, thus, no adjudicable issue is raised. While it is true that Department guidances are designed to implement the standards set forth in the ECL and implementing regulations in a rational and consistent way (see Matter of Pete Drown, Inc., Interim Decision of the Commissioner, January 27, 1994), they do not have the force of law, and do not abrogate or replace such statutory or regulatory requirements. Thus, even assuming SLC's assessment complies with the Guidance, SEQRA still requires that the Department's decision maker evaluate the visual impacts of a project and make SEQRA findings before project approval. Because this matter is subject to Part 624 permit hearing proceedings, the ultimate SEQRA findings rest with the Commissioner (see 6 NYCRR 624.13[b]). Moreover, Part 624 provides a mechanism through which intervenors may challenge an assessment offered by an applicant, so long as they carry the burden of raising such a challenge at the issues conference stage.

Finally, SLC argues that the ALJs failed to apply clear standards or engaged in standardless decision making in their ruling. Accordingly, SLC contends the ruling invites a "free-for-all bereft of any parameters or standards to judge the outcome" (Applicant's Brf on App, at 193). SLC's argument is overstated. As noted above, the ALJs applied established and

well-known standards for determining whether an adjudicable issue exists under Part 624, and settled standards governing SEQRA.

Impacts upon Coastal Zone Policy, Community Character and Historic Resources

In its appeal, SLC challenges the ALJs' rulings that issues concerning the project's impacts on coastal zone policies will be adjudicated in the context of visual impacts, and impacts to community character and historic resources will be adjudicated in the context of visual impacts and air pollution impacts. Intervenors also object to the ALJs' ruling on community character impacts. For the reasons that follow, the ALJs' rulings are modified and, as so modified, affirmed.

Background

As previously noted, SLC's assessment concerning the project's visual impacts were presented in section 5.0 of the DEIS. The DEIS concluded that the height and mass of the proposed cement plant would be disproportionate in scale to other elements in the regional landscape and would be a highly dominant visual element. According to the DEIS, the visual study demonstrated that the plant and its associated plume would be visible from multiple sites of cultural and scenic importance, including Olana, along the Hudson River shoreline, two landscape units designated as SASSs under New York State's Coastal Management Program ("CMP"), and several population centers,

including the Town of Greenport, the City of Hudson, and the Village of Athens.

SLC's analysis of the proposed project's impacts on community character are presented in section 2.0 of the DEIS. The DEIS characterizes the area of the Hudson River Valley in which the project would be located as "historically includ[ing] a mix of rural residential and industrial uses, including an industrial riverfront" (id. at 2-19). The DEIS concludes that the project would represent an "intensification and modernization of a prominent, existing land use rather than a change in land use, and therefore would not have significant impacts on land use or zoning. Past and present uses of the SLC property would be consistent with its future use and environment, and the area's character is unlikely to change with the proposed project" (id.). The DEIS also concludes that the project would not be expected to adversely affect the region's unique historic or architectural resources, and would not interfere with emerging trends for the development of the area as tourist and second-home destinations (see id. at 2-20 to 2-23).

The project's impacts on historic resources is presented in section 7.0 of the DEIS. The DEIS concludes that the proposed project "would be visible from many of the area's historic resources, in some cases introducing a major new industrial facility into the setting of essentially rural

historic resources. In other cases, the facility would be screened from view by topography and/or vegetation" (id. at 7-38). The DEIS notes that the project would be visible from at least one location at Olana, although not from the rooms within Olana open to the public and not in the principal view to the west from Olana. The DEIS also notes that SO_2 and NO_X air pollutant emissions are known to have a deleterious effect on vulnerable building materials. However, the DEIS concludes that with the planned use of pollution control technologies and, consequently, with emission levels of SO_2 and NO_X projected below current levels, the project would not adversely impact historic structural and decorative materials.

1. Intervenors' Offers of Proof

In its petition for party status, HVPC argued that the SLC project will visually dominate the landscape from a number of locations in the City of Hudson, the Towns of Greenport and Claverack, the Village of Athens, and the Hudson River, and that such intrusion will be substantial and unavoidable. HVPC contended that the project will undermine the values sought to be protected by designation of the Hudson River as a National Heritage Area and an American Heritage River, and will interfere with non-industrial trends in economic development in the region. HVPC offered to establish the historic and cultural resources of the area and define the character of the involved communities.

HVPC also offered to establish that the visual impacts from the project are inconsistent with Coastal Management Program Policies ("CMP policies") 23, 24, and 25. It also offered to establish the significance of the impacts on Olana, the Catskill-Olana SASS, the Columbia/Greene North SASS, and the Village of Athens waterfront, including the Hudson/Athens Lighthouse, as well as other historic sites in the area. In addition, HVPC challenged SLC's failure to assess air pollution impacts on historic resources.

With respect to community character, HVPC contended that the DEIS artificially circumscribed the affected community, and that the appropriate study area should include the entire viewshed of the SLC project, if not the entire Mid-Hudson River Valley region. To support its case, HVPC offered the testimony of several experts.

In its petition for party status, TOP emphasized the significance of the project's visual and air pollution impacts on Olana, consistency with CMP policies, and whether those impacts have been mitigated to the maximum extent practicable. TOP offered expert testimony to support its case.[8]

In its petition for amicus status, the Village of Athens criticized the DEIS's failure to address impacts to its

[8] In a letter dated October 1, 2003, TOP subsequently withdrew the issue of air pollution impacts upon Olana from adjudication (see Caffry Letter [10-1-03]).

historic waterfront. The Village argued that the project will be inconsistent with the CMP policies, as well as its own Local Waterfront Revitalization Plan ("LWRP"), which was approved by the Village in 1999, and by the Secretary of State on September 20, 2001.

2. ALJs' Issues Ruling

In their issues ruling, the ALJs held that because the matters intervenors raised with respect to Coastal Management Program policy consistency related primarily to visual impacts, no separate issue for adjudication was presented (see ALJs' Issues Ruling, at 86). Rather, the ALJs concluded that the project's consistency with CMP policies and whether the mitigation and offset measures proposed by SLC are sufficient to overcome the visual impact upon coastal policy would be adjudicated in the context of visual impacts (see id.). Specifically, the ALJs held that intervenors raised adjudicable issues 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 scenic resources of statewide significance -- the SASS policy); and Policy 25 (protection of overall scenic quality of the coastal area) (see id. at 87). With respect to the Village of Athens's petition for amicus status, the ALJs held that more detail must be provided in the record concerning the

potential conflicts between SLC's project and the Village's plans for its waterfront before SEQRA findings and a coastal zone consistency determination can be made (see id. at 86-88).

With respect to the project's potential impacts upon historic resources, both for purposes of SEQRA review and review under the State Historic Preservation Act ("SHPA") (Parks, Recreation and Historic Preservation Law art 14), the ALJs held that intervenors' offers of proof did not raise independently adjudicable issues (see Issues Ruling, at 109, 112). Nevertheless, the ALJs held that impacts on historic resources would be adjudicated in the context of air pollution and visual impacts (see id. at 109). Similarly, the ALJs held that any impacts to community character would be addressed in connection with other identified environmental impacts, including visual and air pollution (see id. at 119). The ALJs confined the inquiry on community character, however, to the effects on the Town of Greenport, the City of Hudson, and the Village of Athens (see id. at 119).[9]

Coastal Zone

SLC challenges the ALJs' ruling on coastal policy impacts on four grounds. First, SLC argues the ALJs failed to apply proper standards for adjudication. Second, SLC argues that

[9] The ALJs' ruling concerning the geographic scope of the inquiry into visual impacts upon community character is addressed infra at 122.

the ALJs erred in considering only four CMP policies and not all 44 policies. Third, SLC contends that the ALJs misconstrued and misapplied two of the four CMP policies identified. Fourth, SLC argues that the Village's LWRP need not be considered. Each argument is considered in turn.

1. Standards

In SLC's view, the ALJs failed to identify specific regulatory standards to be applied, imposed "as-of-yet unspecified, stricter standards in their stead," failed to require sufficient offers of proof from the intervenors, and failed to identify specific factual disputes (see SLC's Brf on App, at 10-15). SLC's argument is unpersuasive.

For actions undertaken by state agencies within the coastal area, Executive Law article 42 requires that such actions be consistent with the coastal area policies of the article, including approved LWRPs. Pursuant to Executive Law article 42, the coastal area policy consistency determination requirement is incorporated by regulation into the SEQRA process (see Executive Law § 919[3]; see also 19 NYCRR 600.4[a]). Where, as here, an EIS is being prepared, the EIS must include a statement concerning the action's consistency with the applicable coastal policies contained in 19 NYCRR 600.5 and any approved LWRP policies (see 6 NYCRR 617.9[b][5][vi] [consistency determination in EIS]; Matter of Xanadu Props. Assocs., Interim Decision of the

Commissioner, Oct. 15, 1990, at 1; see also id., Ruling of the ALJ, Sept. 10, 1990, at 1-2). In addition, among the written findings an agency must make pursuant to SEQRA before it can make a final decision on an action is a finding that "the action is consistent with applicable policies set forth in 19 NYCRR 600.5" and, when an approved LWRP is involved, that "the action is consistent to the maximum extent practicable" with that LWRP (6 NYCRR 617.11[e]).

In evaluating proposed actions against the policies set forth in 19 NYCRR 600.5, agencies are encouraged to consider the coastal policy explanations and guidelines contained in the approved New York State Coastal Management Program document (see 19 NYCRR 600.5). The 44 CMP policies referred to by the parties and the ALJs in this case are included in that program document.

The ALJs properly applied these statutory and regulatory standards, and the interpretative guidelines, when evaluating whether intervenors raised adjudicable issues pursuant to Part 624.

2. Balancing of 44 Coastal Policies

SLC argues that in finding that the sufficiency of its visual mitigation and offset measures is adjudicable, the ALJs erred in applying only four of the 44 CMP policies. SLC asserts, instead, that consistency with all of the coastal policies must be considered as a whole before a consistency determination can

be made. SLC maintains that the ALJs' ruling improperly segments review of the policies, and concludes that because intervenors did not meet their burden of proof of establishing coastal zone consistency as a separately adjudicable issue, none of the coastal zone policies can be evaluated in the context of visual impacts.

SLC's argument is inconsistent with the CMP regulations. First, the governing policies relevant to the coastal consistency determination are those set forth in section 600.5. As noted above, the 44 CMP policies cited by SLC are to be used to interpret the section 600.5 coastal policies. Second, the Department of State's own regulations and policy documents suggest that a project's consistency with each of the coastal policies set forth in section 600.5 should be considered and a determination made whether any one of the policies will be hindered by a proposed action (see 19 NYCRR 600.4[b] [when a determination is made that a DEIS will not be required, State agency must file with the Secretary of State a certification, among other things, that an action "will not substantially hinder the achievement of any of the coastal policies set forth in section 600.5" (emphasis added)]; New York Coastal Management Program and Final Environmental Impact Statement [August 1982] ["CMP FEIS"], at II-6-2 ["State agencies are required to adhere to each policy statement as much as is legally and physically

possible" (emphasis added)]). Third, at the issues conference stage, the question, among others, is whether intervenors have raised any factual disputes requiring adjudication (see 6 NYCRR 624.4[b][2][iii]). Thus, it is entirely proper for intervenors to attempt to raise factual disputes with respect to the project's inconsistency with any one of the section 600.5 coastal policies, and for the ALJ to join such disputes for adjudication if intervenors meet their burden, in order to develop the factual record. Any determination as to the project's consistency with each of the coastal policies must await final decision after adjudication.

3. Interpretation of CMP Policies 23 and 24

SLC goes on to argue that the ALJs erred in holding that CMP policies 23 and 24 should be addressed as part of the visual issue.[10] SLC contends that CMP policy 23 is not concerned with views from historic sites and, thus, does not relate to visual issues. SLC's argument raises an open legal question concerning the proper interpretation of CMP policy 23 and, thus, the proper interpretation of 19 NYCRR 600.5(e)(1) and 600.5(f)(3). Policy 23 (Historic Preservation) and its attendant "Explanation of Policy" appear to be concerned with the alteration, demolition, or removal of historic structures,

[10] SLC raises no specific challenge to the ALJs' conclusion that CMP Policies 4 and 25 are relevant to this case.

districts, or areas (see Policy 23). These documents are also concerned with actions within 500 feet of the perimeter of the property boundary of an historic structure or all actions within an historic district. To the extent the "Explanation of Policy" addresses visual relationships, it does so in the context of the "500 feet perimeter/within historic district" limit (see id.). In contrast, section 600.5(d) and its attendant CMP Policies 24 and 25 expressly address visual impacts on the coastal zone. Thus, Policy 23 arguably is not concerned with the type of visual impact SLC's project will have upon historic structures in the project's viewshed.

On the other hand, the Explanation of Policy for Policy 23 also indicates concern "not just with specific sites but with areas of significance, and with areas around specific sites" (see id.; see also CMP FEIS, at II-4-8). In addition, the CMP FEIS indicates that one of the means for implementing Policy 23 is through SEQRA's consideration of significant impacts upon a historic structure's "community or neighborhood character" (see CMP FEIS, at II-6-124). This suggests that visual impacts on an historic structure's surroundings and, thus, upon the structure itself, are appropriate considerations under the relevant provisions of section 600.5 (see also NY Division of Coastal Resources Consistency Determination for Athens Generating Plant, July 14, 2000).

Given this ambiguity, the prudent course is to reserve on the open legal questions at this time. This is particularly so, given that SLC's argument raises questions concerning the interpretation and implementation of another State agency's program. Because visual impacts upon historic resources is a concern under SEQRA and, as discussed later in this decision, because intervenors have raised an adjudicable issue concerning visual impacts upon historic resources, the issue will be subject to adjudication and further factual development. After the factual record is developed concerning the visual impacts on historic resources, a narrow determination on the specific facts of this case can be made concerning the proper interpretation and application of the section 600.5 coastal policies governing historic resources.

SLC also argues that Policy 24 (Statewide Scenic Resources), which is concerned with preventing impairment of scenic resources of statewide significance, does not apply to its project. First, SLC contends that because the Greenport project is not located within an identified SASS, Policy 24 is not implicated. Neither Policy 24 nor the relevant regulatory provision, section 600.5(d)(1), appear to be so limited, however. One of the questions on the Coastal Assessment Form ("CAF"), which is the equivalent of an EAF under SEQRA, is whether "the proposed activity [will] be <u>located</u> in, or contiguous to, or have

a significant effect upon * * * Scenic resources of statewide significance" (CAF, at C.1.[b], attached [emphasis in original]). Moreover, in Scenic Areas of Statewide Significance (July 1993 ["SASS Guidance"]), the Department of State indicates that an action's impact upon a SASS must be evaluated "[w]hether within or outside a designated Scenic Area of Statewide Significance" (id. at 104). Thus, Policy 24 and, accordingly, section 600.5(d)(1), is not applicable solely to projects located within a SASS.

Second, SLC argues that Policy 24 only applies to views of a SASS, and not views from a SASS. Again, Policy 24 does not appear to be so limited. In the Explanation of Policy for Policy 24, siting and facility-related guidelines are provided to implement the policy. Among the goals of the guidelines is "to retain views to and from the shore" (Policy 24). Moreover, even accepting SLC's argument, the DEIS in this case suggests that because of the size of SLC's Greenport facility, the facility will be visible in the background of views of two identified SASSs -- the Catskill-Olana SASS and the Columbia-Greene North SASS.

Third, SLC argues that mere visibility of a project does not automatically evidence inconsistency with Policy 24, and that the proposed mitigation measures are sufficient to offset any such inconsistency. Accordingly, SLC contends that

intervenors have failed to raise an adjudicable issue concerning its project's inconsistency with Policy 24. As noted above in the discussion concerning the visual impacts of SLC's project under SEQRA, however, intervenors have made a sufficient offer of proof supporting their contention that the visual impacts of the project are greater, and the mitigation measures less significant, than those suggested in the DEIS. Intervenors argued in their petitions that the SLC project will be a highly visible and intrusive element from several key locations in the Columbia-Greene North SASS, including the Greenport Hudson River Conservation Area, and from several landscapes in the coastal area, and supported their contention with offers of competent expert opinion. Moreover, intervenors argued that views from Olana itself and the Catskill-Olana SASS will be adversely impacted. Thus, intervenors have raised an adjudicable issue concerning the project's consistency with section 600.5(d)(1).

4. Consistency with Village of Athens LWRP

Finally, SLC argues that the ALJs erred in concluding that its project's consistency with the Athens LWRP must be considered. First, SLC asserts that because the Athens LWRP was approved by the Department of State on September 20, 2001, after the DEIS was prepared and the issues conference was held, it need not be considered. SLC cites Matter of American Marine Rail,

LLC. (ALJ Rulings on Issues and Party Status, Aug. 25, 2000 ["AMR I"]) in support of this proposition.

SLC raises another open legal question. SEQRA regulations provide that when the Secretary of State has approved an LWRP, no agency may make a final decision on an action unless it has made a written finding of consistency with the LWRP (see 6 NYCRR 617.11[e]). This may be read to suggest that so long as the approval of the LWRP occurs before final agency decision, it must be considered. On the other hand, the SEQRA requirements for a draft EIS require a statement concerning the proposed action's consistency with an approved LWRP (see 6 NYCRR 617.9[b][5][vi]). This suggests that in order to be considered, the LWRP must be approved before the DEIS is prepared.

AMR I is not dispositive. In AMR I, the LWRP at issue was not approved at the time of the issues ruling and, therefore, the ALJ did not consider it for purposes of coastal zone policy consistency. Here, although the Athens LWRP was not approved before the issues conference, it was approved before the issues ruling. Moreover, in this case, the ALJs left the issues conference record open at the time of the issues ruling.

Second, SLC argues that the Athens LWRP does not apply because no aspect of SLC's project is located within the boundaries of the LWRP. Again, SLC raises an open legal question. On the one hand, Department of State regulations and

guidance documents suggest that only actions located within an approved LWRP need to be examined for consistency with the LWRP (see 19 NYCRR 600.4[c] [when a determination is made that an EIS is not required, a determination of consistency must be filed with the Secretary of State "where the action is in the coastal area within the boundaries of an approved" LWRP] [emphasis added]; Department of State, Guidelines for Notification and Review of State Agency Actions Where Local Waterfront Revitalization Programs Are in Effect, Feb. 1, 1985 [defining "action" as "[o]ccurring within the boundaries of an approved LWRP"]). On the other hand, the specific language of the applicable SEQRA regulations do not limit review to actions located within an approved LWRP (see 6 NYCRR 617.11[e] [requiring state agency to consider whether an action "is likely to affect" an approved LWRP]). Moreover, the Coastal Assessment Form, which, although not a regulation, may be considered as guidance, asks whether "the proposed action [will] be located in or have a significant effect upon an area included in an approved" LWRP (see CAF, section C.4).

Again, because of the open legal questions involved that implicate a program under the jurisdiction of the Department of State, resolution of these legal questions should await development of the factual record. The impacts upon the Athens LWRP identified by intervenors are visual and, thus, are relevant

to an assessment of the visual impacts of SLC's project under SEQRA. Because the scope and significance of the visual impacts of the project are otherwise adjudicable, the question whether those impacts have a relevant adverse impact upon the Athens LWRP can be decided after the hearing record is developed.

Community Character

The ALJs, in their issues ruling, specifically held:

> "we have concluded that, in this case, any impacts to community character will be adequately addressed in conjunction with other identified environmental impacts (for example, visual and air pollution). This ruling is limited to the specific factual circumstances at issue here. In addition, we do not adopt the proposed intervenors' view that consideration of this project's impacts on community character must include an assessment of those impacts on the region as a whole (i.e., the Hudson Valley). The inquiry should be confined to the effects on the Town [of Greenport], the City [of Hudson], and the Village of Athens (as noted, the Village's LWRP was recently approved by the Department of State)"

(ALJs' Issues Ruling, at 119 [emphasis added]).

SLC agrees with the ALJs' conclusion that community character is not adjudicable as a stand-alone issue in this proceeding. However, SLC objects to the ALJs' determination that community character will be adjudicated in the context of other issues, such as visual impacts and air pollution. Specifically, SLC argues that the ALJs erred in rejecting local land use enactments and policies as the standard for what constitutes

community character, failed to apply any standard against which the offers of proof on the community character issue could be assessed, and contravened SEQRA's jurisdictional non-interference provision.

On appeal, HVPC argues that the ALJs improperly excluded from adjudication cumulative and indirect, secondary community character impacts that will result from the project, including impacts upon tourism, recreation, historic resources, economic development other than industrial development, and second-home ownership in the region. HVPC argues that the SLC project will intensify industrialization in an area where tourism, recreation, historic resources, and second home ownership have become the predominant economic elements. According to HVPC, SLC's project will degrade the qualities sought to be protected by the various regional, state and national designations that have been given to the Hudson Valley region. In their joint appeal, proposed amici Preservation League of New York State and the National Trust for Historic Preservation join in HVPC's argument that the ALJs erred in concluding that impacts upon regional "Heritage Tourism" are not adjudicable as an impact upon community character.

SEQRA defines "environment" to mean the "physical conditions which will be affected by a proposed action, including . . . existing community or neighborhood character" (ECL 8-

0105[6]; 6 NYCRR 617.2[l]). In guidance, the Department states that the characteristics of an existing area include "size, location, the mix of its land uses, and amenities and existence of architectural elements or structures representative of the community" (SEQR Handbook, November 1992, at 43; see also SEQRA Environmental Assessment Long Form, Part 2, "Impact on Growth and Character of Community or Neighborhood" [listing examples of community character]).

The Department, to a large extent, relies on local land use plans as the standard for community character. Adopted local plans are afforded deference in ascertaining whether a project is consistent with community character (see Matter of Lane Constr. Co., Interim Issues Rulings, February 22, 1996, at 16 [local zoning ordinance as "the expression of the community's vision of itself"]; Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, June 20, 1995, at 8 ["If a zoning ordinance or other local land use plan exists, it would be evidence of the community's desires for the area and should be consulted when evaluating the issue of community character as impacted by a project"]; Matter of Miracle Mile Assocs., Decision of the Commissioner, December 6, 1979, at 3 ["[t]he Department will not intrude its judgment . . . in matters which have properly been the subject of definitive local governmental determinations of patterns of land use"]).

In this case, although the Town of Greenport, in which the SLC mine is located, has no zoning ordinance, it has stated that the project would be consistent with the Town's character.[11] However, local land use plans are not the only evidence of community character where, as here, a project may have impacts on resources with recognized designated historic and cultural importance, such as the Olana State Historic Site. Environmental considerations such as scenic views and vistas, absence of pollution-created haze, or water resources may be components, where appropriate, of the character of a community.

Impacts on community character are often intertwined with other environmental issues and can be addressed in the context of those specific issues (see Matter of Lane Constr. Co., ALJ's Interim Issues Ruling, Feb. 22, 1996, at 16 [most of intervenors' alleged impacts on community character, including impacts on clean air and health of residents, held to be issues for adjudication under specific rulings, including rulings regarding PM_{10} and fugitive dust emissions]; Matter of Amenia Sand & Gravel, Inc., ALJ's Rulings on Party Status and Issues, June 16, 1997, at 13 ["the appropriate consideration of visual impacts to the vicinity's scenic resources is central to the

[11] As the ALJs indicate, no local governmental entity in the project area is proposing community character as an independent issue for adjudication.

evaluation of the Project's overall impact on community character"]).

Based upon my review of the DEIS and issues conference record, the adjudication of visual impacts and air quality impacts in this proceeding will address a number of potential environmental concerns that intervenors have raised with respect to community character. HVPC, in raising community character, references concerns with respect to the extent of the area of the impacted viewshed, alleged visual impairment of Scenic Areas of Statewide Significance and other scenic vistas, and visual impacts to historic properties (see HVPC Petition for Party Status, at 13-16). The adjudication of visual impacts will, by its consideration of impacts on various viewsheds including historic sites such as Olana, provide an opportunity to determine the extent to which scenic views from or to such locations will be impacted. Thus, SLC's challenge is rejected and the ALJs' ruling that any impacts to community character will be adequately addressed in conjunction with other identified environmental issues is affirmed.

HVPC contends that the project raises substantive and significant matters for adjudication beyond direct environmental impacts ("secondary impacts"). HVPC challenges various representations SLC makes in the DEIS concerning the character of the existing community surrounding the project, and the future

development of the local community. HVPC seeks to develop the record concerning the Hudson Valley Region's trend away from industrial uses, and towards greater reliance on recreation, tourism, historic resources, and second-home ownership (see id.).

The DEIS recognizes and considers the factual background that HVPC seeks to develop concerning the characteristics of the community. For example, the DEIS notes that the "historic character of the regional landscape has spurred a trend for local municipalities . . . to market themselves as tourist and second-home destinations," a trend which "appears to be a lasting one" (DEIS, at 2-20). The DEIS also references the development of antique, craft and art gallery trades, as well as the growth of tourism, in this area (see id.).

HVPC also seeks to develop the record concerning the proposed project's consistency with trends in the community. Neither applicant nor any other party disputes that local trends may potentially change the mix of industrial, commercial, agricultural and residential sectors in this part of the Hudson Valley. To the extent that there may be differing perspectives on these trends, these viewpoints have been expressed in the legislative hearing and in the public comments on the DEIS, which the Department must consider in the preparation of the FEIS and in its SEQRA findings.

Thus, HVPC fails to join an adjudicable issue concerning the factual sufficiency of the DEIS or the Department's ability to make SEQRA findings (see 6 NYCRR 624.4[c][6][i][*b*]). Any further development of the factual record on these matters would not materially aid the SEQRA decision making process and would constitute an unnecessary academic exercise.

The parties' positions amount to differences of opinion about which particular community values and trends deserve protection. The DEIS, together with the public comment process, provide sufficient information to allow the decision maker to evaluate these trends and the project's consistency with them, and reach the determinations necessary to make SEQRA findings (cf. Matter of Hyland Facility Assocs., Third Interim Decision of the Commissioner, August 20, 1992, at 4 [Department not required to use adjudicatory hearing process to discharge its obligations as SEQRA lead agency]).

Moreover, to the extent that HVPC seeks to raise various other economics-related matters as an element of community character, such as the project's potential impact on the property market for historic structures, on local property values, and on certain economic sectors (tourism, second home ownership and antique businesses), these matters fail to present an adjudicable issue. Reduction of property values and other

economic-related matters standing alone are not considered to be environmental impacts (see Matter of Red Wing Props., Inc., Interim Decision of the Commissioner, January 20, 1989, at 2; Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, June 20, 1995, at 8 [upholding ALJ ruling that diminution of property values not an environmental issue]; Matter of Hyland Facility Assocs., Interim Decision of the Commissioner, August 20, 1992, at 5 [potential loss of revenue derived from tourism an economic issue, not an issue of community character]; Matter of Waste Mgt. of New York, ALJ Rulings on Party Status and Issues, December 31, 1999, at 46 [holding that under agency precedent, property value impacts not considered "environmental" impacts, but accepting submission relating to property impacts as a substantive comment on the project's DEIS]).[12] Although economics-related matters that HVPC raises may be relevant to any final weighing and balancing of social, economic and other considerations with environmental impacts in developing SEQRA

[12] HVPC cites language from Matter of Palumbo Block Co. (Interim Decision of the Commissioner, June 4, 2001) in support of its broad interpretation of "community character." The reach of Palumbo is much more limited than HVPC suggests, given the context of that proceeding. The issue was primarily whether local law amendments to create a "Scenic Corridor Overlay Zone" would redefine or alter local development goals. The Department, which was the lead agency in that proceeding, evaluated the status and intent of the proposed amendments with respect to the Town of Ancram's definition of its community character.

findings, as noted, the record provides a sufficient basis upon which to make such findings.

SLC contends that the ALJs' ruling contravenes the principle that SEQRA does not change the jurisdiction of agencies. The ALJs' ruling, however, merely provides that the adjudicatory hearing will examine the environmental impact of the project on visual and air resources of the affected communities, consider whether such impacts are more significant than indicated in the DEIS, and evaluate any appropriate mitigation measures.

HVPC's argument that the ALJs defined too narrowly the geographic scope of the air and visual impacts is persuasive, however.[13] The ALJ's conclusion that the inquiry should be limited to the Town of Greenport, the City of Hudson, and the Village of Athens is too restrictive. The geographic scope of the inquiry depends upon the nature of the impact. For example, any assessment of visual impacts must include the entire relevant viewshed of the project (see Visual Impacts Guidance, at 5). The evaluation of air pollution impacts must take into account the entire geographical extent of those impacts, including those beyond the boundaries of the municipalities identified. Beyond this, however, HVPC's contention that impacts on the entire Hudson Valley must be considered is rejected.

---

[13] In its reply to the appeals, Department staff agrees with the assessment that the ALJs too narrowly circumscribed the geographical scope of visual impacts.

Accordingly, the ALJs' ruling on community character is modified with respect to the geographic scope of visual and air impacts, and otherwise affirmed.

Historic Resources

The ALJs ruled that the issues proposed for adjudication with respect to historic resources are not independent of other issues that have been deemed adjudicable, "specifically, air pollution and visual impacts" (ALJs' Issues Ruling, at 109).

Although SLC agrees with the ALJs' ruling that the project's impact upon historic resources is not separately adjudicable, SLC challenges the ALJs' conclusion that impacts upon historic resources are adjudicable in the context of such other issues as visual and air pollution impacts.[14] SLC contends that because intervenors failed to raise an adjudicable issue concerning impacts on historic resources, the issue cannot be brought in through the "back-door" of other adjudicable issues.

"Environment" is defined by SEQRA to include "objects of historic or aesthetic significance" (ECL 8-0105[6]; see also 6 NYCRR 617.2[1]). A project's visual impact upon historic

[14] SLC's challenge to the ALJs' conclusion that impacts upon historic resources will be addressed in the context of air pollution impacts is moot, because TOP has withdrawn this issue from adjudication.

resources is a recognized concern under SEQRA (see Matter of Lane Constr. Co., Second Interim Decision, July 31, 1996, at 7; Matter of WEOK Broadcasting Corp. v Planning Bd. of Town of Lloyd, 79 NY2d 373, 384 [1992]; see also Visual Impacts Guidance).

The DEIS recognizes that the proposed project will have a visual impact on many of the area's historic resources (see DEIS, at 7-38). In accordance with SEQRA, the extent of these visual impacts must be considered together with any appropriate mitigation measures. Accordingly, the ALJs' determination that the adjudication of visual impacts will include consideration of these impacts on historic resources is affirmed.

Miscellaneous Issues

Burden of Proof at Hearing

FOH contends that with respect to two issues certified for adjudication by the ALJs and affirmed on appeal, the ALJs improperly placed the burden of proof at the adjudicatory hearing on intervenors rather than on SLC. Citing 6 NYCRR 624.9(b)(1), FOH contends that once an intervenor carries its burden at the issues conference of establishing the existence of an adjudicable issue, the burden at the adjudicatory hearing is upon the applicant to prove, by a preponderance of the evidence, that the application meets all requirements for permit approval. FOH seeks a modification of the ALJs' ruling to clarify this point. TOP raises the same issue in its appeal.

Although I do not agree that the ALJs' improperly shifted the ultimate burden of proof in this case, some discussion of the issue is warranted. The two holdings challenged by FOH appear in the ALJs' rulings on $PM_{2.5}$ and visual impacts. In their ruling on $PM_{2.5}$, the ALJs held:

> Based upon the differing expert opinions as to the calculation of $PM_{2.5}$ emissions and the probable impacts, we find this to be an appropriate matter for adjudication. The intervenors will have the burden of demonstrating that the analysis performed by SLC underestimated the amount of $PM_{2.5}$ that will be emitted into the atmosphere, and that those emissions will likely affect public health

(Issues Ruling, at 53). Similarly, in their ruling on visual impacts, the ALJs held:

> [W]e find that the issue to be adjudicated concerning visual impacts is whether the mitigation and offsets provided by the applicant are sufficient such that the Commissioner could ultimately find that there are no significant adverse visual impacts from this facility on the scenic resources of this area. To develop this record, the intervenors will have the burden of advancing proof that the mitigation offered will not sufficiently mitigate the impacts particularly with respect to the viewshed concerning (1) Olana, (2) the relevant SASSs, (3) the Village of Athens waterfront, ([4]) other historic sites that are registered or eligible for such listing in accordance with PHL § 14.09, and ([5]) identifiable community resources

(id. at 105).

A fair reading of the ALJs' ruling does not suggest that the ALJs improperly placed the ultimate burden of proof upon intervenors. The ALJs are well aware that SLC has the ultimate burden of proof in this case (see 6 NYCRR 624.9[b][1], [c]). Rather, the ALJs' ruling recognizes that given the expert analyses of $PM_{2.5}$ and visual impacts provided by SLC in its application materials, when those analyses are entered into the evidentiary record at the adjudicatory hearing stage, such analyses may be sufficient to establish a prima facie case of compliance with statutory and regulatory standards governing permit issuance. Also, given the nature of the issues raised by intervenors, the ALJs are indicating that intervenors will have to put on an affirmative case in order to rebut SLC's prima facie showing, assuming one is established, and provide record evidence supporting their position. So viewed, the ALJs' holdings are consistent with the ordinary shifting of the burden to produce evidence -- as distinct from the non-shifting ultimate burden of proof established by section 624.9 -- common to all evidentiary hearings, including those conducted pursuant to Part 624 (see Matter of Peckham Materials Corp., Second Interim Decision, March 15, 1993, at 4; see also Prince, Richardson on Evidence §§ 3-201 and 3-202 [Farrell 11th ed]).

I make no determination at this time concerning whether SLC's proof at hearing will be sufficient to establish a prima

facie showing of compliance with all statutory and regulatory requirements applicable to the proposed project. Having carried their burden of raising adjudicable issues at the issues conference stage, intervenors may, if they so choose, decline to present an affirmative case, but merely limit their participation to cross-examination of SLC's witnesses (see Matter of Peckham Materials, Second Interim Decision, at 4). If intervenors do not present an affirmative case, however, they risk an adverse ultimate determination if it is concluded that SLC made its prima facie showing (see id.).

Production of SLC's Test Blast Results

At a preliminary issues conference conducted on June 21, 2001, the ALJs rejected a request by several intervenors for production by SLC of blasting data on the ground that the request was premature (see ALJs' Issues Ruling, at 6). Subsequently, at the issues conference, intervenors challenged the sufficiency of the DEIS with respect to impacts from blasting activities, including potential impacts to nearby sewer lines and water mains, historic and other structures, and sensitive community facilities such as hospitals. In response, SLC noted that intervenors failed to retain an expert to take measurements or collect data to substantiate their claims regarding existing and potential conditions, and argued that blasting operations would comply with guidelines issued by the U.S. Bureau of Mines upon

which the Department relies. In rebuttal, HVPC reiterated its request for test blast data, arguing that such data were essential to the evaluation of SLC's project.

The ALJs held that intervenors failed to raise a substantive and significant issue (see ALJs' Issues Ruling, at 67). The ALJs concluded that SLC's project conforms with the U.S. Bureau of Mines Guidelines, and that intervenors failed to make an adequate offer of proof that those guidelines were not sufficiently protective (see id.).

The ALJs also rejected HVPC's contention that a "negative inference" should be drawn from SLC's failure to produce the requested test blast results (see id. at 70). The ALJs concluded that such an inference is only applied when an applicant refuses to comply with an ALJ's direction that evidence be produced, which did not occur in this case. The ALJs held, "In any event, even if a negative inference were to be drawn from the applicant's failure to provide the report, that failure would not be sufficient to adjudicate the project's blasting impacts. Rather, the proposed intervenors are required to make an affirmative offer of proof in order to raise an adjudicable issue" (id.).

On their appeal, HVPC argues that the ALJs' rejection of its request that the test blast results be produced was an error of law and violated SEQRA's requirements of public notice

and participation. HVPC contends that critical information has been withheld from the public that would assist in the evaluation of the project's impacts, and that meeting federal guidelines may not always be sufficient to satisfy SEQRA. HVPC reiterates its argument that a negative inference should be drawn from SLC's failure to produce the data.

HVPC's argument is rejected. As correctly noted by the ALJs, in Part 624 permit hearing proceedings in circumstances such as these, proposed intervenors have the affirmative obligation at the issues conference stage to raise an adjudicable issue. Contrary to HVPC's suggestion, HVPC had ample opportunity to offer proof that the federal guidelines are insufficiently protective, and its ability to do so was not hampered by the lack of access to the test blast results. Having failed to provide a sufficient offer of proof, HVPC did not raise an adjudicable issue, and SLC's voluntarily conducted study need not be produced. Thus, the ALJs' ruling is affirmed.

The Olana Partnership's Issues

TOP raises one issue on appeal. TOP joins FOH in objecting to the ALJs' ruling concerning whether intervenors carry a burden of proof at the adjudicatory hearing phase of the proceedings. That issue is addressed above.

In their filing in response to the Commissioner's August 5, 2002 ruling, TOP contends that it has no additional

issues to raise on appeal. However, TOP asserts that two issues still require supplementation of the record, as per the direction of the ALJs: (1) air pollution impacts to Olana resulting from acid deposition emanating from the Greenport plant (see ALJs' Issues Ruling, at 20-21),[15] and (2) the determination of the Office of Parks, Recreation and Historical Preservation ("OPRHP") (see id. at 109-112). SLC did not appeal these directions. Accordingly, the supplementation required by the ALJs is affirmed.

Full Party and Amicus Status Issues

Joinder of Citizens for a Healthy Environment with HVPC

HVPC argues that the ALJs abused their discretion when they did not allow Citizens for a Healthy Environment ("CHE") to join HVPC as part of the coalition. HVPC contends that CHE is a grass roots organization with a commitment to two issues concerning Columbia County, $PM_{2.5}$ and environmental justice. Although CHE was involved early in these Part 624 proceedings, HVPC contends that its withdrawal was due to a miscommunication. HVPC argues that because CHE was involved early in the process, SLC will suffer no prejudice if CHE is joined. In addition, HVPC contends CHE is not seeking to raise any issues not already raised by HVPC in its petition. HVPC contends that allowing CHE

[15] Although this issue was determined to be adjudicable in the First Interim Decision, TOP has subsequently withdrawn the issue.

to join HVPC would further the goals of ensuring that environmental justice concerns are adequately addressed in SLC's application process.

The ALJs' ruling denying HVPC's application to add CHE to its coalition is affirmed. CHE filed a letter of intent to seek party status by the June 13, 2001, deadline. CHE did not file a petition, however. Instead, the ALJs received a letter dated July 12 and signed by Samara Swanston, Esq., who, on behalf of CHE, indicated that it would no longer be seeking full party status.

During one of the final days of the issues conference -- July 31, 2001 -- Mark Gerstman, Esq., who represents HVPC, requested that CHE be added to the coalition. ALJ Goldberger denied the request as untimely (see IC Trans, at 2021).

To the extent HVPC's request is viewed as a late filed petition for party status, HVPC did not satisfy regulatory requirements (see 6 NYCRR 624.5[c]). Even accepting the claim that the July 12 letter was due to a miscommunication, no good cause is demonstrated for why the application was made so late in the issues conference. Moreover, if CHE intends to offer no issues other than those included in HVPC's petition, no showing has been made that CHE will materially assist in the determination of those issues. Thus, the ALJs correctly denied HVPC's application.

Preservation League of New York State/National Trust for Historic Preservation

The Preservation League of New York State ("Preservation League") and the National Trust for Historic Preservation ("NTHP") (jointly "amici") seek clarification of the ALJs' ruling allegedly limiting their participation as amici to issues concerning Olana (see ALJs' Issues Ruling, at 136). In my view, the ALJs did not so limit amici's participation. They simply granted the joint petition of the Preservation League and NTHP for amicus status "based upon their submissions thus far with respect to issues concerning Olana" (id.). Elsewhere in their ruling, the ALJs acknowledged that amici raised concerns about, among other things, the project's coastal zone consistency, and impacts to SASSs. Thus, amici may participate to the extent that issues raised in their petition have been determined to be adjudicable.

Massachusetts Department of Environmental Protection

In its appeal, MDEP challenges the ALJs' failure to grant it full party status. The ALJs ruled that because MDEP raised no adjudicable issues, its petition for party status must be denied (see ALJs' Issues Ruling, at 136). Because MDEP failed to raise any adjudicable issues on appeal, the ALJs' ruling is affirmed.

Natural Resources Defense Council

The Natural Resources Defense Council ("NRDC") challenges the ALJs determination to deny it amicus status. In so ruling, the ALJs held, "while NRDC may participate as a member of the Coalition [HVPC], its participation has also been minimal and its brief, while laudable in its expressed concern for the Hudson River Valley, is too general to provide guidance in these proceedings" (ALJs' Issues Ruling, at 136).

My review of NRDC's petition leads me to conclude that the ALJs correctly ruled that NRDC's petition for amicus status fails to meet regulatory standards (see 6 NYCRR 624.5[d][2]). NRDC's general claim that it is an expert on SEQRA does not support a finding that it has a sufficient expertise, special knowledge, or unique perspective that may contribute materially to the record. Moreover, with respect to the specific issues raised by NRDC, it was determined in the First Interim Decision that the adequacy of the alternatives analysis in the DEIS, including the "no action" alternative, was not adjudicable (see First Interim Decision, at 28). NRDC's concern that SLC may seek, at some future point in time, permission to burn hazardous wastes and tire-derived fuels is speculative. NRDC's contention that issues concerning $PM_{2.5}$ and global warming may require briefing does not constitute a sufficient showing under the

regulations. Thus, the ALJs' denial of NRDC's petition for amicus status is affirmed.

Remaining Issues

Those issues raised by the parties on their appeals not expressly addressed in this decision or the First Interim Decision have been reviewed and are determined to be either academic, lacking in merit, or otherwise resolved.

Accordingly, the proceeding is remanded to the ALJs for further proceedings consistent with this Second Interim Decision, the First Interim Decision, and those portions of the ALJs' Issues Ruling not addressed on appeal.

For the New York State
Department of Environmental
Conservation

by: _____
Erin M. Crotty, Commissioner

Albany, New York
September 8, 2004

APPENDIX A

Table of Acronyms

Administrative Law Judges	ALJs
American Society of Landscape Architects	ASLA
Best Available Control Technology	BACT
Coastal Assessment Form	CAF
Continuous Emission Monitoring System	CEM
Citizens for a Healthy Environment	CHE
New York State Coastal Management Program	CMP
Carbon Monoxide	CO
Draft Environmental Impact Statement	DEIS
New York City Department of Sanitation	DOS
Environmental Conservation Law	ECL
Environmental Impact Statement	EIS
Environmental Protection Agency	EPA
Emission Reduction Credits	ERCs
Final Environmental Impact Statement	FEIS
Friends of Hudson	FOH
Grams per second	GPS
Hudson Valley Preservation Coalition	HVPC
Lowest Achievable Emission Rate	LAER
Lawler, Matusky & Skelly, Engineers, LLP	LMS
Local Waterfront Revitalization Plan	LWRP
Maximum Achievable Control Technology	MACT
Massachusetts Department of Environmental Protection	MDEP
Mined Land Use Plan	MLUP
Micrograms per cubic meter	$\mu g/m^3$
National Ambient Air Quality Standard	NAAQS
National Oceanic and Atmospheric Administration	NOAA
Oxides of Nitrogen	NO_x
Natural Resources Defense Council	NRDC
New Source Review	NSR
National Trust for Historic Preservation	NTHP
National Weather Service	NWS
Official Compilation of Codes, Rules and Regulations of the State of New York	NYCRR
Department of Environmental Conservation	Department or DEC
Office of Parks, Recreation, and Historic Preservation	OPRHP
Ozone Transport Region	OTR
Particulate Matter	PM
Particulate Matter smaller than 2.5 micrometers in diameter	$PM_{2.5}$
Particulate Matter smaller than 10 micrometers in diameter	PM_{10}
Parts Per Million, Dry Volume Basis	ppmdv
Prevention of Significant Deterioration	PSD
Potential To Emit	PTE

Reasonably Available Control Technology.....RACT
RACT/BACT/LAER.....RBL
Regenerative Thermal Oxidizer.....RTO
Scenic Areas of State-Wide Significance.....SASS
Submerged Aquatic Vegetation.....SAV
State Environmental Quality Review Act.....SEQRA
State Historic Preservation Act.....SHPA
State Implementation Plan.....SIP
Saint Lawrence Cement.....SLC
Selective Non-Catalytic Reduction.....SNCR
Sulfur Dioxide.....SO_2
State Pollutant Discharge Elimination System.....SPDES
Total Hydrocarbon Content.....THC
The Olana Partnership.....TOP
Tons Per Year.....tpy
United States Fish and Wildlife Service.....USFWS
United States Geological Survey.....USGS
Volatile Organic Compounds.....VOC