

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of

ST. LAWRENCE CEMENT COMPANY, LLC

Application Number
4-1040-00011/00001

FRIENDS OF HUDSON
POST ISSUES CONFERENCE BRIEF

Dated: September 7, 2001

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PRELIMINARY STATEMENT

Friends of Hudson (FOH) has petitioned for full party status in this proceeding and through its petition and the 12 days of the Issues Conference has met the regulatory burden of identifying substantive and significant issues for adjudication.

In accordance with the direction of the ALJs, FOH submits this brief to address the legal issues identified in the ALJ's August 2, 2001 memo. Pursuant to the ALJ's direction, this brief is not intended as a reiteration of FOH's petition for party status or the offers of proof. The ALJ's are directed to FOH's petition and the Issues Conference transcript for that information.

POINT I

SEQRA REQUIRES MINIMIZING ADVERSE ENVIRONMENTAL IMPACTS IF THEY EXIST DESPITE REGULATORY STANDARDS

As established by the Legislature, SEQRA requires all agencies to conduct their affairs with an awareness that they are stewards of the environment and to act to protect those resources for the present and future generations. ECL Sec. 8-0103. That policy goal is effectuated by the requirement that approvals only be given to projects which minimize or avoid adverse environmental impacts to the maximum extent practicable, consistent with social, economic and other considerations. ECL Sec. 8-0109. Nothing in SEQRA sets as a limit on that obligation compliance with a particular regulatory standard. In fact, DEC and other agencies have frequently required mitigation measures for projects which ostensibly complied with a regulatory scheme where there was a finding that adverse environmental impacts would otherwise result. While regulatory standards are relevant for consideration, they are not determinative of the SEQRA outcome, since SEQRA provides the mechanism for the application of a general regulatory program to the particular circumstances of a specific project. See, *WEOK Broadcasting Corp. v. Planning Board of the Town of Lloyd*, 79 N.Y.2d 373 (1992).

In the context of SLC's application we are presented with this issue in several contexts, including, but not limited to, air pollution, noise pollution and visual impacts. Obviously when there is no regulatory standard, such as when assessing visual impacts, the impact of a project on community character or the impact to fish and wildlife, SEQRA provides the only framework for

consideration of those impacts and the agency is afforded not only wide discretion, but has an affirmative obligation to minimize the adverse consequences to the maximum extent practicable. See, WEOK Broadcasting, 79 N.Y.2d 373; Matter of Lane Construction Corp. v. Cahill, 270 A.D.2d 609 (3rd Dept. 2000) *lv to appeal denied* 95 N.Y.2d 765; Wal-Mart Stores, Inc. v. Planning Board of the Town of North Elba, 238 A.D.2d 93 (3d Dept. 1998).

Even where a specific regulatory standard exists, DEC has the discretion and has exercised it to impose conditions or require lower emission limits to avoid identified adverse impacts. See Gerrard, Ruzow, Weinberg *Environmental Impact Review in New York*, Sec. 5.12[2]. The most obvious example is Consolidated Edison Co. of New York, (Commissioner Decision, Sept. 14, 1983) where the DEC imposed an alternative upon an applicant for a power plant permit to prevent the creation of acid rain, despite ostensible compliance with air pollution regulations. That decision was upheld because the Commissioner had properly balanced the economic costs of the condition against the environmental harm that would be caused by the increased sulfur dioxide emissions. Consolidated Edison Co. v. Department of Environmental Conservation, 112 A.D.2d 989, 492 N.Y.S.2d 800 (2d Dept. 1985).

POINT II

IN SEQRA FINDINGS THE LEAD AGENCY MUST WEIGH SOCIAL ECONOMIC AND OTHER ESSENTIAL CONDITIONS AGAINST ADVERSE ENVIRONMENTAL IMPACTS THAT HAVE NOT BEEN FULLY MITIGATED

The SEQRA statute specifically requires an agency intending to approve a project which has been the subject of an EIS to find “that consistent with social, economic and other essential consideration, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided”. ECL Sec. 8-0109(8). The SEQRA regulations state the requirement slightly differently by specifically requiring the

agency to choose from the reasonable alternatives available, the action which avoids or minimizes adverse environmental impacts to the maximum extent practicable. 6 NYCRR Sec. 617.11(d)(5). Thus, the question presented by the ALJ - what weighing and balancing should be done once it has been determined that impacts have been mitigated to the maximum extent practicable - somewhat mischaracterizes the process. In reality the balancing must occur at the end of the process when all the information is available.

For instance, if all of the adverse environmental impacts have been avoided, no balancing is necessary - since there are no unmitigated or minimal adverse impacts left - practicability is not an issue. If however, it is impracticable to avoid or minimize the adverse impacts any further without fundamentally altering the nature of the action in a manner that abandons its purpose, then the action can only be approved if the unavoided adverse impacts are outweighed by the social, economic and other essential considerations.

It is obvious that for such an analysis to occur there must be a solid record upon which to base the final conclusions. As the court noted in Matter of Lane Construction Corp. v. Cahill, 270 A.D.2d 609 (3rd Dept. 2000) *lv to appeal denied* 95 N.Y.2d 765, the final decision will be upheld if “it is supported by such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact”. Lane, 270 A.D.2d at 612, quoting 300 Gramatan Ave. Assoc. v. State Div. of Human Rights, 45 N.Y.2d 176.

The need for the balancing and using the balancing as a the basis for denying a permit are well established. In Town of Henrietta v. Dept of Env'tl. Conservation, 76 A.D.2d 215, 223, 430 N.Y.S.2d 440, 447 (4th Dept. 1980), the court held that SEQRA “mandates a rather finely tuned and systematic balancing analysis in every instance.”. See, In re 4-C's Development Corp., (DEC Commissioner Decision, May 1, 1996) (“if adverse impacts of hydrogen sulfide gas cannot be completely mitigated or avoided, there must be a balancing of social and economic benefits

against the unmitigable impacts.”). Maple Lane Assocs. V. Town of Livingston, 197 A.D.2d 817, 603 N.Y.S.2d 70 (3d Dept. 1993) (explaining town rationally weighed need for affordable housing and rejected proposed development since ample affordable housing currently existed). In re Bonded Concrete, Inc. (DEC Commissioner Decision, Apr. 9, 1984) at 2,3. (“the record . . . not sufficiently developed to allow the required balancing of environmental, social and economic factors to be undertaken in the comprehensive manner contemplated by SEQRA.”).

The weighing and balancing is integrally related to the sufficiency of the alternatives analysis discussed in Point III, infra. There must be sufficient information about the available alternatives to consider not only their availability, but the relative impacts associated with each.

In this case, if we assume, arguenda, that the adverse impacts have been avoided or minimized to the maximum extent practicable - then we are left with unmitigated adverse visual impacts, since even SLC admits its plant will have an adverse visual impact. Then the Commissioner must decide if the benefits of the project outweigh those impacts. In order to reach that conclusion, the Commissioner must consider the economic benefits of the project. As presented in FOH’s petition, those benefits are greatly overstated by SLC. FOH has proffered expert testimony, unchallenged by SLC, demonstrating the lack of economic benefit. If SLC is arguing for economic benefit to balance out the adverse environmental impacts, that presents an issue of fact for adjudication. Just as factual issues concerning air, noise and water issues must be settled to reach a decision, so must the claimed need and benefit of the project. On the other hand, if SLC does not want to prove its contention and an adjudicatory hearing on the issue is not held, no weight should be given to unsubstantiated beneficial claims and there is no balance to be provided against the unmitigated adverse impacts.

POINT III

THE CONSIDERATION OF ALTERNATIVES MUST BE OF SUFFICIENT

DETAIL TO ALLOW THE AGENCY TO CHOOSE AMONG THE ALTERNATIVES IN ITS FINAL DECISION

As noted previously, to meet its obligations under SEQRA, the DEC must choose from among the reasonable alternatives the one that minimizes the adverse environmental impacts. In order to allow that finding to be made, the SEQRA regulations provide that “the description and evaluation of each alternative should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed”. 6 NYCRR Sec. 617.9(b)(5)(v).

The consideration of alternatives has often been called the “heart” or the “linchpin” of the EIS process, whether being considered under SEQRA or NEPA. See, Shawangunk Mtn. Env’tl Ass’n v. Planning Board of the Town of Gardiner, 157 A.D.2d 273 (3d Dept. 1990); Monroe County Conservation Society v. Volpe, 472 F.2d 693 (2d Cir. 1972). The degree of detail required for the consideration of each alternative varies and depends upon the circumstances and nature of the particular project. Webster Associates v. Town of Webster, 59 NY2d 220, 228, 464 NYS2d 431, 433-34 (1983). For very large projects “it may be reasonable to explore a full EIS discussion of each alternative. This is especially true with alternative technologies in which fully detailed modeling is the minimum level of information necessary for a comparative assessment”. Gerrard, Ruzow, Weinberg *Environmental Impact Review in New York*, Sec. 5.14[3]; quoting DEC, *The SEQR Handbook* at 64 (1992).

Courts have upheld an alternatives analysis that had a sufficient level of detail in a range of alternatives. See City of Ithaca v. Tompkins County Board of Representatives, 164 A.D.2d 726, 565 N.Y.S.2d 309 (3d Dept. 1991)(before choosing site for county solid waste processing facility, the county considered 11 alternative sites with attention to wetlands, aquifers, wildlife, traffic, zoning, etc.).

Discussions of alternatives not favored by the project sponsor must go beyond conclusory statements and must be based upon more than mere assertions to satisfy the

requirement for an adequate alternatives analysis. NRDC v. Calloway, 524 F.2d 69 (2d Cir. 1975); Gerrard, Ruzow, Weinberg *Environmental Impact Review in New York*, Sec. 5.14[3].

In this case, SLC's alternative's analysis is little more than conclusory statements and inadequate review. This is a project of enormous magnitude, virtually unparalleled in the Hudson Valley and the first new cement plant permitted since the enactment of SEQRA. Nevertheless, as set forth in FOH's petition for party status and as more fully discussed at the Issues Conference, SLC has provided no information with respect the available limestone reserves in Catskill; the ability to reconstruct a facility in Catskill; the amount of dredging required for the Catskill facility and most importantly the relative economic costs associated with the various alternatives. The most striking example of the lack of sufficient alternatives analysis is the complete absence of a visual assessment of a Catskill alternative. While the visual assessment of the proposed Greenport project is arguably comprehensive¹ in terms of the number of visual simulations, there is not a single simulation showing what a Catskill facility would look like. Therefore there is no point of reference for the decision maker to make the comparison required to issue findings. Obviously, for a project of this magnitude, SEQRA mandates a far more extensive alternatives analysis than has been conducted to date.

POINT IV

SLC'S MINING ACTIVITIES ARE SUBJECT TO SEQRA

SLC is seeking to increase its rate of extraction of mining to in excess of 6 million tons per year together with an increase in truck traffic, noise and dust associated with that expanded

¹ FOH maintains that SLC has understated the visual impact of Greenport with inaccurate visual simulations and FOH has offered the simulations and testimony of Vincent Bilotta to demonstrate a more accurate assessment. Moreover, the site visit conducted on August 16, 2001 demonstrated that many of the photographs taken by SLC were taken in a manner and at locations designed to understate the impact the plant would have on the landscape.

production. SLC claims, and DEC staff have apparently agreed, that such an increase is a grandfathered action and exempt from SEQRA review. FOH has also argued that SLC's mining activities should be subject to SEQRA review to consider maintaining Becraft Ridge to maintain the visual character of the area. As fully discussed below, the tripling of the extraction rate of the mining is clearly not grandfathered and the 1990 Stipulation and Order on Consent does not limit SEQRA's application to the increased extraction rate. Furthermore, consideration of the maintenance of Becraft Ridge is appropriate under SEQRA.

SEQRA excludes from the definition of actions to which it applies, those actions undertaken or approved prior to SEQRA's effective date. ECL Sec. 8-0111(5). There are two exceptions to the exclusion:

(i) In the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or

(ii) In the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification.

ECL Sec. 8-0111(5)(a).

The second paragraph concerns SLC's attempt to increase its extraction rate, while the first paragraph addresses the issue of the preservation of Becraft Ridge. When the courts have considered these questions, they have consistently held that a substantial change in the scope or magnitude of the activities serves to "ungrandfather" an action from SEQRA.

The fundamental principle was established by the Court of Appeals in Matter of Salmon v. Flacke, 61 N.Y.2d 798, 800 (1984) which while finding that the landfill at issue in that case was grandfathered, it stated " in other circumstances, there might be proof of change in the level

of operation so substantial as to be sufficient to remove an activity from the exclusion clause ECL 8-0111(5)(a), notwithstanding that the basic nature of the activity remains unchanged”.

That rule has been recognized by other courts, particularly in the context of mining operations. In Matter of Atlantic Cement Co. v. Williams, 129 A.D.2d 84, 516 N.Y.S.2d 523 (3rd Dept. 1987) the Appellate Division agreed that an action can be ungrandfathered due to a substantial change in the level of activity, but found that:

Petitioner’s basic activities, however, appear to have remained unchanged since prior to the enactment of SEQRA. There is no showing of a significant change in its blasting activities.

Atlantic Cement, 129 A.D.2d at 92.

Similarly, in Matter of Fletcher Gravel Co. v. Jorling, 179 A.D.2d 286, 583 N.Y.S.2d 286 (4th Dept. 1992) the mining activities were grandfathered because there was no substantial change in previously reviewed and permitted activities.

Conversely, in Matter of Guptill Holding Corp. v. Williams, 140 A.D.2d 12, 531 N.Y.S.2d 648 (3rd Dept. 1988) there was evidence of substantial difference in the level of mining activity from the pre-1975 levels to support a determination that the increased activity was not grandfathered.

The present case presents similar facts to Guptill and demonstrates the substantial change that the courts said were lacking in Atlantic Cement and Fletcher Gravel. There is no question that the rate of extraction is at least a three-fold increase over what was described in the previous Mined Land Use Plan and 1,300 % increase over the previous maximum rate of extraction. Moreover there will be a substantial increase in the size and frequency of blasting. Clearly that increased level of activity constitutes a substantial change of activity requiring compliance with SEQRA.

The 1990 Stipulation does not negate the application of SEQRA with respect to the increased activity. In fact, it supports FOH's point that the mining activity cannot be considered grandfathered. The 1990 Stipulation only addresses the areal extent of the mining activity. (See, IC Exhibit 12(b), page 2, fourth "Whereas" paragraph). The Stipulation also provided that the permittee would conduct its mining operations in accordance with the May 22, 1990 Updated Mined Land Use Plan which also included the updated narrative to that plan. [IC Exhibit 12(b); paragraph 3(a)]. Moreover, the Stipulation specifically recognizes that nothing in the Stipulation precludes the future application of the "ungrandfathering" provisions of SEQRA. [IC Exhibit 12(b); p. 2, sixth "whereas" paragraph].

As recognized by SLC, the MLUP referenced in that Stipulation projected an extraction rate of 2 million tons per year. (DEIS, Appendix A. p. A-2). Thus, by the terms of the Stipulation, 2 million tons per year is the currently permitted level of activity. Contrary to SLC's claims, since it is bound by that narrative, it is not permitted to mine in excess of 6 million tons per year. FOH has demonstrated that the DEIS has failed to consider and mitigate the adverse impacts associated with the increased extraction rate.

In addition to the requirement that the increased extraction rate be subject to SEQRA, the areal extent of the mining should also be ungrandfathered under Sec. 8-0111(5)(a)(i). As fully discussed at the Issues Conference, maintenance of Becraft Ridge is important for maintaining the visual character of the area. Where it is practicable to modify the action so as to mitigate adverse environmental effects, it is appropriate for the DEC Commissioner to exercise her authority to ungrandfather the action. Matter of Rome-Floyd Residents Association v. Flacke, 113 Misc.2d 990, (Sup. Ct. Oneida County 1982) aff'd 93 A.D.2d 981 (4th Dept. 1983) (work on project had not progressed to the point where necessary mitigation measures could not be practicably designed as opposed to alternative sites which were not practicable). In this case the

practicability of the modification - the preservation of Becraft Ridge - is not in question. SLC in its agreement with Columbia County has already agreed to maintain the ridge line. However, SLC has refused to amend its MLUP to reflect the change and DEC staff is also unwilling to include the change. As a result the SLC's agreement with the County is an illusory commitment. That agreement is only enforceable by the County and is not enforceable against any entity to which SLC transfers the property.² Since SLC is willing to mitigate the adverse effects of its otherwise permitted removal of the ridge line, the mining permit should be amended to reflect that condition. Otherwise the commitment is neither enforceable by DEC nor the affected citizens under ECL Sec. 71-1311.

POINT V

SEQRA MANDATES A THOROUGH ANALYSIS OF THE ADVERSE IMPACTS FROM PM_{2.5} CREATED BY THE PROJECT AND SLC'S SUBMISSIONS DO NOT SATISFY THE SEQRA REQUIREMENT

It is beyond cavil that PM_{2.5} presents a significant threat to public health. That issue is not in debate. What has been debated in this state for more than a year is how to deal with assessing and minimizing and avoiding the impacts of increased PM_{2.5} emissions in the context of SEQRA when the regulatory program is still under development. While DEC Commissioners have been reluctant to deal with the problem, the Appellate Division has recently ruled on the issue and made clear what many had previously determined - that SEQRA requires a "hard look" at the issue and that look cannot be deferred to the future.

As the ALJs in this matter well know, PM_{2.5} was first addressed in Matter of American

² This point was made clear by Edward McConville, Esq. counsel to the Columbia Hudson Partnership in his August 27, 2001 letter to ALJ Goldberger, explaining that SLC was not willing to enter into a binding agreement.

Marine Rail, LLC, ALJ Ruling, August 25, 2000 when ALJ Goldberger ruled that a DEIS for the project should be prepared and that the DEIS must address the potential impacts from PM_{2.5}. Commissioner Cahill reversed that ruling in Matter of American Marine Rail, LLC, Interim Decision, February 14, 2001. The Commissioner's ruling was based upon several erroneous assumptions.³ First, it relied upon the fact that the U.S. Supreme Court had not ruled on the legality of establishing a NAAQS PM_{2.5} standard. Second, the Commissioner found that staff's use of PM₁₀ as a surrogate for PM_{2.5} was rational. Finally, relying upon Spitzer v. Farrell, Index No. 400365-00 (Sup. Ct. New York Co. October 12, 2000) the Commissioner ruled that absent a regulatory standard and an approved protocol for calculating emissions or analyzing impacts, SEQRA did not require such analysis. After the Commissioner's ruling in AMR, the U.S. Supreme Court issued its decision in Whitman v. American Trucking Assn, 531 U.S. 457 (2001) and upheld EPA's establishment of NAAQS for PM_{2.5}

In Matter of UPROSE v. New York Power Authority, 2001 WL 830817, ___ A.D.2d ___ (2nd Dept. July 23, 2001) the Appellate Division effectively reversed the Commissioner's ruling in AMR. The Court was reviewing a decision by NYPA to site 11 gas-powered electric turbines in a non-Title X case and held that NYPA had failed to take a hard look under SEQRA at PM_{2.5}

³ Commissioner Cahill made the initial error of confusing the standard of review applicable to an administrative adjudicative proceeding. The Commissioner appeared to find that if staff's review was rational and not arbitrary and capricious it should be upheld and that a "court" cannot weigh the desirability of the action. That is patently wrong. The legal standard cited by the Commissioner, as articulated in Pell v. Board of Education, 34 N.Y.2d 222 (1974) and repeated in Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 400 (1989) is correct, but applies to judicial review of a final agency action - not an interim decision by agency staff. If the standard of review applied in an issues conference to a staff determination with the same deference to policy decisions afforded to a final agency action, then Commissioners would be held hostage to determinations of staff which may not reflect the broader policy goals of the administration. There is no support for extending judicial deference for administrative policy decisions to the lowest level of bureaucratic decisionmaking before the a final administrative decision is made.

and annulled the negative declaration prepared by NYPA. The Court specifically found that “[t]he analysis undertaken by NYPA, in which it assumed that all PM₁₀ emissions are PM_{2.5} emissions is not sufficiently detailed in the EAF and is not an adequate substitute for addressing the health impacts of PM_{2.5} emissions” (Emphasis added).

Since the UPROSE decision, Commissioner Crotty has issued one decision concerning PM_{2.5}. Matter of Consolidated Edison Co. of N.Y., Inc, Commissioner’s Decision, August 16, 2001. That decision concerned a petition for rehearing to consider PM_{2.5} issues in an Article X case and in light of the UPROSE decision. Commissioner Crotty upheld the previous rulings that PM_{2.5} had been adequately considered. As an initial matter, the Commissioner appears to have misinterpreted UPROSE, and secondly, it appears from the Con Ed decision, that there was a far more extensive consideration of PM_{2.5} in that case than has been conducted by SLC. With regard to the misinterpretation of UPROSE, the Commissioner stated that the Appellate Division “did not find impermissible or otherwise disturb the approved methodology that uses PM₁₀ as a surrogate for PM_{2.5}” Con Ed at 3. In fact the Appellate Division did hold that PM₁₀ should not be a surrogate. As quoted above, the Appellate Division ruled not only that NYPA’s analysis not sufficiently detailed but also added that using PM₁₀ as a surrogate “is not an adequate substitute for addressing the public health impacts of PM_{2.5} emissions.”

Notwithstanding the Commissioner’s error in applying UPROSE, it appears that DEC’s review of the particulate emissions in Con Ed was far more detailed than was conducted for SLC. Since New York County is a non-attainment area for particulate matter it appears that a more stringent LAER analysis was conducted than was conducted for particulate matter in Hudson and Greenport. The DEIS for the SLC project dealt with PM_{2.5} in an Appendix and in a cursory and incomplete manner, failing to properly assess existing levels of PM_{2.5} and characterizing the

impacts on surrounding populations.

As the Court in UPROSE correctly noted, the operative standard is whether the lead agency has taken a hard look at the relevant areas of environmental impact and made a reasoned elaboration of the basis for its determination. Jackson v. N.Y.S. Urban Dev. Corp., 67 N.Y.2d 400 (1989). Nothing in SEQRA excuses consideration of readily identifiable potential adverse impacts environmental impacts simply because a regulatory standard has yet to be developed or the means of assessing the impacts are imprecise. The courts will hold an agency to the rule of reason. That point was most recently clearly stated in Matter of Lane Construction Corp. v. Cahill, 270 A.D.2d 609 (3rd Dept. 2000) *lv to appeal denied* 95 N.Y.2d 765, where a challenge to the denial of permit based upon the lack of visual standards was found unavailing because SEQRA does not require the establishment of individual standards. In requiring the lead agency to apply a rule of reason, that reason must be based upon a legitimate hard look. To date, that hard look has not been taken with respect to SLC. And as discussed below, the August 10th submission by SLC (IC Exhibit 111) does not cure that defect. Instead it highlights the inadequacies and inconsistencies of SLC's attempts to deal with the PM_{2.5} issue.

A. SLC's Recent Report Should be Afforded Little Weight and Illustrates the Need for an Adjudicatory Hearing

On August 10, 2001, SLC submitted in the Issues Conference a document entitled "Report of Opinions and Analysis of Issues Raised to ALJs Goldberger and Villa in Party Status Filings and the July 20, 2001 Issues Conference" (IC Exhibit 111). While submission of the report was initially rejected on by ALJ Goldberger on August 15, 2001, on August 24, 2001 the ALJs reversed their earlier decision and decided to accept the report and invited petitioners to

respond to the report as part of this brief.⁴

The report from SLC presents a materially different analysis of PM_{2.5} than what was included in Appendix H-2 of the DEIS. In fact, the report specifically tries to distance itself from the statements in Appendix H-2 (IC Exhibit 111, p. 4). More importantly, it presents information regarding PM_{2.5} which is inconsistent with EPA's regulation of PM_{2.5} and contradicted by SLC's own analysis in its Air Permit Application.

SLC's report attempts to make a strong distinction in the types of PM_{2.5}, claiming that there are toxic and non-toxic types of PM_{2.5} and that only the PM_{2.5} which is combustion related presents any threat to public health. SLC claims that non-combustion and non-fuel related PM_{2.5} comprises materials similar to the earth's crust and are not a threat. (IC Exhibit 111, p. 2). However, the regulation of PM_{2.5} by EPA under the Clean Air Act and the establishment of a NAAQS for PM_{2.5} makes no distinction between combustible and non-combustible PM_{2.5}. All PM_{2.5} is considered in the same manner and the proposed NAAQS for PM_{2.5} deals with total PM_{2.5} not a subset or type of PM_{2.5}.

More importantly, the report by SLC's experts is simply wrong with respect to the nature of the "non-combustible" PM_{2.5} generated by SLC. SLC's experts claim that approximately 57% of the PM_{2.5} generated by the Greenport project is this supposedly benign form of PM_{2.5}. (IC Exhibit 111; Table A). However, Tables E-13A and E-13B of the Air Permit Application (IC Exhibit 8; pp. E-26 and E-27) contain SLC's own analysis of the of the

⁴ FOH respectfully objects to the ALJs' rulings in this respect since SLC has submitted materially new information that the petitioners have not had adequate time to review. Once the ALJs ruled on August 15th that the report would not be considered, FOH did not devote any time or resources to reviewing the report. Subsequent to the August 24th ruling, FOH's consultants, CDM have reviewed the report. The comments set forth in this section of the brief reflect that review.

metal concentrations of the raw feed to the cement plant. These are the concentrations of the metals in the rock ground by SLC and added to the kiln. Contrary to the claim by SLC's experts in the August 10th report, the most significant levels of heavy metals, in particular Arsenic, Barium, Cobalt, Manganese, Lead and Vanadium are found not in the coal but in the raw rock. Thus apart from kiln emissions, it is the emissions from the grinding and handling of the rock containing those metals which by SLC's calculations compose 57% of the PM_{2.5} that present a significant threat. These are not benign dust particles but contain significant levels of heavy metals.

Again reference must be made to SLC's Air Permit Application, which SLC's experts do not appear to have reviewed. As noted in FOH's Issues Petition (p.40), Table C-17 of the Air Permit Application identified that the maximum impacts for PM is found not at the higher elevations (the hills) associated with kiln emissions, but receptors at lower elevations analyzed by the ISCST3 model for simple terrain impacts as opposed to the complex terrain model used for the higher

elevations. Thus the majority of the PM_{2.5} impacts of concern to people living in proximity to the Greenport plant will not be from the kiln, but from the non-combustion generated PM_{2.5} - the material which SLC's experts incorrectly claim is non-toxic.

The August 10th report is also rife with internal inconsistencies. For example, at page 5 the report claims to assume that PM_{2.5} is 70% of a PM₁₀ measurement. However, in Table A when projecting the amount of PM_{2.5} generated, SLC uses a percentage of approximately 41%, thus further underestimating the amount of PM_{2.5} generated. The SLC report also relies incorrectly upon a trajectory analysis. This is inappropriate in two respects. First, as shown by CDM, the Greenport windroses are statistically significantly different from Albany in terms of direction and are more than 50% slower. Moreover, as noted above, the primary impacts from PM_{2.5} is not from the kiln and winds at higher elevations, but from the lower elevation emission sources unaffected by the trajectory analysis.

SLC's August 10th report also claims that there will be a dramatic decrease in mercury emissions. (IC Exhibit 111; p. 4). FOH has already questioned that conclusion in the report from Frank Sapienza of CDM (IC Exhibit 121) who pointed out SLC's inconsistent assessments of mercury removal in the wet scrubber and the unsubstantiated claim of 90% removal of mercury in the wet scrubbers. Moreover, as the draft air permit has no permit limitations on mercury or conditions limiting the mercury content of the coal, it is impossible to either predict or assure such a significant reduction in mercury emissions.

SLC's August 10th report may not be deemed a sufficient analysis under SEQRA for PM_{2.5}. It fails to take the necessary hard look at current PM_{2.5} levels in Hudson and Greenport and fails to carefully assess the impacts from the project. At most it demonstrates that issues of fact exist regarding the likely impacts from PM_{2.5}. The August 10th report may serve as the

basis for SLC's position in an adjudicatory hearing, but it cannot serve to bar the convening of a hearing.

POINT VI

SLC'S CONTROL STRATEGIES FOR NO_x AND VOCs DO NOT CONSTITUTE LOWEST APPLICABLE EMISSION RATE (LAER)

A. Introduction

The SLC facility is a "major source" of nitrogen oxides (NO_x) and volatile organic compounds (VOCs) and must therefore comply with the requirements of the nonattainment New Source Review (NSR) program. In New York, DEC has adopted its own regulations to implement the nonattainment NSR program, which are set forth at 6 NYCRR Subpart 231-2. These regulations establish stringent emission control and other requirements intended to ensure that newly constructed or modified major sources located in areas designated as nonattainment for one or more contaminants do not adversely affect existing air quality. Because the air in nonattainment areas fails the NAAQS, these requirements are much stricter than those applicable to sources regulated under the Prevention of Significant Deterioration (PSD) program. Like the PSD program, facilities covered by the nonattainment NSR program must obtain a preconstruction permit from DEC prior to commencing construction. 6 NYCRR § 231-2.3(a). However, the technological standards applicable to nonattainment NSR sources are stricter than those for PSD sources

B. LAER is the Most Stringent Emissions Limitation Achieved in Practice for a Category of Emission Sources.

Consistent with the federal nonattainment NSR program requirements, facilities that trigger nonattainment NSR must install lowest achievable emission rate (LAER) technology. LAER is defined by regulation as the “most stringent emission limitation achieved in practice for a category of emission sources taking into consideration each air contaminant which must be controlled.” 6 NYCRR § 200.1(ak). The comparable federal regulations define LAER as the most stringent emission limitation achieved in practice by a class or category of sources or the most stringent emission limitation contained in any State Implementation Plan (SIP) for sources in that category, whichever is stricter. 40 C.F.R. § 51.165(a)(xiii). According to EPA’s 1990 Draft New Source Review Workshop Manual,⁵

The emissions rate may result from a combination of emissions-limiting measures such as (1) a change in the raw material processed, (2) a process modification, and (3) add on controls. The reviewing agency determines for each new source whether a single control measure is appropriate for LAER or whether a combination of emissions-limiting techniques should be considered.

NSR Workshop Manual, p. G.3. (Copies of relevant sections of the NSR Workshop Manual are attached as *Exhibit A*.) In making that decision, the reviewing agency can require consideration of technology transfer for similar processes and gas streams.

Unlike Best Available Control Technology (BACT) required under the PSD program,

⁵ Although the NSR Workshop Manual was issued in 1990 and remains a draft document, it is still considered one of EPA’s primary resources for understanding the PSD and nonattainment NSR program.

“the LAER requirement does not consider economic, energy, or other environmental factors.”⁶ NSR Workshop Manual, p. G.4. If another source in the industry is using a particular control strategy, it is essentially presumed that the costs of installation are not prohibitive and that the strategy should be pursued as LAER by the source seeking approval.

LAER is intended to be a “technology forcing” standard. Applicants required to meet LAER are requesting permission to install a new source or modify an existing source that will increase emissions of particular contaminants for which the area already is in nonattainment. Essentially, the applicant is asking permission to discharge more of a particular contaminant into a region that already is experiencing serious air pollution problems with respect to that contaminant. To minimize the impact of the new or modified source on this already polluted area, the law requires the new source to implement a control strategy that reflects the “lowest achievable emission rate” achieved in practice by other similar sources without regard to cost, energy or other environmental factors. If other sources outside the particular source category are achieving stricter control levels and the technology can be transferred to the NSR source, the source will be expected to install it. NSR Workshop Manual, p. G.3. In this way, the LAER requirement gradually forces the development of better and better control strategies. *See* H.R. Rep. No. 294, p. 1294 (1977) (discussing technology-forcing aspects of the LAER). (Copies of the relevant legislative history is attached as *Exhibit B*.)

⁶ The federal PSD regulations, which are delegated to New York, define BACT as:

an emissions limitations (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to a regulation under the Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through the application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12).

C. SLC Can be Required to Consider the Use of Alternative Fuels under LAER. As the above summary suggests, a key component of the LAER analysis is defining the “source” for purposes of assessing what technologies should be considered and perhaps installed. In its original Petition for Party Status, Friends of Hudson argued that SLC failed in its LAER analysis when it neglected to consider use of natural gas as an alternative to coal for reducing NO_x and other contaminants. In its original application, SLC dismissed use of natural gas, arguing that it produces more thermal NO_x than coal. In its petition and at the hearing, FOH challenged this conclusion, arguing that SLC failed to examine as part of its LAER analysis alternatives for reducing NO_x associated with burning natural gas or to consider the benefits, in terms of reductions in other pollutants such as SO₂ and various heavy metals, associated with switching from coal to natural gas. In response, SLC argued, with the support of DEC, that FOH was essentially seeking to “redefine the source” being permitted by demanding that SLC consider natural gas as an alternative to coal. According to SLC, the company is seeking to permit a coal-fired cement plant and can therefore legally be required to assess LAER only for such plants. By demanding that SLC consider switching to natural gas to fuel its cement manufacturing operation, FOH allegedly is attempting to redefine the source in contravention of NSR requirements.

Guidance on the issue of defining the source under the nonattainment NSR program is limited, primarily because relatively few sources have been permitted under that program. However, considerable guidance on this issue is available under the PSD program. Since the standards under the PSD program are less stringent than those under NSR, this guidance can readily be relied on in examining whether SLC can be required to assess use of natural gas as an alternative to coal as part of its LAER analysis.

In the NSR Workshop Manual, EPA offers the following guidance on when sources may

be required to consider inherently less polluting processes/practices in conducting a BACT analysis under PSD:

Historically, EPA has not considered the BACT requirement as a means to redefine the design of the source when considering available control alternatives. For example, applicants proposing to construct a coal-fired electric generator, have not been required by EPA as part of a BACT analysis to consider building a natural gas-fired electric turbine although the turbine may be inherently less polluting per unit product (in this case electricity). However, this is an aspect of the PSD permitting process in which states have the discretion to engage in a broader analysis if they so desire. Thus, a gas turbine normally would not be included in the list of control alternatives for a coal-fired boiler. However, there may be instances where, in the permit authority's judgment, the consideration of alternative production processes is warranted and appropriate for consideration in the BACT analysis. A production process is defined in terms of its physical and chemical unit operations used to produce the desired product from a specified set of raw materials. In such cases, the permit agency may require the applicant to include the inherently lower-polluting process in the list of BACT candidates.

NSR Workshop Manual, p. B.13-14. As the above summary makes clear, the permitting agency has the authority to require an applicant to consider alternative production processes and to include the inherently lower-polluting process in the list of BACT candidates. Since LAER is a stricter standard than BACT, such an analysis is even more appropriate for nonattainment NSR sources such as the SLC plant.

Various PSD decisions issued before and since the NSR Workshop Manual was released in 1990 provide additional guidance on this issue. In *In re Hibbing Taconite Co.*, 2 E.A.D. 838, 1989 WL 266359, PSD Appeal No. 87-3 (July 19, 1989), EPA requested review of a state PSD determination of a proposal to allow the petitioner to modify its furnaces to burn petroleum coke as fuel. In that case, the Appeals Board agreed with EPA that the applicant failed to justify its rejection of burning natural gas as a viable control strategy. In support of that argument, EPA concluded that requiring review of this change did not constitute "redefining the source." The Board noted that EPA traditionally has defined source by their product or purpose (e.g., steel

mill, municipal incinerator) not by fuel choice. In *Hibbing*, the applicant will continue to manufacture the same product regardless of whether it burns natural gas or petroleum coke. Since there are other taconite plants that burn natural gas or a combination of natural gas and other fuels, it is reasonable for Hibbing to consider natural gas as an alternative in its BACT analysis. (A copy of the *Hibbing* decision is attached as *Exhibit C*.)

In *In re: Knauf Fiber Glass, GMBH*, 1999 WL 64235, PSD Appeal Nos. 98-3 through 98-20 (Feb. 4, 1999), EPA remanded a state BACT determination back to the local permitting agency following an extensive review of the state's BACT assessment process. As part of its initial review, the state concluded that Knauf could not be required to install controls similar to those used at another similar fiberglass plant that deployed different processes because such a requirement would amount to "redefining the source." Following a detailed review, the EPA Appeals Board concluded that while the fiberglass manufacturing industry is "indeed characterized by specialized processes and raw material mixtures that vary from firm to firm and product to product [,] the pollution control devices that individual companies apply are legitimate avenues of inquiry, which must be fully explored." *Id.* at 23. In so finding, the Board rejected Knauf's argument that the only facility that was suitable for comparison was its own facility in another state. According to the Board,

While the Lanett plant may well be the most similar to the proposed plant because Knauf intends to use the Lanett process technology in Shasta Lake, that fact should not foreclose Knauf's obligation to look at its competitors' plants in identifying potential control options. The approach used by Knauf has the potential to circumvent the purpose of BACT, which is to promote use of the best control technologies as widely as possible. If a company can claim that the only facilities similar to a proposed project are its own facilities, this objective of the BACT program would not be fulfilled.

A copy of the *Knauf* decision is attached as *Exhibit D*. See also *In re Brooklyn Navy Yard*, 3 E.A.D. 867, 1992 WL 80946, PSD Appeal No. 88-10 (Feb. 28, 1992) (concluding that requiring a

municipal solid waste incinerator to consider source separation as part of BACT analysis did not constitute “redefining the source”) (attached as *Exhibit E*).

Those decisions in which EPA has declined to consider alternative fuels or processes as BACT almost uniformly involved either combustion installations or requests that clearly constituted redefining the source. In *In re Hawaiian Commercial & Sugar Co.* 4 E.A.D. 85, 1992 WL 191948, PSD Appeal No. 92-1 (July 20, 1992), for example, EPA rejected an argument by petitioner that a facility seeking to install a new boiler designed to burn coal, fuel oil and bagasse (a sugar byproduct) should be required instead to install a combined cycle facility fueled with low sulfur distillate or residual oil, concluding that the change would redefine the source. Even in *Hawaiian Commercial*, however, the court made clear that the permitting authority has “wide latitude in how broad a BACT analysis it wishes to conduct in this regard.” *Id.* at 4. The Appeals Board concluded simply that the petitioner had shown no good reason for curtailing the state’s discretion in this case. *See also Old Dominion Electric*, PSD Appeal 91-39 (Jan. 29, 1992) (declining to require coal-fired steam electric generating station to use natural gas as an alternative fuel); *In re Pennsauken County, New Jersey, Resource Recovery Facility*, 2 E.A.D. 667, 1988 WL 249035, PSD Appeal No. 88-8 (Nov. 10, 1988) (rejecting petitioners’ claim that the applicant should be required to consider replacing its proposed municipal solid waste combustion facility with a plan to co-fire a mixture of refuse-derived fuel and coal at existing power plants).

As the above summary suggests, determining when a facility can be required to consider inherently lower polluting processes and practices is complex. However, a few basic principles are clear:

A. The process change proposed cannot affect the basic product or purpose of the source. An applicant for a permit to construct a municipal solid waste incinerator cannot, for example, be asked to consider installing a natural gas-fired boiler as BACT/LAER, even though the boiler may be inherently cleaner. Where a proposed emission reduction strategy will not change the

fundamental product or purpose of the purpose of the facility, the permitting agency should require the applicant to assess that strategy under BACT/LAER.

(2) Although the particular processes used at a planned facility are relevant to the BACT/LAER setting processes, they cannot be allowed to dictate the results of that process. Most industrial facilities engage in production activities or face production conditions that are unique to that facility. Indeed, the essence of industrial development is the development and implementation of new and better ways to produce a new and better product. In deciding what emission reductions strategies a facility will be required to pursue as BACT and LAER, however, these unique characteristics cannot be used as a means of avoiding altogether the obligation to look at alternative emission reduction strategies. Facilities must, instead, examine other facilities and assess whether the emission reduction strategies being pursued there could be applied to their operations, taking into account the unique features of both operations.

(3) The permitting agency has considerable discretion in deciding how to define the source for purposes of assessing available emission reduction alternatives. Thus, although a gas turbine normally would not be included in the list of control alternatives for a coal-fired boiler, “there may be instances where, in the permitting authority’s judgment, the consideration of alternative production processes is warranted and appropriate for consideration in the BACT analysis.” Draft NSR Manual, p. B.13.

These principles were articulated in decisions assessing BACT under the PSD program. As noted above, BACT is a less stringent standard than LAER in that it allows consideration of cost, energy and other environmental factors in identifying the best possible controls. In assessing LAER under the nonattainment NSR program, the permitting authority has an obligation to consider alternative emission reduction strategies, such as the use of alternative fuels or other inputs, in light of the greater stringency of LAER as compared to BACT.

In the present case, SLC argued in the hearing that they have requested a permit to construct a coal-fired cement plant and that they therefore are required only to examine emission reduction strategies implemented at other coal-fired cement plants. According to SLC, they cannot be required to examine natural gas as an alternative fuel because they are not building a natural gas-fired plant. In light of the principles outlined above, this position must be rejected. In asking SLC to examine natural gas as an alternative to coal, FOH is not asking the company to

change the fundamental nature of their product or process. The company will still be producing cement; it will simply be using a different fuel to produce it. To the extent the specific features of the SLC's plant or process make switching to natural gas technically infeasible, SLC should be required to address that as part of its LAER analysis, rather than relying on those differences to avoid assessing LAER in the first place.

In its petition, FOH has demonstrated that use of natural gas will constitute LAER and that SLC has not properly examined natural gas as an alternative to coal for fueling the plant. As discussed in the original petition for party status, the use of coal raises serious environmental concerns. Coal emits large quantities of pollutants including SO₂, PM and various hazardous air pollutants (such as mercury) relative to natural gas. Management of coal also poses serious risks relating to fugitive dust, stormwater runoff, and transportation impacts. FOH has identified in its petition other cement plants that have been designed to burn natural gas, none of which were addressed in SLC's original LAER analysis. FOH is asking is that SLC be required to review these and any other natural gas-fired cement plants to determine whether the use of natural gas is technically feasible at the SLC plant.

D. SLC Must Consider the Use of a Thermal Oxidizer in its LAER Analysis for Control of VOCs .

In its original request for full party status, FOH argued that SLC failed adequately to address the use of thermal oxidizers as LAER for VOCs, noting that a facility owned by SLC's parent company in Dundee, Michigan, recently installed just such a unit to control emissions of VOCs and that this facility was not discussed in the LAER analysis submitted as part SLC's air permit application. In response, SLC argued at the hearing that the Michigan facility differed from the proposed Greenport plant in ways that made the use of thermal oxidizers unworkable. FOH has offered proof that at least one other cement plant is using a thermal oxidizer to control

VOC emissions, thus raising an issue for adjudication. The burden now falls on SLC to provide technical support for its assertion at the hearing that this technology cannot be transferred to the Greenport facility. Consistent with the NSR Workshop Manual, the fact that another facility has installed this technology constitutes evidence that the cost to the industry of that control is not prohibitive. NSR Workshop Manual, p. g.4.

E. Conclusion.

As noted at the outset, LAER is “lowest achievable emission rate” -- the most stringent emission reduction that can be achieved. To satisfy this standard, SLC must be required to review alternative fuels as part of its LAER analysis. SLC also must assess the feasibility of installing a thermal oxidizer to control emissions of VOCs.

POINT VII

**DEC HAS THE AUTHORITY TO HEAR PSD ISSUES IN AN
ADJUDICATORY HEARING UNDER THE
STATE’S UNIFORM PROCEDURES ACT V.**

A. Introduction.

In its Petition for Party Status, FOH presented various arguments relating to the adequacy of the permit proposed to be issued to SLC under the PSD program, among them: (1) SLC failed to undertake a proper BACT analysis for particulate matter; (2) the draft permit failed to establish an opacity limit to satisfy BACT for PM; (3) the draft permit does not establish emission limits for sulfur dioxide (SO₂) that satisfy BACT; and (4) SLC’s BACT analyses for carbon monoxide and sulfuric acid were inadequate. At the issues conference, SLC responded that these issues were not a proper subject for adjudication because the PSD permit was subject to federal administrative procedures under 40 C.F.R. Part 124, which do not allow for review until

after the permit is issued.

The issue under review is whether DEC has the authority to review PSD permits under the Uniform Procedures Act (UPA) or whether it must follow the federal permitting procedures set forth in 40 C.F.R. Part 124. The procedures and time frames for implementing environmental permits in New York State are governed by the UPA, set forth at Environmental Conservation Law (ECL) Art. 70, as implemented by 6 NYCRR Part 621 (Uniform Procedures). These implementing regulations specify that the UPA applies to permits authorized by ECL Article 19 (Air Pollution Control), as implemented by 6 NYCRR Part 201, the State's air permitting regulations.⁷ 6 NYCRR § 621.2(g).

Neither the statute nor the Uniform Procedures specifically exempt PSD permits from this review process. To the contrary, the regulations suggest that PSD permits are governed by the UPA. Section 200.10(a) of 6 NYCRR states that the EPA has delegated authority to DEC to issue permits in accordance with Part 201 of this Title (the air permitting provisions) for the construction and modification of PSD sources. Section 621.4(g)(2) of 6 NYCRR identifies PSD permits as major and specifies the type of information required in a PSD permit application (by cross-referencing back to Part 201). It goes on to specify what procedures the Department must follow when issuing permits, in some cases including provisions specific to PSD permits. *See, e.g.,* 6 NYCRR § 621.5(d)(7) (information required when issuing tentative determination and availability of either draft permit or notice of intent to deny PSD permit).

These provisions, taken together, indicate that the Uniform Procedures, including the provisions authorizing an adjudicatory hearing, apply to PSD permits. In a series of recent

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In particular, ECL § 19-0302 provides that:

The rules and regulations adopted by the department to implement this article and the provisions of article 70 of this chapter and rules and regulations adopted thereunder and the provisions of the state administrative procedure act shall govern permit and certificate applications, renewals, modifications, suspensions and revocations under this article unless otherwise provided for in this article.

decisions, however, DEC has taken the position that PSD permits are not covered by the UPA. Under this theory, DEC has not submitted an approvable PSD program to EPA for inclusion in the SIP, but instead has simply accepted delegation of the program from EPA and is therefore acting as an agent for EPA on the PSD permitting process. Under this theory, PSD permit applications are allegedly subject to the procedural provisions of 40 C.F.R. Part 124 and not the UPA. Because Part 124 does authorize adjudicatory hearings prior to permit issuance, both SLC and the DEC argued that the Administrative Law Judge is barred in this hearing from adjudicating PSD issues.

As set forth in greater detail below, the documentation made available to us by DEC on this issue does not support this conclusion. Moreover, any suggestion that DEC lacks authority to consider BACT and other PSD-related issues in an adjudicatory hearing is belied by the fact that DEC has, in fact, heard numerous PSD issues in adjudicatory hearings over the years without any protest from EPA. DEC's recent decisions in various Article X cases denying authority to hear PSD issues represents a significant departure from this history. Finally, at least one recent DEC decision suggests that even if DEC lacks authority to adjudicate PSD permits, it is not barred from reviewing PSD-related limits to the extent they are embodied in permits issued under 6 NYCRR Part 201. For the foregoing reasons, we believe DEC, in fact, has the authority to hear PSD issues, including questions regarding compliance with BACT, as part of an adjudicatory hearing under 6 NYCRR Part 621. To the extent DEC's decisions in the various recent Article X cases suggest otherwise, these decisions should be reversed, at least with respect to non-Article X sources.

B. DEC Traditionally Has Reviewed PSD-Related Issues in Adjudicatory Hearings.

DEC recently has been required to review numerous permits in conjunction with the

construction of various fossil fuel-fired electric generating facilities governed by Article X of the New York Public Service Law. That law establishes special procedures for siting and approving construction of major electric generating facilities. As previously noted, in a series of recent decisions involving Article X facilities, DEC has argued that it lacks authority to adjudicate PSD-related issues and must defer to 40 C.F.R. Part 124, which does not authorize adjudicatory hearings. This position represents a significant departure from DEC's previous approach to PSD permitting. Prior to these recent decisions, DEC regularly considered PSD issues in adjudicatory hearings on major projects. *See, e.g., In re Application of Foster Wheeler-Broome County et al.*, 1990 WL 181270, DEC No. 7-0334-00023/00001-0 (Sept. 19, 1990); *In re NYC Department of Sanitation Southwest Brooklyn Incinerator*, 1994 WL 115081, DEC No. 2-6106-2/9-0 (Mar. 2, 1994). Where a party objected to the decision reached by DEC under the PSD program, they then had the right to appeal to EPA under 40 C.F.R. § 124.19. *See, e.g., In re St. Lawrence County Solid Waste Disposal Authority*, 1990 WL 324098, PSD Appeal No. 90-9 (July 27, 1990). We have uncovered no decisions in which EPA stated that DEC lacked the authority to address PSD issues in an adjudicatory hearing. To the contrary, in at least one decision, EPA specifically noted that DEC allowed for public comment at an adjudicatory hearing, indicating that EPA was aware of the adjudicatory hearing process and did not in any way object to it. *In re Ogden Martin Systems of Onondaga, Inc., et al.*, 1992 WL 420599, PSD Appeal No. 92-7 (Dec. 1, 1992).

C. Recent Documents Provided by DEC on This Issue Do Not Support the Position that DEC Lacks Authority to Address PSD Issues in an Adjudicatory Hearing.

After the question of DEC's authority to hear PSD issues arose at hearing, FOH requested copies of all delegation agreements and other related documents relied on by DEC to support its position that it lacks authority to consider such issues. In response, DEC provided

FOH with various documents, including those attached hereto as *Exhibit F*.⁸ Among those documents is the March 20, 1991 agreement between DEC and EPA outlining the terms and conditions of EPA's delegation of authority to implement the PSD program. That document does not specify what procedures must be followed in issuing PSD permits -- the Uniform Procedures or 40 C.F.R. Part 124. However, subparagraph (m) of the Agreement provides that:

DEC's delegated authority to issue permits stating the PSD requirements have been satisfied is revoked with respect to those applications for which a "5-day notice" is received by the DEC Commissioner under the provisions of Section 621.9(b). In such cases, the permit application will be provided by DEC to EPA for processing.

This provision indicates that the Uniform Procedures apply to all PSD permits except those for which a five-day letter is sent; the latter permits must be provided to EPA for processing (presumably because DEC has failed timely to act on the application). The specific reference to an element of the Uniform Procedures suggests that these procedures, in fact, apply to PSD permits, except in the limited circumstance identified. This agreement thus contradicts DEC's position that it must follow the procedures in 40 C.F.R. Part 124 and cannot conduct an adjudicatory hearing on PSD issues.

EPA subsequently addressed the issue of PSD delegation in conjunction with the Article X siting process for new electric generating facilities. In 1999, the State Siting Board requested delegation from EPA to issue various federal permits, including PSD permits. In response to that request, EPA indicated that various issues would have to be resolved before the siting board could obtain delegation. With respect to PSD, EPA identified various differences between the Siting Board's regulations and the federal PSD program requirements, among them, the fact that

⁸ FOH specifically requested, among other things, a copy of the PSD Delegation Agreement dated April 19, 1982 cited by the DEC in *In re Ramapo Energy Limited Partnership* DEC App. No. 3-3926-00377/00001 (Apr. 4, 2001). That document was not provided in response to our request and we were informed by DEC that the documents provided were all of the documents in their possession relevant to the PSD delegation issue.

the Siting Board regulations authorized an evidentiary hearing while federal regulations implementing the PSD program did not. However, this determination arose in the context of the Article X siting process, which is outside the scope of the Uniform Procedures and is therefore of limited precedential value in the present case. That letter makes no reference to DEC procedures and does not make any statement that DEC may not hold an adjudicatory hearing, DEC has provided no specific memoranda, letter or other documentation to support its position that it lacks authority to adjudicate PSD issues.

D. Consistent with *Mirant Bowline*, DEC has Authority to Review PSD-Based Emission Limits Arising under the State’s Air Permit Regulations.

Despite DEC’s long history of making PSD determinations, DEC has recently declared that it lacks authority to address PSD issues in an adjudicatory hearing and has repeated that assertion in various decisions arising at Article X facilities. In one such decision issued by the Commissioner, however, DEC concluded that it does have the authority to address the issues underlying the determinations made under the PSD program even if the permit itself is not subject to review in an adjudicatory hearing. In *In re Mirant Bowline, LLC*, DEC No. 3-3922-0003/00015 (Mar. 30, 2001), one of the petitioners contended that the PM₁₀ BACT determination in the draft air permit did not constitute BACT. The ALJ agreed, finding that the County had raised an adjudicable issue concerning the PM₁₀ BACT limitation in the draft air permit. DEC staff appealed this ruling on the ground that the issue of BACT should be addressed in the responsiveness summary required by DEC prior to issuance of a revised PSD permit and the subsequent decisionmaking process under Part 124. The Commissioner rejected this view in *In re Mirant Bowline, LLC*, Case No. 3-3922-0003/00015 (June 20, 2001), concluding that staff’s “exclusive emphasis on the federal PSD permit review is misplaced.”

While PSD matters are not adjudicable by the states pursuant to the federal rule at 40 CFR 124, gaseous emissions and PM₁₀ emissions can be adjudicated under the autonomous authority of the state air permit in Part 201. No prohibition exists in Part 201 or any state air rule preventing the evidentiary review of facts pertaining to the state permit. Based upon an adequate offer of proof, the Department may examine why the subject facility should not be required to meet a lower PM₁₀ emission rate if it is shown that comparable facilities are obtaining such lower rates. The same principle applies to the gaseous emission rate when comparable facilities also obtain a lower rate.

If DEC Staff's position were the case, any emission rates made part of the state air permit would never be adjusted downward when lesser emission rates were reasonably attainable. Any lower emission rate demonstrated for Bowline 3 after hearing would be incorporated into the Part 201 state air permit. That emission rate would never exceed the rate expressed in the PSD, i.e., it may be more but not less restrictive. In other words, the more restrictive state-imposed (Part 201) emission rate would always apply and would serve as the ceiling not to be exceeded. (p. 5)

In essence, the *Mirant Bowline* decision holds that while the PSD permit itself may not be adjudicable pursuant to the State's Uniform Procedures, the underlying emission limitations and standards are adjudicable under the autonomous authority of the State's air permitting regulations in 6 NYCRR Part 201. These underlying emission limitations are derived from an assessment of BACT for the sources regulated by the permit, making BACT an appropriate subject for review in an adjudicatory hearing.

E. DEC's Conclusion that PSD Issues are Not Adjudicable Ignores the UPA, Raising Serious Legal Concerns.

Any argument that DEC lacks any authority whatsoever to address PSD issues in adjudicatory proceedings raises serious legal concerns. The UPA establishes specific procedures DEC must follow when issuing various permits, including those issued under authority of the state air pollution control program. To the extent DEC intends to exclude certain programs from

that review process, it is required to seek a specific exemption by amending Article 70. At minimum, the State would be required to undertake a formal rulemaking to amend Part 621 to specifically exclude that permit from review. In the present case, however, no such exclusion was ever adopted for the PSD program. To the contrary, Part 621 includes specific provisions addressing the issuance of PSD permits, providing clear evidence that the Uniform Procedures are intended to apply to such permits.

The recent Article X decisions appear to ignore the legal implications of the UPA and focus instead on the specific language of New York's SIP provisions which incorporate the federal PSD program by reference. *See* 40 C.F.R. § 52.1689. This narrow approach is troubling for several reasons. Both DEC and EPA purport to have authority to enforce violations of the PSD program in New York. If DEC is merely acting as an agent for EPA in issuing these permits, as has been suggested in the recent Article X decisions, we question how DEC can enforce the final PSD permits. Yet, DEC clearly believes that it is authorized to enforce PSD permits, as evidenced by the fact that it regularly pursues actions against alleged violators of the PSD program. Also, as the *Mirant Bowline* decision implies, DEC's ability to issue a permit to construct under 6 NYCRR Part 201 is intimately linked with its ability to address the underlying PSD issues that give rise to the limitations contained in that permit. It is impractical, to say the least, to attempt to bifurcate the review process as DEC and SLC appear to want to do. Instead, DEC should follow the path taken before the detour prompted by the recent Article X proceedings: allow review of PSD decisions by DEC with an opportunity for appeal to the EPA Environmental Appeals Board pursuant to 40 C.F.R. § 124.19.

A. Conclusion

For the reasons set forth above, FOH believes that DEC has the authority to consider PSD issues in an adjudicatory hearing. To the extent DEC believes it lacks the authority to

address PSD permitting issues, it must consider emissions under the autonomous authority of the state air permit program in Part 201, consistent with the DEC's recent decision in *Mirant Bowline*.

POINT VIII

THE NONMETALLIC MINERAL PROCESSING NSPS APPLIES TO ALL MINERAL PROCESSING ACTIVITIES THAT PRECEDE THOSE REGULATED UNDER THE CEMENT PLANT NESHAP.

A. Introduction/Background

In its original filing, FOH raised as in issue for adjudication the omission in the permit of any reference to New Source Performance Standards 40 C.F.R. Part 60, Subpart Y (Standards of Performance for Coal Preparation Plants) and Subpart OOO (Standards of Performance for Nonmetallic Mineral Processing Plants). In its April 27, 2001 air permit application SLC conceded that both Subparts Y and OOO would apply to the SLC plant. In particular, the application provides:

Since the kiln gases will be used to thermally dry the coal in the coal mill, Subpart Y will be invoked. Subpart OOO will apply because new crushing, handling and storage equipment will be located in the mine. SLC will comply with all applicable sections of these NSPS.

SLC Air Permit Application, p. 3-6 (Apr. 27, 2001). Although the air permit application specifically references both Subparts Y and OOO as applicable requirements, the draft permit issued by DEC contained no reference whatsoever to these provisions, which contain strict limits on opacity and other emissions from regulated sources. At the adjudicatory hearing, questions arose concerning whether Subpart OOO, in fact, applies to the SLC facility.

I. Subpart OOO Applies to All Nonmetallic Mineral Processing Activities Preceding those Regulated by the Cement Plant NESHAP.

With certain exceptions, Subpart OOO applies to the following affected facilities in fixed or portable nonmetallic mineral processing plants:

Each crusher, grinding mill, screening operation, bucket elevator, belt conveyor, bagging operation, storage bin, enclosed truck or railcar loading station.

40 C.F.R. § 60.670(a)(1). Nonmetallic minerals include many of the most common minerals mined in the United States, including limestone.

With respect to cement plants, Subpart OOO specifically provides that:

An affected facility that is subject to the provisions of subpart F or I or that follows in the plant process any facility subject to the provisions of subparts F or I of this part is not subject to the provisions of this subpart.

40 C.F.R. § 60.670(b). The preamble to the proposed regulation clarifies that equipment at cement plants “used to process nonmetallic minerals that precedes equipment already covered by other standards of performance would be subject to the proposed standards.” 48 Fed. Reg. 39566 (Aug. 31, 1983).

In essence, 40 C.F.R. Part 60, Subpart F, the NSPS for cement processing, applies to all emission sources specifically covered by that standard, including certain mineral processing sources directly associated with cement production. All nonmetallic mineral processing sources at cement plants that precede equipment covered by Subpart F, such as that used to process rock in the limestone mine, would be covered by Subpart OOO. The NSPS for new or modified cement plants has since been superseded by the National Emission Standard for Hazardous Air Pollutants (NESHAP) for portland cement plants found at 40 C.F.R. Part 63, Subpart LLL. 40

C.F.R. § 63.1356.⁹ For portland cement plants with on-site nonmetallic mineral processing facilities,

the first affected source in the sequence of materials handling operations subject to this subpart is the raw material storage, which is just prior to the raw mill. The primary and secondary crushers and any other equipment of the on-site non-metallic mineral processing plant which precedes the raw material storage are not subject to [the NESHAP]. 40 C.F.R. § 63.1340(c).

As a practical matter, the change from the NSPS to the NESHAP simply means that the emission standards in the cement plant NESHAP apply to new or modified cement plants in place of the NSPS for operations beginning with raw material storage prior to the raw mill. Subpart OOO continues to apply to sources at cement plant sites that precede (and are therefore not covered by) the cement plant NESHAP.

I. The Draft Air Permit Omits Any Reference to the Emission Limits Applicable under Subpart OOO.

Subpart OOO prohibits from transfer points on belt conveyors or from any other affected facility any stack emission which contains particulate matter (PM) in excess of 0.05 gr/dscm and which exhibits greater than 7 percent opacity, unless the unit is equipped with a wet scrubber. 40 C.F.R. § 60.672(a). With certain exceptions, the regulations establish an opacity limit of 10 percent for fugitive emission sources. 40 C.F.R. § 60.672(c)-(e). The regulations bar altogether visible emissions from various wet screening and subsequent operations involving saturated materials. 40 C.F.R. § 60.672(h). Consistent with the discussion above, these and other limits in the regulations, together with all applicable monitoring, testing, reporting and

⁹ With certain exceptions not here relevant, 40 C.F.R. § 63.1356 provides that “any affected source subject to the provisions of this subpart is exempted from any otherwise applicable new source performance standard contained in 40 CFR Part 60, subpart F.” EPA adopted this provision to eliminate overlap or duplicate coverage of NSPS and Maximum Achievable Control Technology (MACT) standards for portland cement facilities. 64 Fed. Reg. 31897 (June 14, 1999).

recordkeeping requirements in 40 C.F.R. Part 60, Subpart OOO apply to all nonmetallic mineral processing sources at the Greenport facility that precede operations regulated under the cement plant NESHAP. As noted in our comments on the air permit application itself and in our issues brief, the draft air permit makes no mention whatsoever of the Subpart OOO standards despite their obvious applicability to the proposed SLC plant. As a result, the permit omits key emission limitations for the mining and other nonmetallic mineral processing activities that precede those regulated under cement plant NESHAP, raising an issue for adjudication.

Dated: September 7, 2001
Albany, New York

Respectfully Submitted,

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