STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of **ST. LAWRENCE CEMENT CO., LLC** for permits to construct and operate a cement manufacturing facility in the Town of Greenport and City of Hudson, County of Columbia.

Initial Rulings of the Administrative Law Judges on Party Status and Issues

DEC Application No. 4-1040-0001/00001

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Background and Brief Project Description

These proceedings concern the application of St. Lawrence Cement Co., LLC (SLC) to the New York State Department of Environmental Conservation (DEC or Department) for permits to construct and operate a cement manufacturing plant in the Town of Greenport (Town) and the City of Hudson (City) in Columbia County to produce approximately 2.6 million U.S. tons of clinker per year. The facility would be located on property currently owned by SLC - bounded on the north by the City of Hudson, on the east by Newman Road, on the south by NYS Route 23 and on the west by the Hudson River.[1] In the Town, SLC owns 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's facilities in Columbia County also include a dock on the east side of the Hudson River in the City of Hudson. Remnants of the old Universal Atlas Cement plant also stand at the dock and at the Route 9 location. For an overall picture of this planned facility, see Attachment A hereto.

The proposed plant would include a dry process cement manufacturing facility located in the mine site consisting of a raw mill system, kiln feed blending silo, preheater/precalciner tower, rotary kiln, clinker cooler, and finish mill system. In addition, SLC proposes to construct a flexible conveyor between the quarry, the plant and an expanded dock site (which will require dredging and filling in the Hudson River) to transport finished product and to receive raw materials. The applicant has also proposed office and maintenance facilities, access roads, parking areas, a new docking facility and a public park.

If the applicant receives approval to proceed with this project, SLC intends to close its kiln at Catskill. Currently, in Catskill (Greene County), SLC operates a mine, a manufacturing plant, a permitted landfill for cement kiln dust (CKD), and a dock on the west side of the Hudson River. See, Attachment B hereto. SLC would continue to use the Catskill facility to support manufacturing processes in Greenport such as bagging of specialty cement. SLC would also continue to use the landfill for disposal of CKD from the new facility. SLC proposes to demolish the Catskill facility's bunker silos along the Hudson River as well as a stack at the Catskill facility while keeping the kiln structure, and would remove a stack and bank of silos from the old Universal Atlas Cement plant near U.S. Route 9 in Greenport. In addition, SLC plans to rehabilitate certain structures on the property for use and for historic preservation, specifically, the Heermance-Jones house on Route 9 and the old stock house and trestle near the river, both of which the State Historic Preservation Office (SHPO) has expressed interest in preserving due to their unique construction.

For air pollution control, SLC has proposed to use a large multi-chamber baghouse for controlling particulates from the clinker manufacturing process. The applicant has also included staged combustion, a

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1 During these proceedings, petitioner Friends of Hudson (FOH) raised a potential issue regarding the ownership of certain portions of the land occupied by SLC on the Hudson River. This matter is discussed in more detail at p. 83.

low NO_X burner, flame optimization, process optimization, reduced air combustion, and a selective non-catalytic reduction (SNCR) system in its efforts to reduce and control emissions of nitrogen oxides (NO_X). Sulfur dioxide (SO_2) emissions will be controlled by parallel wet/dry scrubber systems.

To construct and operate this facility, SLC must obtain a state facility permit for air pollution control, Environmental Conservation Law Article (ECL) 19 and Parts 201, *et seq.* of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR); a state pollutant discharge elimination system permit (SPDES), ECL Article 17 and 6 NYCRR Parts 750-758; an Article 15 Protection of Waters permit and § 401 Water Quality Certification, 6 NYCRR Part 608; a mined land reclamation permit modification, Article 23 and Parts 420-426; and a freshwater wetlands permit, ECL Article 24 and 6 NYCRR Part 663.

The Department is lead agency under the State Environmental Quality Review Act (SEQRA - ECL Article 8). On April 8, 1999, DEC 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 the preparation of a draft environmental impact statement (DEIS). As lead agency pursuant to SEQRA, DEC must also make a finding that the proposed project is consistent with the State's coastal policies. Executive Law, Article 42; 19 NYCRR Part 600; 6 NYCRR § 617.11(e). DEC staff accepted the DEIS as complete and available for public review on May 2, 2001. A public scoping comment period was provided and a public scoping hearing was held on June 24, 1999 at the Columbia County Office Building in Hudson, New York.

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*. The applicant published these notices in the May 4, 2001 edition of *The Independent* and the May 4, 2001 edition of the *Register Star.* The notice of hearing provided that written comments were to be received by DEC by no later than June 20, 2001. As 6 NYCRR § 617.9(a)(4)(iii) provides that comments will be received by the lead agency for no less than 30 calendar days from the first filing and circulation of the notice of completion or no less than 10 calendar days following a public hearing (whichever is later), a corrected notice was published in the May 9, 2001 editions of the aforementioned publications setting a deadline of July 2, 2001 for mailing of written comments. In addition, based upon the demonstrated need of potential intervenors for more time to prepare petitions for party status and DEC staff's need for more time to prepare draft permits for mining, wetlands and protection of waters, Administrative Law Judge (ALJ) Goldberger agreed to postpone the date for filing petitions to July 13, 2001 and to commence the issues conference on July 18, 2001.

Legislative Hearing

Two sessions of a legislative hearing were convened in this matter on June 20, 2001 at Columbia-Greene Community College. ALJ Goldberger and ALJ Maria Villa of DEC's Office of Hearings and Mediation Services (OHMS) presided over these sessions and the issues conference. Due to the large number of people who wished to speak, these proceedings commenced at 1:00 p.m. and continued with a few short breaks until 12:40 a.m. on June 21, 2001. Over this period, there were well over one thousand people in attendance. One hundred twenty-one people spoke, out of which 15 supported the project. In addition, over one hundred people turned in registration cards indicating a desire to speak, but when called upon did

not respond. With respect to written submissions, the OHMS received approximately 982 comments prior to or by the July 2, 2001 deadline. Of these, 561 letters were in opposition to the proposed facility and 421 were in support. At the legislative hearing, the ALJs were also presented with petitions in support of the project with 5,234 signatures and petitions in opposition to the project with 11,342 signatures.

Those who opposed the project expressed concerns about: health-related effects based upon increases in air emissions; impacts to the scenic beauty of the area due to the size of the proposed industrial structures; alteration of the community character due to the change in land use with the addition of this large industrial facility, increased noise, dust, and traffic; effects to historic structures (particularly Olana) due to the visual impacts as well as other impacts from dust, air pollution, and blasting; and impacts to the Hudson River waterfront on both the east and west sides due to increased shipping traffic, visual impacts from dock structures proposed by SLC, dredging and filling, and limitations on public recreational use of this portion of the Hudson River.

Speakers in opposition emphasized the historical and pastoral nature of the surrounding community and expressed concerns about the scale of the project. They stated that this facility would result in significant changes to the quality of life in the communities surrounding the facility resulting in decreased property values and the loss of many businesses, tourism, and second home buyers. Many of these speakers stated that Catskill was a more appropriate location for an industrial facility of this nature due to the small population located near the Catskill plant (500 residents as opposed to 20,000 living near the Greenport location) and the nature of the surrounding area. A large number of commenters also expressed concerns about the choice of fuels by SLC (coal) and the potential that garbage and hazardous waste might also be burned as fuel at this facility. In addition, many people commented that the expected economic benefits from the facility were limited, compared to the anticipated environmental impacts. Still others expressed doubts about the environmental compliance record of SLC and its parents and affiliated companies. Many speakers objected to industrial development of the Hudson River, particularly cumulative effects resulting from the Athens Generating plant and the precedent-setting effect for further heavy industrial development.

Several public officials spoke, including Senator Nuciforo of Massachusetts, who raised concerns about the air, water and health of the Berkshire public affected by SLC's plant. He emphasized that the plant would be located 23 miles from the Massachusetts border and that his state is downwind from the facility site. Village of Athens (Village) Trustee Andrea Smallwood stated SLC did not consider the Local Waterfront Revitalization Plan of Athens although the Village is directly across the river from the proposed facility. Ms. Smallwood said that the Village is concerned about the use of the SLC dock by large barges and ships, stockpiling of material, lighting, noise, and degradation of air quality based upon cumulative effects from the Athens Generating facility. City of Hudson Alderman Robert O'Brien polled his constituents and found an almost even number of people in support of and opposed to the project. However, he concluded that a substantial number of residents were undecided and had concerns regarding the proximity of the plant to the community, the size of the facility, the length of time it would be in operation, and the lack of environmental enforcement by DEC. Alderman Grandinetti also raised concerns regarding the large population concentration that is proximate to the proposed plant. He stated that the choice of fuels was purely an economic one and that SLC chose coal to reduce costs. A number of local business owners spoke, including Nancy Gordon of H.A.V.E. These individuals stated that the scale of the project and its anticipated impacts of noise, vibration from blasting, and dust would be inconsistent with the community character and would harm the economic health of the community.

Speakers in support of the project stated that the County and area were in need of more businesses and that SLC would meet the applicable regulatory criteria; therefore, the project should be permitted. Other supporters maintained that SLC would bring the types of jobs that are lacking in the community, while others commented that SLC's plant would positively affect air quality due to the use of modern technology and the shut-down of the Catskill facility. A number of SLC employees spoke about SLC's to become more efficient in order to sustain itself and remain competitive in the current economy. The employees also stated that the community required a balance of industry and other types of business to become viable. Sarah Nessich, a 30-year resident of Cementon - a village south of Catskill - noted that while living near 3 cement plants at one time presented inconveniences in terms of dust, the beneficial trade-off of increased job opportunity made it worthwhile. She mentioned that she was unaware of any bad health effects from this industry in her community and that the new plant would result in a significant reduction in air pollution. Diane Zipp of SLC stated that the plant would bring less pollution, more dollars to the community, and a quality product made in the United States.

Issues Conference

Preliminary Issues Conference - June 21, 2001

As a result of a conference call held on June 8, 2001 with representatives of SLC, the DEC staff and a number of organizations and municipalities that expressed an intention to file petitions for party status in these proceedings, ALJ Goldberger determined that it was appropriate to postpone the filing date for petitions and to delay the start of the issues conference in order to ensure a thorough evaluation of the project during the conference.[2] By this time, DEC staff had not completed preparation of a number of draft permits related to the application and FOH had not had access to files of the Department it had requested. ALJ Goldberger required any organization or individual seeking party status to file a letter of intention by June 13, 2001. The OHMS received such letters from the following: FOH; the Village of Athens; Stand Together to Oppose Power Plant (S.T.O.P.P.); Massachusetts State Senator Andrea Nuciforo, Columbia Hudson Partnership (CHP), Citizens for a Healthy Environment (C.H.E.), Columbia County; a coalition of Scenic Hudson, Inc., Hudson River Heritage, Concerned Women of Claverack, Historic Hudson, Inc., Hudson Antiques Dealers Association, Citizens for the Hudson Valley, and Clover Reach; the City of Hudson and the City of Hudson Planning Commission; The Olana Partnership (TOP); the Preservation League of New York State; Natural Resources Defense Council (NRDC); Town Board and Planning Board of the Town of Greenport; Commonwealth of Massachusetts Department of Environmental Protection (MDEP); Riverkeeper, Inc.; Berkshire Regional Planning Commission (BRPC); and the National Trust for Historic Preservation. ALJ Goldberger determined that on June 21 and June 22, respectively, a preliminary issues conference and site visit would be held.

The preliminary issues conference was convened on June 21, 2001 at 10:00 a.m. at Columbia-Greene

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2 In addition to DEC staff and Thomas West, Esq. on behalf of the applicant, the other participants in this conference call were: Jeffrey Baker, Esq. on behalf of Friends of Hudson, Marc Gerstman, Esq. on behalf of Scenic Hudson, Carl Whitbeck, Esq. on behalf of Greenport's Town and Planning Boards, Sara Griffen on behalf of The Olana Partnership, and Cari Schneider on behalf of Senator Nuciforo.

Community College. In attendance were: Robert Leslie, Regional Attorney and Michael Higgins of the Division of Environmental Permits on behalf of staff; Thomas S. West, Esq., Michael Peters, Esq. and Yvonne Marciano, Esq. of LeBoeuf, Lamb, Greene & MacRae on behalf of SLC; Jeffrey Baker, Esq. of Young, Sommer...LLC for FOH; Marc Gerstman, Esq. for a coalition of groups including Scenic Hudson, Citizens for Hudson Valley, Hudson River Heritage, Historic Hudson, Concerned Women of Claverack, Clover Reach and Hudson River Antique Dealers Association (Coalition); John Caffry, Esq. for TOP; Albert Butzel, Esq. for NRDC; Kevin Colwell, Esq. for the City of Hudson and the City of Hudson Planning Commission (the City); George Rodenhausen, Esq. and Carl Whitbeck, Esq. of Rapport, Meyers, Whitbeck, Shaw & Rodenhausen, representing the Town of Greenport and the Town Planning Board (the Town); John Leonardson, Deputy County Attorney for the County of Columbia; Andrew Schuyler representing Senator Nuciforo; Susan Falzon of S.T.O.P.P.; Marilyn Fenollosa, Esq. and Autumn Rierson, Esq. of the National Trust for Historic Preservation; Samara Swanston, Esq. for C.H.E., Margaret Ayers, Concerned Women of Claverack; and Daniel Mackay for the Preservation League.

Among the preliminary matters that were addressed at this meeting, ALJ Goldberger identified the application materials including the DEIS, the air permit, the application to the Office of General Services (OGS) for use of land under water, the joint permit application, the SPDES permit application and the draft permits for air and water.[3] At this conference, the staff distributed copies of the draft permits for mined land reclamation, freshwater wetlands, protection of waters, and a draft water quality certification. IC Ex. 12a.[4]

At this conference, Mr. Baker stated that FOH had submitted State Freedom of Information Law (FOIL) requests to the Department in January and June of 2001, in which FOH had requested that the staff provide the isopleth data that was submitted to DEC by the applicant as part of its air permit application. The applicant agreed to provide this information to FOH as well as the Town by June 25, 2001. In addition, FOH had made a general request to staff to review its files related to this project and wished to ensure access to them when FOH's expert, Mr. Sagady, would be available to review them. Staff agreed to make the materials available. A discussion then ensued concerning a proposed site visit. Certain intervenors requested

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3 As a result of discussions at the issues conference on July 23, 2001, the applicant revised its SPDES permit application. A revised permit application was distributed to the parties on August 6, 2001 and was marked as IC Ex. 11a. (A list of issues conference exhibits is annexed hereto as Attachment C). In addition, the joint permit application contained a wetlands mitigation plan that was also revised and distributed by SLC to some parties at the first day of the issues conference on July 18, 2001. The ALJs, as well as the petitioners and the DEC staff responsible for reviewing this material, did not receive a copy of this revised mitigation plan until July 26, 2001. This document was marked as IC Ex. 10a. At the August 15, 2001 session of the issues conference the applicant presented yet another report related to the wetland mitigation proposal. IC Ex. 118. On October 19, 2001, the applicant submitted a further revised wetland mitigation plan that has been identified as IC Ex. 10b.

4 On August 24, 2001, the OHMS received a copy of a revised version of these permits from DEC staff. IC Ex. 12a(i).

that the applicant perform a repeat balloon fly during a future site visit.[5] Due to the early stage of the proceedings and the fact that the applicant had already performed this demonstration as part of the DEIS, ALJ Goldberger determined that the site visit would instead include a tour of the locations of the proposed project: the plant site in the mine, the office area, the dock area and the path of the conveyor. The possibility that another site visit would be held to view other significant sites in the area that would be affected visually by the proposed facility was left open.

ALJ Goldberger declined the application of the Coalition and FOH to extend the public comment period. In addition, the ALJ found requests by a number of intervenors for the applicant's production of meteorological and blasting data premature.

June 22, 2001 Site Visit

The site visit took place on June 22, 2001. The participants met at SLC's offices on Route 9 in Greenport at 10:00 a.m. In addition to representatives of SLC and DEC staff, representatives of the Town of Greenport, the Coalition, the Preservation League, FOH, TOP, the City, S.T.O.P.P., the National Trust for Historic Preservation, C.H.E., Columbia County, and the Riverkeeper, as well as members of the press, were in attendance. At the beginning of the tour, Thomas West, counsel for the applicant, distributed three drawings that depict the proposed site plan, the location and dimensions of the primary crusher building and the preblend hall, and the proposed dock area. IC Ex. 53. The tour began at SLC's offices on Route 9 in Greenport. From this vantage point, the group viewed the Becraft Mountain ridge that is east of the dock facility area and west of the site of the proposed manufacturing facility. This ridgeline was to be mined late in the project; however, based upon an agreement with Columbia County, SLC has agreed to preserve this ridge.[6] SLC intends to maintain offices and a testing materials laboratory at the current offices on Route 9. West of this area, the participants viewed other structures that are remnants of Universal Atlas Cement's activities, including the silos and stack, which the applicant intends to remove. See, DEC draft special visual permit condition14a, IC Ex. 12a(i). Based upon the State Office of Historic Preservation's (SHPO) interest in the stock house, the powerhouse building and the trestle, SLC has agreed to clean, rehabilitate and utilize the stock house, rehabilitate the powerhouse and possibly incorporate the trestle into a pedestrian walkway to the river. See, id., DEC draft special visual permit conditions nos. 12 and 15.

From SLC's offices, the participants boarded a bus and proceeded to the mine site where the

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5 SLC flew balloons on December 2, 1999 and in the spring of 2001 to assist in the visual impact analysis of the facility. The results of the first demonstration are set forth in Appendix B to the DEIS, IC Ex. 7. A video and photographs of the second balloon fly were submitted as public comments on the DEIS by photographer Sarah Sterling. These materials were also marked as exhibits at the issues conference as IC Exs. 61 and 61a-g, respectively.

6 SLC declined to agree that this stipulation should be incorporated as a permit condition or into the mined land use plan due to its position that its mining activities are grandfathered under SEQRA and there would be no jurisdictional basis for such a requirement. TR 2025. This issue is discussed in more depth on p. 59. SLC represented that, in the event DEC denied this permit application, SLC will soon mine this ridge as part of its continued operations in Greenport.

manufacturing facility would be located. SLC had placed numbered cones in this area to denote the different structures that are planned such as the raw mill building, the blending silos, the preheater tower (largest structure), exhaust stack, clinker cooler, cooler baghouse, the plant office, and the mill building near the Becraft Mountain ridge. We viewed the mine impoundment that functions as a manmade lake in this area. The applicant's representatives described the route of the conveyor and its dimensions (seven feet tall by three and a half feet wide).

Back across 9G, we walked along an access road where the conveyor would be located. At the dock, SLC described the structures it intends to construct at that location, as well as the planned rehabilitation of the stock house, which will be retained and expanded. An expanded dock and a second dock to the south is proposed for the delivery of raw materials such as coal and gypsum, and the shipping of cement, respectively.

August 16, 2001 Site Visit

In response to ALJ Goldberger's request at the June 21 preliminary issues conference for a suggested itinerary for a further site visit to observe areas that would be affected by the project, in their petitions for party status, Coalition and TOP presented suggested locations to visit, including Olana (specifically, Cosy Cottage and the main house) both inside and on the grounds. In addition, the Coalition felt that it was also necessary to visit the City of Hudson, Village of Athens waterfront, Webb Road in Claverack, Routes 9H north and south of
the hamlet of Claverack and 23B in the hamlet of Claverack, Route 9G below Mt. Merino, Warren Street in Hudson, Route 9 south of Hudson, Academy Hill, the Rossman-Prospect Avenue Historic District, Cedar Park Cemetery in Hudson, and the Hudson River in the area between the lighthouse and the upper end of the Middle Ground Flats.

In addition, these intervenors requested that as part of this additional site visit, the applicant should bring larger copies of the available photo simulations in the DEIS and conduct another balloon fly. After several discussions on this subject, the ALJ concluded that it was not appropriate to require the applicant to provide these additional pictures and that the difficulties associated with another balloon fly by the petitioners were too unwieldy to coordinate with a second site visit. Instead, ALJ Goldberger requested that the Coalition submit a specific plan for the tour, and stated that if the Coalition wished, it could submit its own photo simulations based upon a balloon fly into the issues conference record. Due to the need for an added day for the issues conference, August 15 and 16 were selected to complete the conference and to hold the second site visit.

On August 16, the participants to the issues conference met again at the SLC offices in Greenport to convene this second site visit. Trustee Chris Pfister of the Village of Athens, Mr. Caffry and Margaret Davidson from TOP, Thomas S. West, Yvonne E. Marciano, Bob Bristol, Gina Facca and Ellen Nicholas representing the applicant, Michael Higgins and Robert Leslie of DEC staff, Jeff Baker, Sam Pratt and Vincent Bilotta for FOH, Alix Gerosa of Scenic Hudson and Marc Gerstman for the Coalition, Joseph Brill for the *Hudson City Register*, Mr. Howard Cort, and the ALJs were present for this tour. The purpose of the visit was to observe the various historical and scenic locations in the vicinity of the proposed project and also to view the balance of land uses in the area including a number of industrial and institutional facilities.

The first stop on this visit was to the Hudson Waterfront Park which is currently under development. There are plans by the City to extend the park to the south, although there are also some contaminated properties in that vicinity. Farther south is SLC's property. While at the Waterfront Park site, the participants viewed the Hudson Correctional Facility to the east. At the site for the pump house; we viewed a large salt pile as well as the railroad trestle that SHPO has expressed interest in having the applicant preserve. See, draft special visual permit condition 15, IC Ex. 12a(i). SLC intends to construct a "T" dock for barges to dock in this vicinity.[7] From this location, the submerged aquatic vegetation (SAV) beds were straight ahead of us, as were the Athens Lighthouse and the Village of Athens. From here, we could also see several historic buildings in the Village including the Stewart House.[8] From this site, the southern edge of the Middle Ground Flats was visible, an island in the river that provides partial screening from locations to the west of portions of the shore where SLC proposes waterfront activities.

We then walked along the shore to the area where SLC proposes to build a park (Lookout Point). SLC has proposed a gazebo and walkway, with an area for picnicking. Staff has raised concerns about destruction of habitat and has suggested a more simple design. See, IC Ex. 12a(i), draft visual permit, special condition 8; IC Ex. 114. From this location we could view the bridge that connects to the South Bay, and, on the other side of the CSX railroad tracks, the vicinity of the proposed wetlands mitigation plan. We also observed the southern edge of the Greenport Conservation area. From here we also viewed the north end of Mount Merino, as well as a pond in which the water level does not fluctuate. On our walk back, the ALJs noted the location of the current stormwater impoundment. The proposed dock impoundment will be in this vicinity, and will be larger.

Driving down route 9G, we noted the location of the prison as well as the presence of water on the side of the road that connects to a stream under the railroad trestle near the proposed dock location.

We next visited Olana, a National Historic Landmark that is on the State and National Registers of Historic Places, and was the home of the Hudson River School painter Frederic Church. As we drove in, we observed the lake built by Church. We went to Cosy Cottage (the original Church residence on the property) and a meadow near it where we could observe where the facility would be located, particularly the main stack and preheater, which is to the east/ northeast of Cosy Cottage. Appendix B, DEIS, IC Ex.7, pp. B1-101 - B1-104. From this vantage point, the views are strikingly pristine with the notable exception of the abandoned Universal Atlas cement plant owned by SLC. This defunct plant is located to the west of the proposed facility. SLC proposes to remove these structures to mitigate the visual impacts associated with the project. There is also a view of Becraft Mountain from this vantage point.

We then walked to the main house where we viewed the restoration of the exterior cornices and the

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7 Due to concerns of staff that were raised with respect to the dock's location and potential impacts on SAV beds, SLC agreed to move the dock further out into the river (approximately twenty feet to the east of the navigation channel) to avoid this sensitive habitat. This agreement has not yet been specifically incorporated into the draft permit. IC Ex. 12a(i), Article 15 draft permit, special conditions 6-7.

8 This part of the Village (the Lower Village Historic District) is a National Register District.

views to the west, northwest and southwest. On the opposite shore of the Hudson are a number of abandoned oil tanks, although the tanks are partially obscured by second growth.[9] To the southwest, we observed structures at SLC's Catskill facility which the applicant has agreed to remove in part, including the bunkers at the shore and the stack. The facility's plume was also visible. Further southwest is the Lehigh Cement facility.

The tour then crossed the Hudson River to the Village of Athens Waterfront Park, and proceeded down Second Street where there are many well kept older homes. From the waterfront, we viewed the Athens Lighthouse. While a portion of the proposed dock and plant would be obscured by the Middle Ground Flats in some locations of the Park (including the vantage that was photographed by the applicant's consultant - IC Ex. 7, DEIS, Appendix B1-42 - 45), it is clear that, from this location, dock unloading, material stockpiling, a portion of the plant's main stack and its plume will be visible. In addition, the conveyor, pump house, and stock house will also be seen. From this location, the railroad trestle and the Atlas stack and silos are also visible. In addition, based upon the photosimulation contained in the DEIS, Appendix, pp. B1-57 - 59, the main stack of the facility will be visible from the Athens boat launch.

We next drove back across the Hudson River to Claverack where we stopped at a church on 9H and viewed the ADM stacks, as well as the viewpoint from which travelers on Route 9H will be able to see the proposed facility. We then drove to the Old Courthouse in Claverack to observe many of the old historic homes in this hamlet. We traveled to the Colarusso mine that is located off Newman Road and also past the ADM/Lone Star plant site. Our final visits stops included Academy Hill, Rossman Avenue, Promenade Park and the KAZ facility in Hudson. At this last location, we attempted to get a view of the Plumb-Bronson historic house that is located on the prison grounds, but were unsuccessful. The applicant has included photographs and photo simulations in the DEIS of views of the proposed facility from most of these locations. See, DEIS, Appendix B1-7 - 12, B1-18 - 23.

Issues Conference - July 18-July 31, August 15, 2001

The OHMS received timely petitions for full party status from the following organizations: FOH represented by Jeffrey S. Baker, Esq. of Young, Sommer . . . LLC, the Coalition (now comprised of Scenic Hudson, Inc., NRDC, Historic Hudson, Inc., Hudson Antique Dealers Association, Hudson River Heritage, Citizens for the Hudson Valley, Clover Reach, the Concerned Women of Claverack, and Riverkeeper, Inc.[10]) represented by Marc S. Gerstman, Esq., TOP represented by John W. Caffry, Esq., the Town represented by George A. Rodenhausen, Esq. of Rapport Meyers Whitbeck Shaw & Rodenhausen LLP, the City represented by Jason Shaw, Esq. of the Rapport Meyers law firm, MDEP represented by Robert Bell, Chief

9 In the comprehensive plan of the New York State Office of Parks, Recreation and Historic Preservation and TOP to restore the grounds of Olana to the landscape envisioned and executed by Church, the intention in this vicinity is to remove much of this growth to provide more of a western view. See, Exhibit E to TOP pet., IC Ex. 41. Issues conference participants informed the ALJs that a portion of the mitigation fund created as a result of the Athens Generating Co. proceedings will be used to remove the tanks.

10 At various points in these proceedings, attorneys Amanda Waters, David Gordon and Basil Seggos provided representation related to topics of specific concern to Coalition member Riverkeeper.

Regional Counsel, and BRPC represented by Elisabeth Goodman, Esq. of Bernstein, Cushner & Kimmell, P.C.[11] In addition, timely petitions for *amicus* status were submitted by the CHP represented by Edward McConville, Esq., the Village represented by Mayor David M. Riley[12], the County of Columbia represented by John M. Leonardson, Esq., Deputy County Attorney, the New York State Preservation League represented by William A. Hurst, Esq. of McNamee, Lochner, Titus & Williams, P.C., the National Trust for Historic Preservation represented by Autumn Rierson, Esq., and NRDC represented by Albert Butzel, Esq.[13]

During these proceedings, staff was represented by Regional Attorney Robert Leslie and SLC was represented by Thomas S. West, Esq., Robert J. Alessi, Esq., Yvonne E. Marciano, Esq., Michael Peters, Esq., and Frederick B. Galt, Esq. of LeBoeuf, Lamb, Greene & MacRae, LLP.

For a summary of the positions of the various petitioners, see the chart annexed as Attachment D. On July 12, 2001, a conference call was held among the petitioners, the applicant and DEC staff with ALJ Goldberger to set a schedule for the issues conference.[14] Mainly, this schedule was adhered to with the exception of a few proposed issues. The conference schedule was as follows:

July 18 - Air - modeling, meteorology data, offsets, air emission impacts to Olana
July 19 - Columbia County Stipulation, Air - PSD, BACT/LAER, NSR Alternatives
July 20 - Air - BACT/LAER, opacity, $PM_{2.5}$
July 23 - BACT/LAER, monitoring, wildlife/plant impacts, wetlands, SPDES
July 24 - SEQRA/mining/Becraft Hills, water supply, blasting
July 25 - Blasting, traffic, noise
July 26 - Wetlands mitigation plan, waterfront, noise

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11 By letter dated July 12, Ms. Swanston, representing the Citizens for a Healthy Environment, advised ALJ Goldberger that this group had decided not to petition for party status. By letter dated July 10, attorney Bacon advised ALJ Goldberger that S.T.O.P.P. would be represented by Ms. Susan Falzon. Because Senator Nuciforo's office and S.T.O.P.P. did not submit petitions, these organizations as well as C.H.E. were deleted from the service list for this proceeding. At the issues conference on July 31, 2001, attorney Gerstman sought permission to add C.H.E. to the Coalition. ALJ Goldberger denied this request based upon the lateness of the application. TR 2021.

12 During the issues conference, the Village was at times also represented by Trustees Chris Pfister and Andrea Smallwood.

13 The applicant objected to NRDC's application for "dual" status; however, the ALJ interpreted this organization's petition as principally one for *amicus* status as in its role as part of the Coalition, NRDC does not act independently. TR 39-42.

14 By setting this schedule, the participants were able to arrange for consultants to be available on the relevant days and were able to attend only those days of the conference that discussions pertinent to their concerns were held.

July 27 - Site visit, CKD, economics, community character, alternatives
July 30 - Visual impacts, historic sites, coastal zone
July 31 - Visual impacts, historic sites
August 15 - Met data, fisheries and wetland mitigation plan, revised SPDES permit application, CKD, record of compliance, briefing matters, and 2d site visit itinerary.
August 16 - 2d site visit

The ALJ set a briefing schedule to permit the issues conference participants to provide additional argument on certain legal issues that arose during the conference. Initial briefs were due on September 7, and replies were due on September 21. Due to the events of September 11, a request was made by the Coalition's attorney for more time to file replies and the ALJ agreed to extend the deadline for replies to September 28, 2001. While typically the receipt of the transcript and the reply briefs would close the issues conference record, because we have found a number of outstanding items requiring supplementation of the record, as well as review by staff and the other participants in this process, the issues conference record is being held open pending the fulfillment of these requirements.

By letter dated September 6, 2001 (subsequent to the close of the issues conference), Attorney Whitbeck wrote to advise the ALJs of the Town's determination to withdraw its petition for full party status in light of a pending Host Community Agreement with SLC. IC Ex. 132. The Town also submitted an *amicus* brief dated September 28, 2001 in support of the project and similar in content to the petition of the County. IC Ex. 154. Accordingly, this issues ruling will not address the Town's proposed issues

By letter dated November 28, 2001, Mr. Shaw informed the ALJs that the City and SLC have been negotiating the language of a settlement but the Planning Commission has not yet approved this agreement. IC Ex. 176. This ruling addressed the issues raised in the City's petition because, unlike the Town, the City has not withdrawn that petition.

Standard of Review

When Department staff has determined that a permit application will, subject to draft permit conditions, meet all statutory and regulatory requirements, petitioners must demonstrate that an issue is substantive and significant in order for the issue to be subject to adjudication and for the petitioner to achieve party status. 6 NYCRR § 624.4(c)(4). An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria such that a reasonable person would inquire further. 6 NYCRR § 624.4(c)(2). The bases for the ALJs' determination are the petition, the offers of proof, the issues conference presentation in light of the application, the draft permit, the presentations of the staff, the applicant, and the petitioners at the issues conference as well as the issues conference exhibits, briefs, and the applicable law and regulations.

A substantive issue may also be raised by the identification of a defect or an omission of pertinent information in the application and EIS, so as to warrant further inquiry. Matter of Town of Brookhaven, 1995 WL 582471 (Interim Decision, July 25, 1995); Matter of Halfmoon Water Improvement Area, 1982 WL 25856 (Interim Decision, Apr. 2, 1982).

An issue is significant if it has the potential to result in the denial of a permit, a major modification of the project or the imposition of significant permit conditions in addition to those already in the draft permit. 6 NYCRR § 624.4(c)(3).

PROPOSED ISSUES

Air Quality

The Clean Air Act (the Act or CAA) provides national ambient air quality standards (NAAQS) for six pollutants (sulfur dioxide, particulate matter [PM], carbon monoxide [CO], ozone [O_2], nitrogen dioxide [NO_2] and lead) known as "criteria pollutants" that have demonstrated effects on health and the environment at certain levels. 42 USC §§ 7408, 7409, CAA §§ 108, 109; 40 Code of Federal Regulations (CFR) Part 50.[15] The states develop implementation plans to achieve these standards where the standards are not already met. 42 USC § 7410, CAA § 110. When major sources are built or modified in non-attainment areas, new source review (NSR) requirements pertain including the technology forcing standard of lowest achievable emissions rate (LAER). 42 USC 7501(3), CAA § 171(3); 6 NYCRR Part 231. When major sources are modified or built in NAAQS attainment areas, PSD standards apply including best available control technology (BACT). 42 USC §§ 7470-7479, CAA §§ 160-169. PSD increments have been set for SO_2, PM and NO_X at a fraction of the NAAQS levels. Belden, supra, p. 50. Because the applicant has proposed a facility in an area that is subject to both PSD and NSR requirements, in addition to other federal and state air pollution control requirements, it has applied for air pollution control permits from DEC.

Intervenors, FOH, the City, the Coalition, MDEP, TOP, BRPC, and CHP raised potential issues regarding the applicant's air quality analysis and the project's potential impact on air pollution in the surrounding area of the facility and east into Massachusetts. Below is the discussion of those matters and the determinations we came to as a result of our review of the issues conference record. As a general note, for a number of the matters involving the draft air permit, there remains uncertainty due to the staff's declarations during the issues conference that more review (and discussion with the United States Environmental Protection Agency [EPA]) will be necessary to ascertain whether the permit limitations meet regulatory requirements. Accordingly, we have no choice but to find that once there are decisions made by staff on these permit conditions, and assuming there are changes to the draft air permit, the revised draft air permit will have to be subject to further review in the context of the issues conference.

Modeling Protocol

The applicant performed an air quality impact analysis to determine if emissions from its proposed facility, including the existing mine operation and existing background sources, would comply with the NAAQS and New York State Ambient Air Quality Standards (NYSAAQS), PSD increments, and New York State *Draft Air Guide*-1 concentrations. See, SLC Greenport Air Permit Application, C-1, IC Ex. 8 . To do

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15 For a very concise explanation of these pollutants and their health impacts, see Roy Belden's *Clean Air Act* - ABA's Basic Practice Series (2001), pp. 12-13. See also, Wooley, *Clean Air Act Handbook* (9th ed. 2000) § 1.02.

this analysis, SLC performed dispersion modeling.

FOH, the Coalition, TOP, the City, the BRPC and MDEP argued in their petitions that the applicant's air analysis was flawed because its modeling was based upon meteorological (met) data from the Albany Airport National Weather Service (NWS) station rather than from the on-site Greenport monitoring tower. The applicant constructed a meteorological tower in Greenport and collected data beginning in August 1999 from this location.[16] At the preliminary issues conference, the applicant declined to present this data because the data had not been validated and had not been utilized by SLC in its modeling. In response to a motion to compel production of this material made by FOH on July 18, the ALJ and issues conference participants learned that as part of the protocol for the collection of the data, it had been transmitted to DEC staff and was therefore accessible to the public via FOIL. At that point, both the applicant and staff agreed to furnish the data to the intervenors and additional time was granted for the petitioners to supplement their filings to address this new information. Supplemental filings were provided on August 9, 2001 by FOH, the Coalition, TOP, BRPC, and the Town. IC Exs. 36a, 39a, 40a, 41a and 51a.

After the close of the issues conference, FOH informed the ALJ and other participants by fax dated September 26, 2001 that its consultant, Camp Dresser and McKee (CDM), had performed the air modeling using the local met data and determined that the facility would cause exceedances of the PM_{10} PSD increment. FOH made a formal motion on October 2, 2001 to make this finding an additional issue for adjudication. The issues conference participants agreed to a response date of October 19, 2001. The ALJs determined in a memorandum dated October 23, 2001 that this additional information did not require a formal reconvening of the issues conference but could be considered as part of this record. IC Ex. 170.

RULING: An issue exists for adjudication because the applicable regulatory authority and facts indicate that the use of the on-site meteorological data in the air dispersion modeling would potentially result in a different outcome, specifically for impacts from particulate emissions from SLC's proposed facility.

Part 61, section 9.3 of Title 40 of the CFR, contains guidelines for air quality modeling. This section provides that "[t]he meteorological data used as input to a dispersion model should be selected on the basis of spatial and climatological (temporal) representativeness as well as the ability of the individual parameters to characterize the transport and dispersion conditions in the area of concern." This section goes on to state that the "representativeness" depends on the proximity of the monitoring site to the area of concern; the complexity of the terrain; the exposure of the monitoring station; and the period of time during which the data is collected. This data is obtained from either a NWS or an on-site measurement program. While these regulations indicate that five years of data is generally preferred, when on-site data of one year or more is available, that data is more preferred. 40 CFR Part 61, § 9.3.1.2.

Essentially, the applicant contends that in developing the modeling protocol and choosing the Albany NWS, SLC worked with DEC and EPA's Region 2 office extensively and complied with all regulatory requirements. TR 55, 2093. According to the applicant, because the project met the applicable requirements for the complex terrain model using the default meteorological values, there was no need to utilize the on-site

16 The Town of Greenport produced the application filed by SLC to build the met tower noting that the application indicates that SLC intended to use that data in the air permitting process. IC Ex. 58.

met data. See, Appendix A to Applicant's Opposition to Friends of Hudson's Motion to Add an Issue For Adjudication, October 18, 2001, IC Ex. 166, p. 4. The Albany Airport is a Class I meteorological station - meaning that it has the highest degree of quality assurance and quality control over the data - and there are many years of data from this station. But this choice would still appear contrary to what is provided in the federal regulations because of the availability of the on-site data, the length of time the data has been collected, and the ability of the applicant to perform the validation necessary to ensure quality assurance.

DEC's Air Guide 26 - *NYSDEC Guidelines on Modeling Procedures for Source Impact Analyses* (revised 12/9/96), p. 4, also provides that "[o]n-site meteorological data is generally preferred over National Weather Service data."

The on-site data would better reflect conditions in the area than the Airport NWS which is 40 miles away. Moreover, as the CFR notes, the nature of the terrain must be considered. As noted by the intervenors and not disputed by SLC, the two topographies are quite different in that the airport is located on a plain while the on-site monitor is located in an area "with high rolling hills and mountains." See, SLC Air Permit Application, IC Ex. 8, p. C-1. While the applicant pointed out that the Athens facility also had an on-site met tower and that data was not used, this choice did not become an issue in that proceeding. Moreover, there are enough distinctions between the location of the Athens plant and the Greenport facility that may result in differences in the data collected from the two meteorological towers. With respect to validation of the data, while this must be a necessary step in determining whether FOH's modeling results are accurate, it should be noted that CDM did review the filed logs, site inspection checklists, preventive maintenance checklists and calibration/audit reports for the 2000 data and found the data to be "accurate, complete, and of acceptably good quality." IC Ex. 157, Exhibit A, pp. 1-2.

SLC chose two models: (1) the ISCST 3 model for simple terrain (the area below the stack height) and (2) the CTScreen model for areas above the stack height. The ISCST 3 model uses the data from Albany Airport but the complex terrain model uses conservative default data that is supposed to simulate worst case conditions. SLC maintains that the Albany data is more reliable because it is collected over a longer period of time, and thus would be less likely to be unduly influenced by extreme, anomalous weather conditions. In addition, the applicant maintains that it would be a waste of resources to require it to go through the validation process for the on-site data, given the relatively short duration of data collection and the regulatory agencies' approval of the use of the Albany data. Nevertheless, the applicable guidelines provide that one year of data is sufficient, and given the importance of the air issues to the community and the scale of this project, such analysis would not be a waste of resources but rather would ensure that appropriate scrutiny was given to potential air impacts.

Once the local met data was reviewed, these intervenors found that the speed and direction of the winds were at variance from what the applicant presented. While there was an apparent misinterpretation of how the data was presented, CDM prepared a corrected report dated August 24, 2001 and submitted that report to the OHMS on August 27, 2001. CDM calculated that wind speeds from Albany are approximately 55 percent faster than those from Greenport. CDM report, IC Ex. 39b, p. 5. In addition, as noted by the applicant and staff at the August 15 issues conference, the wind rose produced by CDM was also in error -

meaning that the wind direction found by FOH's consultants was incorrect.[17] The August 24 report acknowledges this error and finds that the data indicates "a strong channeling of winds in the north and south directions, with a predominant direction from the south and a secondary preference from the north." The winds at Albany are from the south, with a secondary preference from the west-northwest. Id., p. 4. Thus, the intervenors maintained that the differences remain significant and the failure to use the on-site met data has potentially resulted in an underestimation of pollutants from SLC's proposed facility.

Next, FOH presented CDM's dispersion modeling of PM_{10} using the Greenport met data. IC Ex. 157. In its report, CDM questioned the results achieved by SLC in its PM_{10} results due to some "suspicious" data points. Id., Siple Report, p.3. Most significantly, Mr. Siple reports that the analysis revealed that the maximum 24-hour PM_{10} concentration near the property line is predicted to be 31.89 ug/m^3 (micrograms per cubic meter) and the second high 24-hour PM_{10} concentration is predicted to be 30.15 ug/m^3. The allowable PSD increment for new sources in this area for the 24-hour PM_{10} concentration is 30 ug/m^3. 40 CFR § 52.21(c). Id., p. 4. The concentrations that CDM found occur at receptors located at the property line of the proposed facility. Id., p. 4. Mr. Siple, who is a Principal Air Quality Scientist at CDM, concludes in his report that the maximum PM_{10} concentration from SLC must be reduced to protect the PSD increment, a complete cumulative analysis must be undertaken and the effects of these results on $PM_{2.5}$ must be determined. Id., p. 5.

The applicant and staff respond to this motion with many criticisms of CDM's analysis. IC Exs. 166, 168. First, these parties emphasize that the protocol employed by SLC to model air impacts was thoroughly scrutinized by the regulatory agencies, and that SLC adhered to that protocol. In addition, these parties argue that because the met data has not been validated and therefore, CDM's results are not reliable. Maureen Hess, on behalf of Malcolm Pirnie, SLC's consultant, emphasizes in a letter dated October 18, 2001 (the Hess Letter), attached to SLC's response, that the failure to validate makes the data suspect and points to several resulting "potential areas of concern . . ." SLC Opposition, Attachment A, p. 6 to IC Ex. 166. This is further supported in the October 17 report of meteorologist Russell F. Lee that was also submitted by SLC with its response. Citing to EPA guidance, Mr. Lee emphasizes that site-specific data is only preferred where there has been quality assurance. SLC Opposition, Attachment B, p.3, IC Ex. 166. While CDM does report that it performed some level of scrutiny to assure itself of the quality of this data, there is no assertion that the validation required by a modeling protocol was performed. Siple, pp. 1-2, IC Ex. 157. It is clear to the ALJs that if we are to adjudicate the issues of fact that exist among the intervenors, the staff, and the applicant on this matter, there must be a starting point of validated data. See, SLC's Opposition, p. 15. Because the applicant has satisfied DEC staff that its air quality analysis was sufficient and the results indicate compliance with applicable regulations, the burden is on the intervenors to show otherwise. 6 NYCRR § 624.4(c)(4). Therefore, FOH is responsible for validation of this data should it wish to proceed to hearing on this matter.

The Hess Letter also questions some of the inputs presented by FOH, claiming that emission point

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17 A wind rose depicts the various frequencies and intensities of wind direction and speed.

contributions were overstated. Appendix A to IC Ex. 167, p. 7. Malcolm Pirnie reran the model with the data provided by CDM but changed the input of these emissions points, and obtained results of an annual average of 7.97 ug/m^3, a 24-hour average of 30.98 ug/m^3 and a 24-hour average of the highest, second high of 27.92 ug/m^3. Id. While SLC emphasizes that the mistakes that its consultants have determined were made in CDM's analysis should put this matter to rest, instead we find a dispute that cannot be settled in an issues ruling. Rather, resolution requires a hearing where the experts' analyses will be subject to cross-examination so that the Commissioner will have a firm basis to determine what the project's impacts will be. While staff maintains that air modeling is not meant to be an exact predictor of air impacts, if there is a question about whether an essential aspect of the conclusions regarding these impacts exists, that rises to the level of a substantial and significant matter that should be subject to further scrutiny.

Staff emphasizes that even if FOH's analysis is correct, the 30.15 ug/m^3 meets the PSD increment because 40 CFR § 52.21(c) sets the increments in whole numbers. However, reading this regulation provides no indication that levels that exceed the 30 ug/m^3 meet the increment allowance.

We agree with SLC and staff that while PSD matters may not be adjudicated in this forum, as stated elsewhere in this document, the SEQRA requirements as well as the State's air permitting regulations - 6 NYCRR § 220.3 - require an accurate assessment of particulate emissions from this facility. The application itself provides that particulates will increase as a result of this project. Air permit application, IC Ex. 8, p. C-26; DEIS, IC Ex. 6, p. 14-25. The Department cannot rely on an air standard that it finds to be consistent with protection of public health and welfare if it is not certain what the impacts from these emissions will be and hence whether the appropriate protective standard will be met. Accordingly, to ensure that a potentially significant adverse impact is addressed in this review, the issue of the accuracy of the air dispersion modeling with respect to particulate emissions must be addressed in an adjudicatory hearing.

Emission Offsets

Section 231-2.4 of 6 NYCRR requires that any proposed source that emits any nonattainment contaminant must obtain, *inter alia*, emission offset credits (ERCs) for that pollutant. See also, 6 NYCRR § 231-2.4(b). Because the proposed facility is located in the ozone transport region (OTR) and the plant will emit volatile organic compounds (VOCs) and NO_X, precursors of ozone, SLC must provide ERCs for these pollutants. In other words, prior to permit issuance, the applicant must demonstrate a reduction of these pollutants within the OTR that compensates for the proposed new emissions in accordance with the ratios set forth in 6 NYCRR § 231-2.12.

The draft air permit does indicate that SLC will obtain emission offsets for NO_X and VOCs; specifically, 149 tons of VOC ERCs and 4,740 tons of NO_X. In addition, the conditions provide that the ERCs shall be identified as to source and amount prior to issuance of the permit. See, conditions 37 and 38, IC Ex. 12, pp. 20-21.

FOH identifies the omission of the exact source of these credits as an issue for adjudication. FOH contends that if SLC does not intend to close Catskill, and instead plans to obtain the ERCs elsewhere, this

result will have a significant impact on the SEQRA analysis of the Department.

At the issues conference, SLC stipulated that ERCs will come from the permanent closure of the Catskill kiln prior to the production of the first clinker at the Greenport plant. TR 107. SLC maintained that this information is sufficient to comply with 6 NYCRR § 231-2.10, which requires that ERCs be identified prior to permit issuance, as well as a separate public notice and comment period.

RULING: SLC is directed to identify the source(s) and quantities of ERCs obtained for this project within sixty (60) days from the date of this ruling. In accordance with Part 231, the applicant and staff have committed to identification of the credits as well as providing the requisite public notice and comment. However, because of the proceedings already set in motion by this application and the precedent of other permit proceedings before DEC in which the ALJ required the receipt of the ERC information prior to the close of the issues conference, we will do likewise.[18] The identification of ERCs is not an issue for adjudication.

Based upon the stipulation provided by SLC, we do not find that the closure of the Catskill kiln is an open question and thus, any SEQRA findings related to that event will not be forestalled. However, based upon the above requirement, should there be any question with respect to the ERCs provided by the applicant, the parties will have notice.

Compliance Certification

In addition to the ERC requirement for facilities that will emit nonattainment pollutants, 6 NYCRR § 231-2.4(a)(2)(i) requires applicants to "certify that all emission units which are part of any major facility located in New York State and under the applicant's control (or under the ownership or control of any entity which controls, is controlled by, or has common control with the applicant) are in compliance, with all applicable emission limitations and standards under Chapter III of this title." FOH stated in its petition that SLC has failed to certify its compliance, and must do so now as part of its new source review application. In addition, FOH maintained that SLC should be required to certify the compliance status of other facilities it controls in this state. FOH also alleged that the applicant's parent, Holcim, has interests in Glens Falls and Lehigh/Glens Falls Joint Ventures requiring compliance certification of those facilities.

RULING: SLC stated that as part of its Title V application on behalf of Catskill a compliance certification has been submitted to DEC. Staff agrees that this certification, because it is not current, is not sufficient for this application. The applicant stipulated to recertify. TR 122. As with the ERCs, this certification should

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18 In the application by KeySpan for the Ravenswood Article X facility, the staff identified the ERCs as a potential matter for adjudication based upon omission of this information in the application. Thus, the applicant was required to provide this information prior to the close of the issues conference and the completion of the issues ruling. See, Application of KeySpan Energy (Ravenswood), 2001 WL 470660, *5 and Appendix A, p.2 (Part 624 Issues Ruling, Apr. 18, 2001). We do note however that in Application of Mirant Bowline, LLC, the Department has issued a separate notice dated October 5, 2001 inviting comment and identification of issues related to the announcement of ERCs. This process which is being used in an Article X proceeding, appears less efficient than addressing these concerns now.

be made part of this issues conference record and therefore, SLC is directed to supply this certification to the parties within sixty days of this issues ruling.[19] This omission by SLC is not an appropriate issue for adjudication.

With respect to the Glens Falls facility, SLC explained at the issues conference that there is less than a 10 percent stock ownership by Holcim and Dyckerhoff in this plant and because this is a joint venture, Holcim's interest is less than 5%. Added to that equation, SLC, LLC is a subsidiary of St. Lawrence Group, Inc. which is a Canadian publicly traded corporation - 64% of the St. Lawrence Group, Inc. is owned by Holman and Holman is a wholly-owned subsidiary of Holcim, leaving a long corporate chain to reach the small interest that Holcim has in that facility. FOH has not established sufficient cause to merit further examination with respect to the ties among these entities and whether those ties would warrant compliance certification for the Glens Falls plant.

Air Pollution Impacts to Historic Resources

In their petitions, TOP and the Coalition raised concerns regarding the potential for damage to structures and vegetation at Olana from air pollution associated with SLC's Greenport project. TOP states that such impacts would adversely affect efforts underway to restore and enhance Olana and to continue to attract visitors. Olana is a State historic site and National Historic Landmark (NHL), and was the home of 19th Century Hudson River School painter, Frederic Church. The house is situated on the original 250 acres plus additional lands acquired by New York State totaling 336 acres and located about 3 miles northwest of the proposed plant site. DEIS, IC Ex. 6, p. 5-12; TOP Pet., IC Ex. 41, p. 4. As set forth in TOP's petition, the 1870's main house at Olana is known for its intricate design and decoration both in and outside of the building. TOP maintains that the pollutants emitted by SLC - sulfur dioxide, nitrogen oxides and others - will erode building materials and reduce their useful life. TOP has retained an analytical chemist with over thirty years of experience in architectural conservation, Norman Weiss, who states in his report that the masonry, copper roofing and lead materials are vulnerable to the expected emissions from the plant.[20] See, Exhibits J, K and L to TOP petition, IC Ex. 41.

RULING: As noted by the intervenors, SEQRA includes "objects of historic or aesthetic significance" in its definition of "environment." ECL § 8-0105(6). While the applicant contends that its air analysis indicates compliance with the NAAQS secondary standards that provide protection for structures, there is no indication in the EIS that consideration was given to determining what, if any, significant effects the project's air emissions will have on the structure of the Church residence at Olana given its proximity to the proposed facility. See, Matter of Application of Foster Wheeler-Broome County, Inc., ALJ Ruling (Apr. 26, 1990) (evidence of substantial local adverse impact sufficient to require analysis pursuant to SEQRA that further air emissions reductions were warranted, despite compliance with NAAQS). In fact, staff stated at the issues

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19 See, Keyspan Ravenswood Issues Ruling, supra.

20 TOP concurs with other intervenors that the air modeling performed by SLC had inappropriate inputs and projects that if correctly modeled, the air emissions are likely to cause greater damage to Olana. These discussions are addressed elsewhere in this ruling.

conference that such analysis was not required by the air permitting process. TR 131. With respect to SLC's position that the closure of Catskill will offset any of the Greenport plant's emissions of SO_2 and NO_X, TOP's expert contends that the difference in proximity of these two facilities to Olana would outweigh any such benefit. TR 134. Accordingly, given the contentions by TOP's expert that the SLC Greenport emissions will cause deterioration of the main house at Olana based upon the constituents of the house's structure and the nature of the pollutants, this omission must be addressed by supplementation of this record. See, Exhibit L to TOP petition.

Compliance with Part 231 and New Source Review Requirements

Pursuant to 6 NYCRR Part 231 and New Source Review under the Clean Air Act § 173, new or modified major sources in nonattainment areas must (1) apply LAER standards to control the NAAQS in question as well as obtain ERCs; (2) certify that facilities they control in New York State are in compliance with air pollution standards; and (3) perform an alternatives analysis that demonstrates the benefits of the project versus the environmental and social costs. As described earlier, as Columbia County is in the OTR, the applicant must apply LAER to its emissions of NO_X and VOCs which are precursors of ozone. SLC does not disagree that these laws are controlling. Nevertheless, FOH and other intervenors raise questions as to whether the applicant has properly applied these standards.

In response to certain matters raised by the petitioners as well as comments received by EPA Region 2 in a comment letter dated June 29, 2001 (IC Ex. 55) concerning the draft air permit, the applicant produced a summary table of stipulated emission limits for PSD/NSR affected pollutants at the July 19, 2001 session of the issues conference. IC Ex. 60. FOH stated that this submission would resolve only its issues regarding the draft air permit's omission of PSD limits for VOCs (FOH Pet., IC Ex. 39, 1F) and the draft permit's lack of terms that specifically provide that the limits subject to PSD are so described (FOH, Pet., IC Ex. 39, 2A). TR 204. This chart was revised and resubmitted to the ALJs on October 26, 2001. IC Ex. 60a.

MDEP and BRPC reserved their concerns regarding the lack of a "top-down" BACT analysis set forth in the application with respect to SO_2 and particulate matter. TR 206. BACT is the applicable standard for air emission control of pollutants subject to PSD.[21] In 1987, EPA issued a memorandum providing that a "top-down" analysis be performed to determine BACT. EPA New Source Review Workshop Manual, B.2; Citizens for Clean Air v. EPA, 959 F.2d 839, 845 (9th Cir. 1992). This requires that the most stringent control is first examined and applied unless the applicant demonstrates, and the permitting authority agrees, that due to BACT considerations this technology is not achievable. The next most stringent method is then examined, and so on. Id. These petitioners also wish to see additional monitoring conditions added to the permit - broken bag detectors and a visolite test. TR 208. They also argued that permit language should be added, requiring that the scrubbers be operational whenever the kiln is on. SLC agreed to the latter condition. TR 211. With respect to the other issues, these petitioners and the

[21] BACT is determined on a case-by-case basis to find the maximum degree of reduction for each pollutant subject to regulation taking into account energy, environmental and economic costs. EPA Office of Air Quality Planning and Standards, New Source Review Workshop Manual, (October 1990 [draft]), B.1; CAA § 165(a)(4); 40 CFR 52.21(j); 6 NYCRR § 200.1(j).

applicant stated that they would attempt resolution. To date, the ALJs have not heard of any progress regarding these discussions and therefore, consider these concerns as potential issues for adjudication in this ruling.

Based upon the applicant's agreement at the issues conference to stipulate to inclusion of language related to any PSD-related permit condition that would subject these terms to federal enforcement, this concern of FOH is resolved. TR 205. In addition, SLC stipulated to agree to language in the permit that would clarify what pollutants are subject to the PSD program and what pollution controls apply to the facility. TR 205.

Staff indicated that its review of the permit is ongoing, in light of EPA's comments with respect to NO_X, CO, PM and PM-10 limits. TR 194. However, there has been no further report regarding this review, nor has a revised air permit been submitted reflecting the above referenced stipulations by the applicant. We are directing staff within 60 days of this ruling to produce a revised air permit with a status report that incorporates SLC's stipulations and explains any changes, particularly with regard to EPA's comment letter of June 29, 2001. In the event that staff is still engaged in discussions with EPA regarding the draft permit terms, the ALJ and the parties in this process should be provided with a status report and proposed schedule for the issuance of a revised draft permit.

Adequacy of SLC's NO_X LAER Analysis with respect to Natural Gas Alternative

SLC proposes to use coal as its primary fuel at the Greenport facility. The applicant explains that this choice is based upon natural gas's production of high NO_X emissions at cement plants. In contrast, the applicant maintains that the use of coal or oil in the kiln will produce longer, less aggressive flames that will result in a reduction of thermal NO_X. Air permit application, p. 6-13, IC Ex. 8. Pointing to other cement plants in the U.S. and Canada that have used natural gas with Gyro-Therm low NO_X burner technology, FOH contends that SLC did not fully investigate whether SLC can implement additional technologies that would reduce the NO_X emissions in the natural gas to the same levels that would be obtained with coal. FOH's concern with respect to the use of coal is based upon the increased emissions of SO_2 and PM associated with that fuel. FOH maintains that the use of technology to reduce NO_X emissions with natural gas would be LAER, rather than coal, as SLC contends. Furthermore, FOH argues that the use of natural gas as an alternative is consistent with SEQRA because other environmental impacts, related to dredging the river for the HudsonMax vessels, fugitive emissions from coal piles, and noise associated with coal transfer operations would be eliminated. In the alternative, FOH recommends the examination of the use of low-NO_X coal.

The applicant maintains that coal is used in most cement plants because of its "highly effective heat transfer . . .as well as many trace constituents . . . necessary for cement production . . ." In addition, SLC points out that cement kilns operate at much higher temperatures than other industrial boilers and thus, NO_X formation occurs at much greater rates. TR 216. The applicant further asserts that because natural gas raises the operating temperature in the kiln and is also a turbulent fuel, its use increases NO_X formation.

With respect to SO_2 emissions, SLC argues that sulfur is trapped by the "inherent adsorption of the kiln feed mask." TR 219. In addition, the applicant has agreed to install wet and dry scrubbers and baghouses capable of removing SO_2. The applicant contests FOH's claim that the Durkee, Oregon plant referred to in FOH's petition achieved any significant decrease in NO_X from the use of natural gas and the Gyro-Therm burner, and added that the Oregon facility operates on a mixture of gas and coal. TR 220–221.

RULING: The choice of coal as fuel for this facility is not an adjudicable issue with respect to SLC's NO_X LAER analysis. LAER seeks the "most stringent emission limitation achieved in practice, or which can reasonably be expected to occur in practice. . . " 6 NYCRR 200.1(ak). Ultimately, FOH's own consultant agreed with the applicant that the use of natural gas with the Gyro-Therm burner may be a "wash" in terms of NO_X reductions. TR 229-231. Because SLC's investigation indicates that the nitrogen content in the fuel is not the main source of the NO_X output, the use of low-NO_X coal does not address the problem. Air application, p. 60-12, IC Ex. 8. The petitioners have not established a sufficient basis to go forward to a hearing because there is no indication that the use of either of these technologies will result in lower emissions, which is LAER's goal.

With respect to other environmental impacts associated with the use of coal, the applicant noted that the dock expansion and any associated dredging would still be necessary because the HudsonMax ships would be bringing in gypsum. Further, mercury emissions associated with the two fuel sources are not significantly different and mercury emissions will be controlled with scrubber technology. Air permit, IC Ex. 8, E-31, TR 241. With respect to particulates, SLC provided that it is the pulverized stone rather than the fuel that is the main source of these emissions and that a switch to natural gas would mandate that SLC would have to increase the stone to make up for the constituents lost from not using coal. TR 235-236. FOH failed to provide adequate support for these contentions. Thus, the ALJs did not find that there was sufficient doubt requiring further examination in an adjudicatory hearing.

Finally, with regard to SO_2, the applicant maintains that it has captured these emissions sufficiently through the cement production process and add-on technology. Dr. Miller, on behalf of FOH, contends that there is a significant amount of SO_2 that is derived from the use of coal. This is not a LAER matter because the proposed facility is in an attainment area for this pollutant. Rather, emissions of SO_2 are governed by the PSD program as well as Part 257-2. Sulfur content in fuel is also regulated by 6 NYCRR Parts 220 and 225 of 6 NYCRR and the State Acid Deposition Control Act - Title 9 of Article 19 of the ECL.

While staff maintained, without citing to any authority, that DEC does not mandate the use of any particular fuel in a given project (TR 222, 232), the Department has an obligation to ensure through the choice of fuels and appropriate control technology that the applicable standards are met and that significant adverse impacts are avoided. See, e.g., 6 NYCRR §§ 220.6, 225-1.2(f). Accordingly, in Matter of the Applications of Consolidated Edison Co. of New York, Inc., 1983 WL 166627 (Sept. 14, 1983), the issue of whether to allow Con Ed to burn coal was examined. Based upon concerns of cumulative impacts of coal-burning, Commissioner Williams determined that the

applicant must install certain control equipment to burn coal in its facilities in New York City.[22] In re Inter-Power of New York, Inc., PSD Appeal Nos. 92-8 and 92-9 (March 16, 1994), 5 EAD 130, 1994 WL 114949, citing to Hawaiian Commercial & Sugar Company, PSD Appeal No. 92-1 at 5, n. 7 (July 20, 1992), EPA expressly found that in deciding BACT for a particular source, the Agency must consider "both the cleanliness of the fuel and the use of add-on pollution control devices." For attainment of reasonably available control technology (RACT) for NO_X, choice of fuel is a compliance option. See, 6 NYCRR § 227-2.5.

However, as this matter does not relate to the LAER analysis, the concerns regarding the use of coal and its effect on SO_2 emissions are addressed elsewhere in this ruling, infra, at pp. 39-40.

Throughout the legislative hearing, individuals raised concerns about the potential use for garbage, waste oil, or some other hazardous substance as fuel in this plant. The draft air permit limits SLC's fuel usage to coal, petroleum coke, distillate fuel oil and natural gas. The draft air permit specifically precludes SLC from burning any type of waste oils. Draft air permit condition 35.2, IC Ex. 12.

Adequacy of NO_X LAER Analysis with inclusion of SNCR

With no disagreement from other participants, SLC states that the cement-making process gives rise to substantial amounts of NO_X due to the high temperatures required to produce this product and the need to remove alkali from the raw materials to meet the standards for cement use in New York and to protect the facility's equipment. Air application, 6-6-6-7, IC Ex. 8; TR 264. Because NO_X is an ozone precursor and Columbia County is in the OTR, this pollutant is subject to control via the LAER requirements. The applicant has agreed to include SNCR to control NO_X emissions, in addition to the low-NO_X burner, combustion design optimization, multi-stage combustion, and a wet scrubber (though due to its limited benefit, SLC states that it has not taken a NO_X reduction credit for this strategy). Air application, IC Ex. 8, pp. 6-8 - 6-24. However, due to SLC's position that the nature of the operation at Greenport and the constituents of the available raw material make for a difficult platform for the use of SNCR, the staff agreed to allow a two-year period for final emission limits for NO_X to take effect.[23] SLC has one year to install SNCR after start-up. This control equipment does not apply to the alkali bypass. FOH, MDEP and BRPC dispute the phase-in, as well as the forecasted limits. Draft air permit, conditions 70.2 and 71.1, IC Ex.12; IC Ex. 60a.

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22 In its review of an air application, the staff needs to know what fuel will be used in a proposed project so air pollution controls can be evaluated and selected. For example, in this matter, in its early review, staff identified certain deficiencies in SLC's toxics analysis including a comparison to a facility (Lone Star Industries' Cape Giradeau - Missouri) that burns hazardous waste fuels while SLC's Greenport facility is to burn coal. See, IC Ex. 72d, p. 3.

23 This is an amendment to the current draft permit that provides until month 36 of operation for the final rolling 12-month limit of 3718 tons of NO_X. Draft air permit, p. 44, IC Ex. 12.

RULING: The adequacy of SLC's NO_X LAER analysis is an appropriate subject for an adjudicatory hearing because there is reasonable doubt as to whether the phase-in is necessary, whether the emission limits set by staff in the draft permit are sufficiently stringent, and why SNCR is not proposed for the alkali bypass.[24] In its comment letter dated June 29, 2001, Region 2 EPA raised concerns similar to FOH's with respect to the NO_X limits, in light of the NO_X reduction rates achieved by other cement plants in Europe that utilize SNCR. IC Ex. 55. Similarly, Steven Riva, EPA Air Branch Chief, states that cement plants in the U.S. that do not utilize this control equipment achieve lower emission rates. Id. Finally, EPA indicates that a phase-in for SNCR is unwarranted, given the extensive use of this equipment in European cement plants. Id. SLC argues that European facilities do not have to concern themselves with increases in carbon monoxide levels and opacity violations that may result from increased reductions in NO_X. FOH argues that additional control equipment would address CO.

SLC stresses the case-by-case determinations that must be made regarding LAER because of the nature of the cement industry and the variability in the process and available raw materials. This is the situation for all sources, yet, 40 CFR § 51.165(a)(xiii) provides that LAER must be the most stringent emission limitation contained in a state implementation plan (SIP) of any state for the applicable category of sources, or the most stringent emission limitation achieved in practice by a source in the same category as the applicant. There is no consideration of economic, environmental or energy factors. See, Belden, supra, p. 51.

SLC's concerns regarding implementation of SNCR, and whether those concerns merited postponing the use of this control, cannot be resolved at an issues conference. While staff member O'Connor explained the Department staff's review of the air application and how Staff reached certain conclusions regarding the BACT/LAER analysis, this presentation in some cases underscored the uncertainty of those determinations. See, e.g., NO_X LAER discussion, TR 710-715. This is exactly the type of information that must be presented in an adjudicatory hearing and subjected to examination to determine whether, for example, controls at other U.S. plants that have lower emission limits without SNCR are inapplicable.

While staff spoke of a "road map" that they used to make this determination and others in their review, the record before us is not so descriptive and therefore, further elaboration subject to cross-examination is needed. TR 497. While SLC argues that deference to staff's approval must be given, the standards that govern this proceeding are set forth in Part 624 which requires an intervenor to come forward with a substantive and significant challenge when staff and the applicant are in agreement. Here, based upon the factors cited above, FOH has met this test.

What raises the greatest concern here is that SLC has agreed to use SNCR and thus, the permit relies upon that control equipment, yet there is a lengthy period during which the facility will not be subject to SNCR. Apart from general information about the plant's special operations necessitating this shake-down

24 In SLC's Response to Notice of Incomplete Application Dated February 7, 2001 (February 27, 2001), IC Ex. 64, p. 3, the applicant states that "[u]p to 30% of the air stream . . . can be diverted from the kiln inlet area." At the issues conference, staff member O'Connor confirmed that "[t]he alkali bypass has an average 20 percent emissions that are not basically controlled for NO_X. . ." TR 710.

period, there are not sufficient assurances in this record to accept the conditions as they are. Moreover, the basis for waiting an entire year to install SNCR is lacking, particularly given the area's nonattainment status.

SLC responds to this proposed issue and to many others by stating that FOH's claims are a question of "completeness" pursuant to Part 621 of 6 NYCRR and thus, are not subject to adjudication. 6 NYCRR § 624.4(b)(7). We disagree with that analysis here and elsewhere as indicated. Completeness in the DEC permitting context simply means that an application is ready for substantive review. It does not mean that the application contains all the information necessary to meet regulatory and statutory requirements. See, 6 NYCRR § 621.1(d). And, where information is lacking regarding an applicant's ability to meet regulatory standards, a request for more information is specifically provided for in the permit and hearing regulations. 6 NYCRR §§ 621.15(b) and 624.4(b)(7). Here, the applicant has presented information to the Department indicating why SNCR is problematic. The Department has nonetheless decided to require this technology while allowing a lengthy period for meeting emission standards that appear less stringent than required by LAER given other information presented at the issues conference. This determination should be submitted to adjudication because there is sufficient doubt about the applicant's ability to meet applicable criteria that requires further inquiry. 6 NYCRR §§ 624.4(b)(2), (3).

Adequacy of NO_X Permit Limits

In its petition, FOH argues that the draft air permit fails to set a definitive limit for NO_X emissions, in violation of Part 231. As described above, the permit provides for a phased approach to limiting this pollutant so that over a course of 24 months (one year after the operation has started up) the12-month rolling limit starts at 3.6 pounds of NO_X per ton of clinker produced (no more than 4121 tons per year); and is reduced to 2.8 pounds in month 36 until DEC makes a final determination on the efficacy of the air pollution controls including SNCR. Draft air permit, item nos. 69.2, 70.2, IC Ex. 12; IC Ex. 60a.

RULING: This matter is identical to the preceding discussion regarding the adequacy of the NO_X LAER analysis. As LAER is required once the permit is issued, the phase-in and delay of setting final limits in the draft permit is inapposite to the requirements of 6 NYCRR § 231-2.5. As the permit limits are subsumed by the prior issue, they will be addressed as part of the adjudication of that issue.

PM_{10} Modeling

FOH contends that SLC failed to use the correct PM_{10} potential to emit (PTE) emission rate in its modeling and therefore, the worst case scenario is actually 35% higher than what was indicated by the modeling. FOH maintains that since the proposed facility will use 76% of the short-term PM_{10} significant deterioration increment, this error is significant.[25] FOH Pet., IC Ex. 39, p. 20; TR 276. The applicant responded that the worst case scenario for the facility's emissions is not necessarily when the plant would be

25 The PSD program requires (in addition to BACT) that a proposed source not cause or contribute to air pollution in excess of any NAAQS or the maximum allowable increments of air quality deterioration for any regulated pollutant. 42 U.S.C. § 7475(a)(3), CAA § 165(a)(3).

operating at PTE and that SLC modeled a variety of scenarios to identify the worst case. TR 277. Staff responded that the applicant was required to model the maximum allowable emission rate and this is set forth at Table C7 of the application. Mr. Sedefian, DEC's air expert, pointed out that this analysis shows that the worst case impacts were associated with the lower load for PM emissions.

The endpoint in this discussion from the perspective of the applicant is that SLC has stipulated to an annual PM_{10} limit of 170 tons per year and that this corresponds to a model run based upon a maximum load scenario of 110 percent of maximum operating load at 8760 hours per year. IC Ex. 60; TR292. At the issues conference, we understood that SLC had also agreed to a short-term limit of 0.0085 grams per dry standard cubic foot (gr/dscf) for PM_{10} emissions for all sources of particulates. TR 206. The applicant explained that it had made a correction to account for moisture content. However, by letter dated October 26, 2001, a revised stipulation was submitted by SLC that provides for a short-term limit for PM_{10} of 0.008 gr/dscf for the main stack and for all other stacks a short-term limit of 0.0085 gr/dscf. IC Ex. 60a.

RULING: This is not an issue for adjudication at this time. However, FOH has pointed out that the calculation of PM_{10} emissions 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.

The proposed facility is in an attainment area for PM_{10}. Accordingly, the applicable program is PSD and BACT. 40 CFR § 52.21. The Department has been delegated by EPA to administer this program in New York State, but it remains a federal program subject to federal law and regulation. Accordingly, it has been found in several recent Article X cases that PSD matters are not subject to adjudication by the Department. This has been confirmed by Commissioner Crotty.

As set forth in ALJ DuBois' ruling of April 9, 2001 in Matter of Ramapo Energy Ltd. Pship., 2001 WL 470658, evidentiary hearings are not part of the process for any of the permits covered by 40 CFR Part 124.40. This includes PSD permits. A Commissioner's decision in that case and others confirms the use of the federal procedures in the PSD program. Ramapo Energy Limited Partnership, 2001 WL 470659, *4 (Apr. 4, 2001). While FOH disagrees with this conclusion, and, indeed, the failure to address this specifically in the regulations governing DEC's permit proceedings (Parts 621 and 624) seems incongruous, these are the holdings of this Department. The fact that these recent decisions were made in the context of Article X proceedings does not distinguish them. The determinations were made in the DEC air permitting process, which is conducted as part of the Article X review, but is otherwise unaltered. In addition, the letter sent by EPA then-Regional Administrator Jeanne Fox dated February 11, 1999 to Public Service Commission General Counsel Lawrence Malone confirms that PSD permits may not be subject to an evidentiary hearing. See, Exhibit F to FOH closing brief, IC Ex. 138.

However, particulate matter is also regulated under Parts 201, 220 and 257-3 of 6 NYCRR. As Commissioner Crotty found in her interim decision in Matter of Mirant Bowline, LLC, 2001 WL 703905 (June 20, 2001), the Department has independent bases to examine these issues. 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. TR 283-285, 294. Based upon errors that SLC made in its initial documentation (TR 292), 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.

Clarity of Air Permit

FOH contends that the draft permit conditions are vague and would permit greater emissions than should be allowed. Specifically, FOH argues that the draft air permit is unclear regarding when monitoring requirements will occur, when a 12-month period commences, and when SNCR is to be installed. TR 299, FOH Pet., IC Ex.39, pp. 12-13. At the issues conference, FOH stated that the short-term emission rates for NO_X would allow SLC a 50 percent increase over the annual limit. TR 298. FOH asserts that an eight or twenty-four hour standard is more appropriate. TR 314. With respect to the continuous emissions monitoring system (CEMS) for NO_X, SLC agreed that it would have this system operational at first clinker production and have it NO_X-certified within six months after that.[26]

Regarding the NO_X NAAQS, SLC argued that this matter was not specifically raised in FOH's petition. SLC maintained that it will have to comply with both annual and short-term limits and therefore could not exceed the limits, as FOH contended. Based upon the variability of NO_X and CO emissions due to the cement production process, SLC asserts that there is a need for the rolling averages contained in the draft air permit. TR 301; draft air permit items 67.2-72.2.

In its letter of June 29, 2001, EPA also questioned SLC's short-term limit and stated that the air permit application, Appendix C, Table C-8, would indicate a short-term limit of 941.29 lbs/hour. IC Ex. 55, p. 3. Apart from Mr. West's statements that preliminary discussions with EPA indicate its willingness to consider these rolling averages, this office has not yet received additional information indicating that EPA's concerns have been addressed.

Staff offered changes to permit language to clarify that the CEMS would be operational upon production of first clinker and SLC agreed to this revision. TR 305.

RULING: NO_X is a precursor of ozone - a pollutant for which the area is in non-attainment. Therefore, it is crucial that the Department limit any introduction of NO_X to ensure that reasonable progress towards attainment is not hampered. SLC and staff argued that the plant could not meet the annual limits if the plant operated at the higher levels of the rolling averages on a regular basis, and that the nature of this facility requires flexibility in these emissions. Yet, it would seem, as FOH proposed, that some balance could be struck to provide greater assurance that LAER is indeed achieved, particularly in light of the availability of

26 Mr. Lochbrunner explained that the certification procedure verifies that the CEMS is providing accurate data. TR 304-305.

the CEMS data. Moreover, as was the case with the issue discussed previously, staff indicated that it was still considering EPA's comments. TR 308. While SLC maintained that rolling averages were quite common, there was no presentation as to how and whether these are used in the same circumstances presented here. EPA's letter appears to indicate otherwise. IC Ex. 55, p.3

Accordingly, we find that the short-term emission limits for NO_X are an appropriate issue for adjudication to determine whether those limits adequately meet new source review requirements. In addition, we are directing staff to revise the draft permit to reflect the stipulations agreed to by the applicant and staff with respect to the implementation of CEMS and that any limits and conditions that are to commence at the start-up of production specifically indicate same by insertion of the language "at first clinker." TR 300, 305. This revised permit should be circulated within sixty days of this ruling to the parties and to the ALJs.

Regenerative Thermal Oxidizer, LAER Limits for VOCs and BACT Limits for CO

FOH maintains that SLC failed to adequately support its determination not to incorporate a regenerative thermal oxidizer (RTO) into its facility design to further control VOCs and CO. FOH points to the use of an RTO in a facility in Dundee, Michigan owned by Holnam, SLC's parent company. FOH argued that, according to the air permit application for that plant, the unit was expected to reduce VOCs by 80% to 90%, and CO between 75% and 85%. FOH asserts that without this equipment or more information about why it cannot be used successfully at Greenport, SLC has not met LAER for VOCs or BACT for CO. Because this location is in attainment for CO, the standard for air pollution control for CO is BACT pursuant to the PSD program.

In addition, FOH noted in its petition that the draft air permit contained no LAER limits for VOCs. FOH Pet., IC Ex. 39, p. 14. This is also raised by EPA in its letter. IC Ex. 60. In the table of stipulated limits that SLC presented at the issues conference, the applicant proposes 129 tons per year and 18 ppmdv THC at 7% (measured as propane-based upon compliance testing).

SLC does not dispute that its Greenport facility is subject to LAER and BACT for VOCs and CO respectively. Nevertheless, SLC takes issue with FOH's contention that use of an RTO in Greenport represents those standards for this facility. SLC described RTO as a system that is used to burn remaining pollutants off after they have come through the facility and other air pollution control systems. TR 317. SLC argues that comparing the two facilities in the U.S. that use RTO to Greenport is not appropriate, due to differences in plant design and variability of raw material feed. TR 319. The applicant further points out that at the Dundee facility, the organic content of the rock is very high, requiring the use of RTO to address odors. TR 320; IC Ex. 64, p. 6. SLC states that the rock it will use at Greenport has a low organic content. Moreover, SLC argued that because SLC has stipulated to annual and short-term permit limits for VOCs that it has found are LAER, they should be accepted. TR 310; IC Ex. 60; IC Ex. 8, 6-4. In further support of this conclusion, SLC provides that this emissions rate is 50% of the maximum achievable control technology (MACT) standard set forth in 40 CFR Part 63 subpart LLL. IC Ex. 8, 6-3.

With respect to the use of RTO to control CO emissions, SLC found that optimized combustion design and RTO could be used, but that the latter would have adverse environmental and energy effects, and SLC determined that such an approach was not appropriate. TR 323. SLC did not find a facility anywhere

that used RTO to control an exhaust as great as the rate for Greenport - 660,000 standard cubic feet of gas per minute. TR 325. With respect to energy use, SLC found that it would have to raise the exhaust gas temperature from 120 degrees to 1600 degrees Fahrenheit with only a 75% percent heat recovery that would require burning of gas. TR 326-327. This in turn would result in increased emissions of NO_X and sulfuric acid emissions and uncombusted gas that would also emit hydrocarbons. TR 327-328.

Staff supported SLC's position by stating that it did not find that the VOC emissions were significant enough from this facility to require the installation of an RTO.

FOH's consultant, Frank Sapienza, a senior chemical engineer at CDM who specializes in air pollution control, stated that RTOs are used in many industries that have unsteady process exhaust.[27] TR 334. Mr. Sapienza also disputed SLC's claim that huge exhaust outputs were not accommodated by RTO and pointed to a motor company paint spray operation with a 500,000 cubic feet per minute exhaust output. TR 335. In addition, he stated that RTOs are regenerative in terms of energy use and therefore have a high degree of thermal efficiency. TR 335. Mr. Sapienza also disputed SLC's claims regarding increased NO_X emissions from the combustion chamber of the RTO unit due to recent NO_X controls placed on RTOs. TR 336. Similarly, Mr. Sapienza disagreed with SLC's conclusions with respect to increased emissions of sulfuric acid and uncombusted gas. TR 337-339.

RULING: There is an issue for adjudication regarding SLC's conformity with LAER with respect to VOCs and in particular whether the RTO is an appropriate technology to utilize to attain LAER. As stated earlier, 40 CFR § 51.165(a)(xiii) provides that LAER must be the most stringent emission limitation contained in a SIP of any state for the applicable category of sources or the most stringent emission limitation achieved in practice by a source in the same category as the applicant. The air permit application states that the most stringent federal or state regulatory emissions rate it found in a SIP or regulation for VOCs from a cement kiln is the THC limit of 50 ppmdv, at 7% O_2 (reported as propane). Thus, it would appear that SLC has more than met this standard with the 18 ppmdv THC at 7% O_2 (measured as propane-based upon compliance testing). IC Ex. 60a. However, EPA contests this finding in its letter of June 29, 2001 by stating that two cement plants - one in the U.S. and one in Puerto Rico - have achieved lower VOC levels per ton of clinker. Thus, it is not clear that SLC has met LAER for VOCs for this facility.

Mr. Sapienza spoke persuasively with respect to his view that RTO will not have the negative adverse environmental effects that SLC predicts. TR 335-339, 485-487. While SLC's representative disputed the application of this technology based upon a potential "susceptibility of plugging due to the alkalized salts"- this is the kind of argument that must be resolved in a hearing and not at an issues conference where only the basic concepts of the dispute can be heard. TR 490. If DEC issues conferences were to adopt the procedures suggested by SLC - that the "entire spectrum of information regarding [the] technology . . ." be made available - these conferences would become trials rather than issues conferences. TR 490. And, because there is no procedure for examination of witnesses or prior discovery, they would not be trials that would lend themselves to findings of fact. Rather, there is a need for an adjudicatory hearing so that the two

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27 Mr. Sapienza's curriculum vitae indicates that he has had experience in design of RTOs. Exhibit A to FOH petition, IC Ex. 39.

technical positions can be subject to cross-examination and a finding made based upon the record.

BACT applies to CO. BACT is defined as the most effective control technology that will address the pollutant in question, taking into account economics, environment and energy concerns. 40 CFR §§ 51.166(b)(12), 52.21(b)(12). As is the case for LAER, to determine BACT the applicant must use EPA's top-down approach to determining what technology is appropriate by starting with the most stringent controls. With respect to this facility, there is a balance that continually must be struck between control of NO_X and CO as the control for one often increases the other. The RACT/BACT/LAER Clearinghouse (RBLC) information reveals that good combustion practices (GCP) are BACT for cement plants.[28] Table 5-2, IC Ex. 8, p. 5- 19. SLC proposes to use GCP as well as optimized combustion design to achieve the limits set forth in its stipulated emission limits. See, air application, p. 5-8, IC Ex. 8; IC Ex. 60. From the table presented in the air application, lower emission rates are achieved at other cement facilities but not by the use of different technologies such as the RTO. EPA also cites to a plant in Puerto Rico that achieved a lower CO limit in 1996. See, IC Ex. 55 and air application, IC Ex. 8, p. 5-19.

Based upon the prior discussion at pp. 27-28, PSD requirements are not subject to adjudication. However, as noted by EPA, there is no mention of CO in the draft air permit and the stipulated limits agreed to by SLC are not presented. Therefore, the ALJs are not able to discern whether these limits comply with Part 257-4 of 6 NYCRR. Therefore, we direct the staff and the applicant address this omission by providing draft permit conditions within sixty days of this ruling to the ALJs and the other parties.

Part 231 Alternatives Analysis

Section 231-2.4(a)(2)(ii) of 6 NYCRR requires applicants governed by new source review requirements to submit an analysis of "alternative sites, sizes, production processes, and environmental control techniques which demonstrates that the benefits of the proposed source project or proposed facility significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification within New York State." FOH says that this analysis is not provided in the air permit application and that SLC has failed to consider alternative processes and technologies as set forth above. In addition, FOH contends that SLC has failed to consider a smaller plant or different location which would mitigate some of the air pollution impacts. FOH Pet., IC Ex.39, p. 16.

SLC maintains that it has met these requirements in the DEIS (Section 17) and the air permit application and has gone far beyond the requirements of Part 231 in doing so. TR 354.
With respect to air pollution control technologies, SLC points to its analysis in Sections 5 and 6 of the air permit application to demonstrate that it has considered a variety of alternatives. Staff concurs.

RULING: As noted by ALJ Goldberger in the issues ruling concerning KeySpan Energy, 2001 WL 470660 (Apr. 18, 2001), there is little guidance upon which to rely to determine what constitutes compliance with 6

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28 The RACT/BACT/LAER Clearinghouse is a resource established by EPA that enables applicants and regulators to identify what technologies and what air emissions limits are established in permits issues for all kinds of sources. See, http://www.epa.gov/ttn/catc/.

NYCRR 231-2.4(a)(2)(ii) or Clean Air Act § 173(a)(5), 42 U.S.C. § 7503(a)(5) which requires the same analysis. In re Campo Landfill Project, 1996 WL 344522 (June 19, 1996), NSR Appeal No. 95-1, EPA found that the Act does not set forth specific requirements for this analysis and no regulations have been promulgated that set forth more detail. In addition, citing In re Inter-Power of New York, Inc., 5 E.A.D. 130, 144 (EAB 1994), the Agency provides that in this challenge to a landfill siting, the petitioners bore a heavy burden of showing that the evidence in the record clearly outweighs the regional determination.

As noted in the above rulings, we have found issues for adjudication with respect to certain specific technology alternatives: NO_X and the RTO.

As for this analysis generally, SLC did perform such an analysis in the DEIS and also in its air application that the staff has accepted. In Chapter 17 of the DEIS, SLC provides brief descriptions of alternative scenarios for the project and the reasons for rejecting them. IC Ex. 6. In the air application and response to NOIA dated February 7, 2001, SLC provides information as to how it selected each control technology and why some were eliminated, as well as a comparison of emissions from the Catskill plant. IC Ex. 8, Chapters 5, 6, 11-12; IC Ex. 64. Throughout the DEIS, SLC has set forth its position that the project will benefit the community both economically and environmentally by providing capital investment in the area and through the closure of the Catskill facility. SLC maintains that many of its proposed actions will mitigate any possible disadvantage such as removing obsolete, decaying structures at the waterfront, rehabilitating certain historic buildings, providing a future source of corporate support for community activities, providing public access to the waterfront, and providing an overall decrease in regional air pollution. FOH argues that the analysis is insufficient because it is not contained in the air permit application, and because it is conclusory and does not provide sufficient information to permit an adequate comparison.

The fact that the Part 231 alternatives analysis is not labeled specifically as such is of no consequence. See, Campo Landfill Project, supra (NEPA document [comparable to EIS] could be relied upon for these purposes). Without passing on whether the alternatives analysis is sufficient for SEQRA purposes, we find that with respect to Part 231 requirements, except for the specific rulings related to NO_X and the RTO, there are not sufficient grounds to find that this is a matter for adjudication. It 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.

Requirements of the PSD Program

As explained above, because Columbia County is in attainment for the pollutants SO_2, NO_2, PM and CO, SLC, as a potential "major emitting facility," must demonstrate that it would not cause significant deterioration with respect to the attainment status of any of these pollutants.
To comply with this federal requirement (40 CFR § 52.21), SLC has to apply BACT, conduct an ambient air quality analysis, analyze impacts to soils, vegetation and visibility, show that it will not adversely impact a Class I area, and undergo adequate public participation with respect to the permit application. CAA § 165, 42 U.S.C. § 7475.

FOH argues in its petition that the draft permit does not mention the PSD requirements and that

PM_{10}, CO and VOC do not have ton-per-year limits making this permit unenforceable under the PSD program. At the issues conference, SLC agreed to permit language that describes the equipment that is subject to PSD and/or Part 231 review and sets forth the pollutants that are subject to BACT and LAER, respectively, as well as identifies the applicable air pollution control equipment.[29] At the same time, SLC pointed to its summary table of stipulated emissions limits to address the lack of limits in the draft air permit. TR 377-378. FOH responded that this does not respond to SLC's failure to include PSD limits in one-hour and eight-hour intervals to conform with the framework of the PSD increment analysis.

RULING: As explained above at pp. 27-28, PSD conditions are not subject to adjudication in this forum. Moreover, SLC has agreed to permit language that would clarify the PSD and Part 231 permit requirements. We ask that staff develop this language and include it in the revised draft air permit. With respect to CO however, as 6 NYCRR § 257-4 sets forth limitations for this pollutant in terms of one-hour and 8-hour periods, it appears that this must be the requirement in the permit to conform with State regulation. See, e.g., Foster Wheeler-Broome County, ALJ Ruling (April 26, 1990)(BACT addressed in context of State and PSD regulation).

ALJ Goldberger contacted staff in late September to inquire about the location of the CO permit limitations. Mr. Leslie reminded her that these were not in the permit and informed her that while it appears that there is an agreement between staff and the applicant with regard to the limits set forth in the stipulation (IC Ex. 60), there is still disagreement with regard to the short- term CO emission limits. See, Attachment E to this ruling. However, SLC has presented a revised stipulation that indicates an 8-hour average. IC Ex. 60a. The staff must provide a revised version of the draft permit and submit it to the parties so that these terms can be reviewed as part of this process. As this matter does relate to State as well as PSD requirements, if there remains a dispute between staff and the applicant this matter is automatically subject to adjudication. 6 NYCRR § 624.4(c)(1)(i). Until there is clarification with respect to this matter, we cannot determine whether there is a need for adjudication.

BACT Analysis for PM

FOH's petition asserts that SLC did not perform an appropriate BACT analysis for PM emissions and failed to provide sufficient monitoring for the efficacy of the baghouse system.[30] Specifically, FOH explains that except for a vendor guarantee, there is no explanation of the selection of baghouse technology, thus rendering this analysis defective. In addition, FOH contends that the permit provides no emission limit for PM except for draft permit condition 59 that relates to federal NESHAP controls, and that this limit is less stringent than BACT. FOH also comments that the permit must be revised to include a PM limit for all PM sources other than those regulated under the kiln. FOH Pet., IC Ex. 39, pp. 21-23. EPA echoed these concerns in its letter of June 29, 2001. IC. Ex. 55. In its petition and at the issues conference, MDEP questioned whether SLC had performed a top-down BACT analysis and also requested that broken bag

29 This stipulation also addresses a concern of EPA as stated in its letter of June 29, 2001. IC Ex. 55.

30 FOH confirms this position in its letter of November 6, 2001 in response to SLC's latest stipulation regarding air emissions. IC Exs. 60a, 174.

detectors and a visolite test be incorporated into the permit requirements. MDEP Pet., IC Ex. 52, p. 2; TR 208. MDEP stated that it could agree to SLC's proposed short-term limits for PM if it had more understanding of the BACT analysis. TR 208.

Putting aside its position that these are not adjudicable issues because they relate to the PSD requirements, SLC responds that this issue is resolved because it has agreed to the following PM limits: 0.01 grains per dry standard cubic foot (gr/dscf) for short-term limits, and 200 tons per year (tpy) for annual emissions. Earlier in the issues conference, Mr. West provided that short-term limits presented in IC Ex. 60 are for all sources of PM and PM_{10}. TR 206. This has apparently been changed by virtue of the new stipulation that contains different short-term limits for PM_{10} emissions from the main stack and the other stacks. IC Ex. 60a.

With respect to monitoring, SLC maintained that these requirements are appropriate for the operations and maintenance plan that it is required to submit to comply with 40 CFR § 63.1350(a) and its Title V application that will follow the construction and operation of the facility. TR 381,385-386. As for continuous opacity monitoring for the mills, the applicant notes that this is not required under existing regulation, and opacity is to be monitored daily through visual observations. 40 CFR § 63.1350(e); draft permit conditions 78, 79. Draft permit condition 75.2 does require a continuous opacity monitor for the kiln.[31] TR 386. See also, 6 NYCRR § 220.8.

With respect to its BACT analysis, SLC responds that it did perform the "top-down" analysis and that the rates it has proposed are consistent with what has been determined to be BACT at other facilities. SLC also asserts that the vendor guarantee is the appropriate method to ensure that these limitations are met. TR 387-388.

Staff concurred with SLC's positions but did note that it intended to review the EPA and FOH comments regarding short-term limits, and that it planned to add those to the permit. TR 388.

RULING: We have determined elsewhere in this ruling that there is an issue for adjudication with respect to SLC's particulate analysis in light of the modeling performed by CDM and presented in FOH's motion of October 2, 2001. IC Ex. 157. In addition, we have also found that due to errors that SLC made in its initial documentation (TR 292), the newly produced PM_{10} emissions rates in the stipulation, and the staff's statements during the issues conference, further review by staff and clarification of the basis for the derivation of the numbers for the project's particulate emissions is needed. In the event that prior determinations about particulate matter prove to be erroneous, the controls and emission rates proposed by SLC and adopted by DEC staff may also have to be adjusted.

We conclude that there is no issue for adjudication. As stated above, PSD conditions are not

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31 As acknowledged by SLC in the discussions related to opacity and supported by documentation from EPA (IC Ex. 70) discussed, infra at p. 38, continuous opacity monitoring systems (COMS) are mandated by federal regulation to monitor opacity from the clinker cooler and the kiln. 40 C.F.R. § 60.13(g)

adjudicable in this forum. In addition, the applicant has agreed to the inclusion of the short-term permit limits. IC Ex. 60a. Because MDEP's sole argument relates to whether there was an appropriate BACT top-down analysis, that matter is not adjudicable. In addition, while FOH generally argued that it was possible that there could be lower limits set, there was no specific offer of proof as to this contention. With respect to the lack of data on the baghouse make-up, without any specific offer of proof as to how this omission leads to a specific regulatory exceedance or environmental harm, there does not appear to be a reason to further delve into this matter.

We do acknowledge that given SLC's potential for significant particulate emissions in a well-populated community, there are SEQRA concerns. DEIS, IC Ex. 6, p. 14-25-14-26; air permit application, IC Ex. 8, p. C-36; FOH Motion to Add Issue, IC Ex. 157. Accordingly, as for the monitoring requirements, while SLC provided that the visual observation methods 22 and 9 are the proscribed measures in the regulations for addressing opacity, given the 24-hour operation of this facility it would seem prudent to consider other methods. In fact, at the recommendation of MDEP, Mr. West stated at the issues conference that SLC would consider the use of a visolite monitoring system that uses dye visible under ultra-violet light to detect leaks and breaks in the baghouses. TR 211-212. We direct that this methodology be made part of the permit.

BRPC and MDEP

BRPC's main concerns are related to air quality impacts on Berkshire County and how SLC's effects on regional air quality will affect the ability of Berkshire County to continue to grow, given the County's own attainment issues. IC Ex. 36; TR 402-411.

Apart from the proposed issues on SO_2 and PM addressed elsewhere in this ruling, MDEP also stated in its petition that DEC should "ensure that the lowest emission levels achievable consistent with BACT and LAER are imposed . . . to minimize PSD increment consumption." MDEP Pet., IC Ex. 52, p. 2.

RULING: Both the petition and BRPC's statements at the issues conference related to these concerns are quite general and more appropriately characterized as comments that the applicant will have to respond to in a responsiveness summary, rather than a presentation of adjudicable issues. See, 6 NYCRR §§ 624.12[b], 617.9[b][8]). While BRPC has offered the testimony of two experts (Dr. Colin High, a scientist with air quality analysis expertise, as well as a planning expert), the basis for requiring these experts' involvement is lacking. BRPC states that it finds the DEIS insufficient in terms of its air quality analysis and also in its lack of examination of impacts to Berkshire County. In addition, BPRC states that the project may adversely affect regional economic development by limiting the availability of air permits for projects in Massachusetts. While these concerns are legitimate, there are insufficient grounds to find adjudicable issues on such sparse information. See, Matter of Adrian Girouard, 2001 WL 300580, (Interim Decision Mar. 16, 2001). Accordingly, we find that BRPC has not presented any adjudicable issues for this forum.

Similarly, MDEP's concerns regarding application of BACT and LAER do not meet the Part 624 standards and should be addressed in the responsiveness summary that becomes part of the FEIS. 6 NYCRR §§ 624.12(b), 617.9(b)(8).

BACT Opacity Limit

FOH contends that because the limit for particulate matter is lower than the federal MACT standard for this facility, the opacity limit should follow suit. FOH Pet. IC Ex. 39, p. 23. The draft permit items 31.1, 56.2 , 60.2 and 73.2 and the federal MACT standard provide for a 20% opacity limit. But due to the more stringent particulate matter condition for the SLC Greenport facility, FOH maintains that the opacity limit should reflect this heightened stringency and argues for a 10% limit for opacity. FOH maintains that the opacity limits are a means to monitor PM, and that to allow the higher opacity limitations will result in failures to detect degraded and broken baghouses.

RULING: The opacity limitation is not a proper subject for adjudication in this forum. The applicant has stipulated to a ten percent opacity limit for exhaust gases in the duct from the clinker cooler, as well as a continuous opacity monitor to ensure compliance with that limitation. TR 437. With respect to the main stack, SLC argues that the opacity limit is properly 20 percent as provided in federal and state regulation. 6 NYCRR § 220.4; 40 C.F.R. § 60.3 LLL. The staff agrees with these limitations, and in addition, will be requiring a stack test to address the PM standards. TR 437-478. While FOH provided a printout from EPA's website showing that the Suwanee American Cement Co. plant in Florida has a 5% opacity limit attached to certain components of its facility, there was no demonstration that a) the opacity limits set with respect to SLC's facility are not in keeping with the applicable regulatory requirements or b) would have an adverse impact on the environment.

We are not deciding whether these limits are subject to BACT. SLC has argued that they are not, claiming that opacity is not subject to these requirements because it is not a specific pollutant, but rather an indicator. FOH points out that 40 CFR § 52.51(j) includes "visible emission standard" as part of what BACT controls.[32] In either case, as stated earlier, strictly PSD matters are not adjudicable here.

SLC is bound to the requirements set forth in Part 220 and applicable federal regulations. In support of its position, SLC produced an EPA Determinations Detail (IC Ex. 70) that answers the question as to what procedure to use to comply with opacity limits when a cement plant's kiln and clinker cooler route their exhaust streams to a single stack. The document provides that because the clinker cooler is subject to a 10% opacity standard and the kiln a 20% opacity limit, a continuous opacity monitoring system is to be installed on the ductwork from the clinker cooler to the preheater that demonstrates compliance with the 10% limit. Another COMS is to be installed on the kiln exhaust that shows compliance with the 20% standard. It is not clear from the draft permit conditions, however, that there will indeed be two monitoring systems as is required by this EPA determination letter. Accordingly, we direct that staff make that clarification in the revised draft air permit.

There is no basis to find that a more stringent limit should be set and therefore no hearing on this matter is necessary. With respect to the baghouse integrity issue, as set forth above at p. 36, we ask that staff include a permit condition requiring the visolite dye system so that tears or broken bags will be detected

32 We found this reference in 40 CFR section 51.166(b)(12) defining BACT as "an emission limit (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation . . ."

promptly. In accordance with our other rulings, staff is directed to revise the draft air permit to reflect the stipulations and determinations made by SLC and staff on opacity. TR 437-438.

SO_2 BACT Limits

In its petition, FOH stated that the draft air permit does not contain any condition specifically identifying PSD emissions for SO_2 that constitute BACT. FOH maintains that the failure to provide short term limits for SO_2 and enforceable permit conditions for achieving BACT such as provisions for monitoring and record keeping, are not in keeping with PSD requirements. In addition, FOH argues that the applicant has failed to provide needed detail regarding the scrubbers' operation and maintenance, and that lack of detail could lead to a failure to operate this equipment properly and a lack of control efficiency. FOH Pet., IC Ex. 39, p. 24.

MDEP stated in its petition that there should be a more stringent emission limit for SO_2, and that BACT was not demonstrated for this pollutant. MDEP Pet., p. 2 and attached comment letter dated July 2, 2001, p. 2, IC Ex. 52. MDEP stated at the issues conference that it was "okay with" the short-term limits proposed by the applicant in IC Ex. 60 but still wanted to see more analysis as to how these limits were derived. At the July 19 session of the issues conference, Mr. Bell stated on behalf of MDEP that it wished to see a permit condition requiring that the applicant operate its scrubber whenever the kiln is working. TR 208.

RULING: There is no issue for adjudication on this matter because PSD issues are not subject to adjudication in this forum. In light of the applicant's agreements to a) include SO_2 limits in the draft permit (IC Ex. 60) and b) operate the scrubber whenever the kiln is working (TR 459) as well as draft permit item 3.1 that requires SLC to operate the pollution control equipment in "a satisfactory state of maintenance and repair in accordance with ordinary and necessary practices . . .", FOH and MDEP have failed to identify a specific issue that would meet the substantive and significant standards in Part 624. MDEP was generally seeking more information on the BACT analysis. While we encouraged the exchange of this information at the issues conference, these general queries alone are not sufficient to require a hearing. TR 208-213.

In the air application, SLC provides information on how it determined that BACT for this facility is comprised of wet and dry scrubbing in addition to inherent scrubbing. Air permit application, IC Ex. 8, pp. 5-22 - 5-23. This latter technique uses the cement kiln feed as a natural dry scrubber to absorb SO_2 from cement kiln gases. Id., p. 5-20. A number of other cement facilities rely upon this technique alone for SO_2 control. Id., Table 5-3, p. 5-23. While FOH points out that a few plants in the U.S. have lower emission rates for SO_2, such as Suwanee American, which uses low sulfur material and process control, there is no demonstration that the technology SLC intends to employ is by any means deficient. The use of the three types of scrubbing techniques appears to conform to EPA's interpretation of BACT - that is the use of the most stringent technology unless the applicant can demonstrate technical or economic infeasibility. See, In re Inter-Power of New York, Inc., 1994 WL 114949, 5 E.A.D. 130, p. 4, (Mar. 16, 1994), PSD Appeal Nos. 92-8 and 92-9. The draft permit also contains a requirement that SLC maintain a continuous emission

monitoring system (CEMS) that measures SO_2 emissions from the kiln. Draft permit condition 58, IC Ex. 12. While FOH's expert made some statements about the possibilities of getting greater reductions by manipulating aspects of the technologies employed, these are too uncertain to form the basis for an adjudicable issue.[33] TR 469-470.

We recognize that there has been a specific omission in SLC's calculations in the context of the choice of fuel issue raised by FOH. In addition, we note the requirement in 6 NYCRR § 220.6 regarding compliance with Part 225 limitations on emissions of sulfur compounds derived from fuels. Accordingly, we have concerns about the lack of analysis in the application regarding coal composition. On behalf of FOH, Dr. Miller questioned SLC's calculations regarding SO_2 emissions on the basis that the applicant omitted the sulfur content in the coal and relied upon the quantities in the stone in formulating the emissions limits. TR 227. We direct SLC and the staff to provide clarification of this point and second, include in this submission information on how the applicant intends to comply with Parts 220 and 225 in terms of sulfur limits in the fuel and how this is indicated in the air permit.[34]

In the Inter-Power matter, there is a lengthy discussion of the applicant's analysis of the use of low sulfur fuel; however, that appears lacking here. In its letter of June 29, 2001, EPA also comments on the draft permit's omission of a sulfur limit in the bituminous coal and petroleum coke that can be used at the facility. IC Ex. 55. There is a record-keeping condition (draft permit item 58.2) requiring that the facility demonstrate that the control systems from the kiln result in less sulfur emissions than what would be required by Part 225's sulfur-in-fuel limitations but it should be abundantly clear in the application and draft permit that SLC will meet this condition and how.[35] While Columbia County may be in attainment for SO_2, the State's concerns regarding emission of this pollutant go further as manifested in the State's Acid Deposition Control

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33 The applicant maintains throughout these proceedings that the high sulfur contained in its raw material is largely responsible for SLC's higher emissions of certain pollutants despite the employment of advanced control technology. No one has suggested that SLC derive its materials elsewhere - it would appear that this would entail a different project from what the applicant has proposed akin to "redefining the source, " i.e., a demand that an applicant change its basic design. Such action is generally not required to arrive at BACT, though EPA does not preclude such examination. See NSR Workshop Manual, at B. 13-14.

34 We do note that draft air permit item 34.2 limits the sulfur content of oil used and item 35.2 restricts the fuel to coal, petroleum coke, distillate fuel oil and natural gas, but we do not find a limitation on the sulfur limits in the fuel, or any explanation for this omission.

35 A brief comment made by SLC's counsel at the issues conference - that "SLC's emission estimates include consideration of the fuel-sulfur restrictions imposed by 6 NYCRR Part 225" does not resolve this omission. TR 456.

Act. ECL, Article 19, Title 9.[36]

BACT Analysis for Sulfuric Acid[37]

Without further elaboration, FOH's petition contends that the draft permit is deficient because it contains no provisions addressing sulfuric acid (H_2SO_4) under PSD or any regulatory program. Pet., IC Ex. 39, p. 25. In response to SLC's submission of the stipulated emission limits at the issues conference (IC Ex. 60), FOH stated that the proposed annual emission limit of 40 tons was too great and was approximately 50 percent higher than what was described in the application. TR 478. The applicant has submitted a revised stipulation indicating that the emission limit for H_2SO_4 is 26.63 tpy and the short-term emission limits have been reduced to 6.08 lb/hr (24-hour rolling average). IC Ex. 60a. However, in its letter of November 6, 2001,

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36 The State's Attorney General intervened in EPA's lawsuits against Midwestern utilities for failure to obtain air permits while making major modifications to their facilities that would require such permits based upon their contributions to New York's acid rain dilemma. U.S. v. American Electric Power Co., C2-99-1182 (S.C. Ohio 1999). Settlement discussions are ongoing in that matter. The State legislature has also taken steps to reduce acid deposition from Midwestern and out-of-state power plants by requiring electric generators to include restrictive covenants in their Title IV SO_2 allowances that they sell to any one of 14 upwind states. By including the restrictive covenants, the generators avoid a penalty equal to the amount received for the sale of the credit to these states. L. 2000, c. 36 added PSL § 66, amended ECL § 19-0201, added § 99-q to State Finance Law and new subdivision 10-a to Public Authorities Law § 1854. This legislation is subject to challenge in Clean Air Markets Group v. Pataki, No. 00-CV-1738 (2000). Without addressing Dr. Miller's concerns about the sulfur calculations, SLC and staff do note that this facility should result in a net decrease in SO_2 emissions of 2285 tpy due to the closure of the Catskill plant. See, Supplement to Fact Sheet, *Review of the St. Lawrence Greenport Project* (12/22/00), pp. 1, 3, IC Ex. 12.

37 In FOH's petition the BACT analysis for CO is raised here as well, but this matter has already been addressed at pp. 31-32 and will not be revisited.

FOH maintains that SLC has not performed a proper BACT analysis to demonstrate how it arrived at these limits nor is there any showing as to how this limit will be monitored. IC Ex. 174.

RULING: There is no issue for adjudication pertaining to this matter. This is also a PSD-implicated pollutant. We understand that the technology requirements are the same for SO_2 and accordingly, we rely upon our ruling on the BACT analysis for SO_2 with respect to that discussion.

Federal New Source Performance Standards

FOH's petition asserted that the draft permit does not meet new source performance standards (NSPS), which require certain minimum technology and emission standards for new or modified sources in certain industrial categories. 42 USC § 7411, CAA § 111; FOH Pet., IC Ex. 39, p. 29. Specifically, FOH argues that the draft air permit fails to include conditions that refer to 40 CFR Part 60, Subparts OOO and Y (applicable to non-metallic mineral processing and coal preparation plants respectively). Id., pp. 29-30. FOH argues that the 7% opacity limit set forth in Subpart OOO applies to the baghouses associated with coal and rock processing facilities. Id., p. 30; TR 500-501. In support of this position, FOH points to the air permit application which notes that because kiln gases will be used to dry coal in the coal mill, Subpart Y will be invoked and because new crushing, handling and storage equipment will be located in the mine, Subpart OOO will apply. Air permit application, IC Ex. 8, p. 3-6.

Initially, staff's position on these federal requirements was that Subpart OOO is not applicable because it has been superseded for facilities that will not be functioning until 2002 by the MACT standards (for portland cement plants) associated with national emission standards for hazardous air pollutants (NESHAP), 40 CFR Part 63, subpart LLL. TR 502-504; air permit application, IC Ex. 8, p. 3-7-3-8.[38]

RULING: This is not an adjudicable issue but rather a matter that requires staff to set forth in the draft air permit conditions that incorporate the applicable NSPS and NESHAP requirements. A review of the post-issues conference briefs does not reveal great differences in the interpretation of these regulations among staff, FOH and SLC. IC Exs. 138, 139, 140, 150, 151a. In fact, in its reply brief, FOH states that it believes this matter has been satisfactorily resolved. IC Ex. 150, pp. 19-20. Staff altered its position in its post-hearing brief to acknowledge that in addition to the requirements of 40 CFR 63 subpart LLL (draft air permit conditions 76-77, 79), the mining operations are subject to the NSPS standards at 40 CFR 60, Subpart OOO and the coal processing operations will be subject to 40 CFR 63, subpart Y. Staff's Br., IC Ex. 139, pp. 38-

38 The MACT standards were subject to an industry challenge in National Lime Ass'n v. EPA, 233 F.3d 625 (DC Cir. 2000). The court remanded certain regulations to EPA for reconsideration. However, SLC maintained at the issues conference that these rules remain in effect and in any case, the applicant agrees to be bound by them. TR 507-508.

40. In its reply brief, SLC agrees to stipulate that the project's mining operation crusher is subject to the 7% opacity limit set forth in subpart OOO - 40 CFR 60.672(h). IC Ex. 151a, p. 29.

We direct staff to revise the draft air permit consistent with its post-issues conference brief to clarify limitations that address: (1) Subpart LLL's application to each aspect of the facility pursuant to 40 CFR 63.1340(b)(1-9); (2) Subpart OOO's application to the mining operation pursuant to 40 CFR 60.670(a)(1); (3) Subpart Y's application to the coal preparation plant; and (4) the opacity limits set forth in 40 CFR 60.672(a), (b), (c); 40 CFR 60.252(a), (b), and (c). In addition to these, staff shall incorporate other applicable requirements such as performance testing and opacity observations.

Fugitive Emissions

FOH stated in its petition that the applicant has not addressed measures that would address material handling and fugitive dust emissions from a variety of operations. FOH also maintains that the fugitive dust control plan is inadequate. FOH Pet., IC Ex. 39, pp. 30-37.

Clinker Handling and Transfer

At the issues conference on July 20, SLC stipulated that clinker and off-spec clinker will be stored in enclosed silos. TR 510. Mr. West noted that the plans include the construction of a second silo if one proves insufficient. TR 511. In addition, clinker will be transported in trucks that utilize soft covers.[39] TR 512, 514.

RULING: There is no issue for adjudication with respect to SLC's handling of this material. As is apparent from SLC's agreement to store this material in silos and to transport it in soft-covered trucks, there should not be a problem with dust. FOH claimed that dust will be created by transfer of this material, pointing to the use of a baghouse on the clinker cooler. SLC distinguished those circumstances by stating that clinker in that process is subject to high temperatures and air circulation which would cause dust. TR 514. This is different from the cooled material that was presented as an exhibit at the conference. IC Ex. 63b. This material is rock-like and unless it is subject to some extreme turbulence or pressure, it does not appear that it would release fugitive dust.[40]

Staff is directed to revise the draft air permit to reflect SLC's agreement to the conditions noted above.

Spray Conditioning Towers

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39 Related to this, SLC stated its willingness to stipulate to be limited to transfer clinker in the amount that is projected in the application. TR 518.

40 During this discussion, FOH also argued that SLC's Catskill facility, which will remain active with respect to certain processes, should be subject to the same opacity limitations as Greenport. TR 518-519. As noted by Mr. West, Greenport and Catskill are not under consideration as one facility in this process and SLC's Catskill pollution control equipment is not subject to scrutiny here unless there is some change there that is related to the proposed Greenport project. SLC's Catskill plant is subject to the MACT rule (10 percent opacity) and is also involved in the Title V permit process. TR 521.

FOH maintains that the spray conditioning tower for the main precalciner/preheater flue gas output does not show any control of tower bottom drop-out. According to FOH, this could be a significant source of particulates. FOH's air expert, Mr. Sapienza explained at the issues conference that the application did not contain a process flow sheet to indicate how materials would be processed. TR 524-525.

RULING: This is not an issue for adjudication. At the issues conference, SLC offered, and FOH accepted, a stipulation providing that the entire bottom of the spray conditioning tower (the dropout point) would be closed. TR 525-526.

Raw Material Blending

In its petition, FOH contends that though the raw material blending hall is depicted in figure 2-1 of the air permit application, there is not sufficient information regarding whether this structure is enclosed, and whether there is a potential for air pollution from this operation. Pet., IC Ex. 39, p. 32.

RULING: There is no issue for adjudication with respect to this matter. SLC has stipulated that this is a totally enclosed structure with the exception of the door to it that is subject to the visible emission standard in 6 NYCRR § 220.4(c). TR 527. This stipulation resolved this matter for FOH. TR 528.

Raw Mill System

FOH's petition asserts that a lack of detail regarding the raw mill system (figure 2-3 of the air permit application) makes it difficult to determine if there are sufficient controls on the systems to prevent uncontrolled kiln gas emissions. IC Ex. 39, p. 32.

RULING: There is no issue for adjudication with respect to this matter. FOH was satisfied with SLC's explanation that the raw mill system works under negative pressure, thereby preventing pressurization that could result in fugitives. In addition, figure 2-2 of the air permit application shows a rotary air lock and a blower/pneumatic pump combination on the fly ash feed system, while figure 2-3 shows a rotary feeder air lock on the fresh feed, and an air lock on the recirculated feed. TR 528; IC Ex. 8, figures 2-2, 2-3.

Baghouse Cement Kiln Dust

FOH expressed concern in its petition as to whether SLC intends to waste any of the CKD from the main kiln/in-line mill PM collection system. IC Ex. 39, pp. 32-33.

RULING: There is no issue for adjudication with respect to this matter. SLC stated at the issues conference that 100% of this CKD will be recycled back into the system at all times. TR 530. In offering this explanation, Mr. West distinguished this material from that produced by the alkali bypass, which is discussed below. TR 530. FOH accepted this explanation and thus, this matter is resolved.

Off-Loading of Dust from Alkali Bypass

FOH pointed out in its petition that figure 2-12 in the air permit application shows two points where

CKD will be loaded into open top trucks from the alkali bypass system. While this drawing shows a water spray on the conveyor at the principal offloading point, FOH maintains that this is insufficient to prevent fugitive emissions and is not BACT for PM emission control FOH Pet., IC Ex. 39, p. 33.

In response, SLC described the pug mill that will be used to mix the dust from the alkali bypass with water so that the dust is in a more granular form and moisturized to prevent dust. Once the dust is in this form, SLC maintains that transportation will not be a problem and that the open top trucks will have tarps over them. TR 531; air permit application, IC Ex. 8, figure 2-12.[41] In the event that the CKD is to be sent to a facility that will only accept this material in a dry form, SLC represented at the issues conference that CKD would be loaded pneumatically to eliminate the potential for fugitive emissions. TR 534.

RULING: There is no issue for adjudication with respect to the fugitive air emissions matter that FOH raised. However, in the course of examining the pug mill scenario, a potential issue arose as to whether the recycled water that is obtained from the wet/dry scrubber has the potential to make the CKD unacceptable for landfilling due to contaminants such as mercury in the scrubber water. This matter is addressed at pp. 58-59 below.[42]

Pneumatic Loading of Barges/Ships

FOH's petition argued that there is no emission control system shown in the application with regard to the pneumatic loading of the ships and barges. FOH contended that this will result in "highly objectionable, very heavy fugitive emissions of cement dust at the Hudson River dockside location." FOH Pet., IC Ex. 39, p. 33.

RULING: This is not a matter for adjudication. SLC described the system of loading of cement that provides for the barges to have on-board baghouse filters to control fugitive dust. TR 542- 543. FOH expressed satisfaction with this control system. To the extent that this is not evident in the draft permit, we direct staff to make this clarification.

Baghouse Hopper Collection Points

In its petition, FOH states that, except for the very largest baghouses, SLC failed to provide details on how the collected dust from the baghouse hopper collection points will be managed. FOH Pet., IC Ex. 39, pp. 33-34.

RULING: This is not a matter for adjudication. SLC described the action of the nuisance dust collectors that

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41 Currently, the Catskill facility has a permit to landfill CKD and there are approximately 10 years of capacity left. Nevertheless, SLC represented at the issues conference that it intends to continue to seek ways to recycle this material so that it is not landfilled. TR 533.

42 SLC protested that this matter was not raised in FOH's petition and that it was therefore untimely. While it is true that it was not contained in FOH's petition, it appears from statements made by DEC staff at the issues conference that the content of this recycled water and its potential effects on the CKD sludge were never examined, and staff agreed that there was a need to do so. TR 1463-1474.

will return this material to enclosed locations. TR 543-544. FOH was satisfied with this description as long as this was made a requirement of the design. SLC agreed.. TR 547. We direct staff to specify in the draft air permit the management of the collected dust from the baghouse hopper collection points to conform to this discussion at the issues conference.

Reintroduction of Collected Contaminants

While the draft air permit provides in item 8.1 that as practical, operators of an air contamination source shall recycle or salvage air contaminants in an air cleaning device and condition 9 prohibits reintroduction of collected contaminants to the ambient air, FOH's petition maintains that there is insufficient information as to how SLC will accomplish this. FOH Pet., IC Ex. 39, p. 34.

RULING: There is no issue for adjudication. As with the baghouse collection points, SLC points out that these are enclosed systems. The draft air permit shall be revised to provide a description of these controls. Item 8.1 should reference the specific state air regulation that applies, rather than generally referencing to Title 6.

Coal, Coke and Raw Material Dockside Transfer and Fugitive Dust Control Plan

FOH maintains in its petition that the dockside operations will cause particulate emissions due to the material transfer systems that SLC proposes. FOH Pet., IC Ex. 39, p. 34. FOH argues that the use of a clamshell crane loading system and an open hopper may cause spillage, and result in dust emissions. Id. FOH states that there is no provision for a covered and controlled conveyor system for unloading, and no information on low moisture material conditions. Id. In its petition, the City of Hudson also criticizes the lack of information SLC provided in the air permit application regarding control of emissions at the dock, stating that emission control failures would hinder the City's planned development of the waterfront for recreational use. City Pet., IC Ex. 48, pp. 6-7.

SLC filed a revised fugitive dust management plan by letter dated September 28, 2001. IC Ex. 155. In a letter to the ALJ dated October 9, 2001, the City stated its dissatisfaction with the revised plan and with SLC's failure to meet with the City and others regarding the plan, as discussed at the issues conference on July 20, 2001. IC Ex. 163, TR 573-585.[43] FOH also submitted comments on SLC's revised plan dated October 16, 2001. IC Ex. 167. FOH contends that SLC failed to provide a specific and enforceable plan to control fugitive dust. FOH points out that this is a standard requirement, and gives examples of such plans at other facilities, such as the Holnam Dundee Cement Plant. IC Ex. 167, Attachments B, C, D.

There is some additional detail provided in the September 28 submission, such as a commitment to pave frequently traveled roads in the facility, to perform regular dust removal, to spray haul roads, to cover long-term storage piles, to cover open bin trucks with flexible, removable tarps, and to maintain records with

43 A reading of the transcript reveals that SLC agreed to have a more detailed plan available to DEC and for public comment "well in advance of the start of construction . . ." TR 576. In addition, Mr. West agreed the company would meet with the intervenors during the issues conference to discuss this matter in more detail. TR 585.

respect to these measures. Yet, the information with respect to these matters remains general and is quite limited with respect to controls at the dock. SLC maintains generally that it cannot provide complete detail on dust management until final engineering for the facility is complete. SLC's revised submission indicates that SLC will maintain appropriate moisture levels in these piles to reduce dust, and will adhere to the requirements of 6 NYCRR §§ 211.2 and 220.4. The proposed mined land use plan (MLUP) also provides that SLC will adhere to requirements in Part 212 (General Process Emission Sources), as applicable, as well as implement other general dust control measures. DEIS Appendix, IC Ex. 7, p. 14. The former regulation is essentially a prohibition on nuisance-related air contaminants and the latter prohibits visible emissions at cement plant facilities. These regulations, as well as the requirements under the federal PSD program noted by FOH in its October 16 submission, do mandate fugitive dust controls. IC Ex. 167.

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. IC Ex. 12, draft air permit conditions 87.2 and 86.2.

With respect to the unloading of ships and barges, SLC maintains that these operations are straightforward and that the company would take necessary steps to preclude spillage into the Hudson River. TR 557-558.

RULING: We find that this matter is not suitable for adjudication, but there remains a need for supplementation, particularly with respect to activity at the dock. The materials that will be handled at the dock include clinker, gypsum and coal. The dock area currently receives gypsum and salt, and as noted during the second site visit, the piles may remain on the dock for some time. SLC stated at the issues conference that the materials it receives at the dock will stay there no longer than 100 hours. TR 554. However, from an examination of the coal and the gypsum that were presented as exhibits at the issues conference, these materials (the coal more so than the gypsum) release dust if subject to wind and disturbance. IC Exs. 63a and 63c. While the stockpiling of these materials may be common at many dock facilities, this vicinity is subject to multiple uses including recreation and thus, special care must be taken to ensure that such dust is minimized.

SLC contends that without final engineering plans a more defined fugitive dust plan is premature. As ALJ Goldberger stated at the issues conference, while this may be true in terms of every detail, there should be a means to determine at this point generally what controls will be used. TR 574-575. Many of FOH's suggestions for dust control may not be necessary. Nevertheless, more detail should be provided with respect to controls that have only been addressed by SLC in general terms, particularly at the dock facility and also for transfer of materials from ship/barge to the dock to avoid spillage. In the event of a dry period or significant storm, measures must be identified to ensure that significant quantities of coal dust are not spread into the river or blown away. SLC must also maintain adequate moisture levels in these materials, and specify what circumstances will trigger this requirement. It is simply not sufficient to say that SLC will comply with the regulations and law - the purpose of this proceeding is to determine if the measures provided in the application will accomplish this goal. See, e.g., Matter of Blasdell Development Group, Inc., 1995 WL 1771604 (ALJ Ruling Aug. 17, 1995).

With respect to the balance of the facility, SLC has adopted some of FOH's suggestions regarding

dust control such paving roads, setting speed limits, spraying roads, and covering trucks. The draft permit also provides some conditions regarding dust control at the mine. IC Ex. 12(a)(i), conditions 12 and 13. However, the draft permit should be more specific with respect to implementing these measures. The plan must also incorporate SLC's agreements to eliminate spillage associated with unloading operations as described by Mr. West at the issues conference on July 20. TR 555-556. There is no indication from FOH that the method it suggests (the tube conveyor) is necessary to accomplish these goals, nor that such measures are employed at other dock facilities.

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.[44] 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. FOH has identified a number of permits from other states that indicate more specific controls; however, we have no indication as to what point in the permitting processes these controls were identified. IC Ex. 167, Attachments B, C, D. Within sixty days of this ruling, the applicant shall submit a more detailed materials handling and fugitive dust plan that addresses the dock and transfer operations. In conjunction with this work, staff should devise appropriately detailed permit conditions that address these outstanding concerns. SLC and staff shall distribute this plan and the revised permit to the those participants who have been granted party status for review and comment.

$PM_{2.5}$

In their petitions, proposed intervenors FOH, the City, the Village and the Coalition criticized SLC's analysis of $PM_{2.5}$ impacts.[45] $PM_{2.5}$ are fine particulates that have a diameter of less than 2.5 microns. Based upon its review of the particulate NAAQS, EPA concluded that due to the potential health threat from these substances, which can lodge deep within the lungs, a new standard that addressed fine particulates was required. In 1997, EPA adopted a long-term annual standard of 15 micrograms per cubic meter and a 24-hour standard of 65 micrograms per cubic meter. 62 Fed. Reg. 38652, 38679. The rule was quickly subject to challenge. In the spring of 2001, the U.S. Supreme Court in Whitman v. American Trucking Ass'n, 531 US 457 (2001) rejected the challenges to the regulations.

FOH argues that SLC's $PM_{2.5}$ analysis is flawed because SLC focused on compliance with the NAAQS, rather than addressing the health impacts of these emissions. FOH Pet., IC Ex. 39, p. 38. In light of the plant's proximity to the City of Hudson and sensitive receptors such as a school and hospital, FOH maintains that the DEIS is defective because potential health effects are not addressed. Id. FOH also challenges SLC's air modeling because the emission rate used is not specified and because SLC modeled only its own emissions, instead of including the Athens power plant and other nearby sources of $PM_{2.5}$. In

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44 It does contest that a fugitive dust plan is required by law but this appears to be a matter of semantics only as the law and regulations identified by SLC and FOH clearly mandate control of fugitive dust. 6 NYCRR §§ 211.2, 220.4(c) and 40 CFR § 52.21.

45 The Town had also raised this in its petition but has now withdrawn its objections.

addition, FOH maintains that SLC's focus on secondary creation of $PM_{2.5}$ (caused by gas reactions of SO_2 and NO_x emissions that occur at some distance from the facility), and the regional offset of these emissions due to the shutdown of Catskill ignores local impacts. Id., p. 39. Moreover, FOH's consultant, CDM, has determined based upon air data provided by SLC that there will be a substantial increase in PM in residential areas near the facility. FOH calls for a health risk assessment based upon this finding. Id., pp. 39-40. In addition, as noted above at pp. 14-18, FOH maintains that SLC's analysis of $PM_{2.5}$ is flawed because that analysis was based upon the Albany NWS data, which underestimated PM impacts. IC Ex. 157, pp. 3-4.

The Coalition argues similarly that SLC's analysis underestimates the background levels of $PM_{2.5}$. The Coalition maintains that the applicant failed to show the results of the models that it ran to show PM_{10} impacts.[46] Coalition Pet., IC Ex. 40, p. 29. Moreover, as does FOH, the Coalition argues that there are no known safe levels of these particulates and therefore, reliance upon compliance with the NAAQS is improper. Id., p. 22. The Coalition challenges SLC's conclusions regarding the reduction of secondary $PM_{2.5}$ based upon the chemistry and speed of reactions that lead to this result. Id., p. 23. The Coalition agrees with FOH that this theory also ignores local impacts. Id.

The Village of Athens' petition states that the Village is seeking a cumulative air impact analysis that includes $PM_{2.5}$ emissions from SLC's project, Athens Generating and the Iroquois Gas compressor. Village Pet., IC Ex. 43. The City criticizes SLC's use of the Albany NWS met data and Cementon air monitoring data to establish the background ambient air quality, instead of using local information. The City also contends that an environmental monitor and the construction and use of air monitoring stations in the City are necessary to assure that air emissions are not at unhealthful levels. City Pet., IC Ex. 48, pp. 8-10.

RULING: The question of whether or not SLC relied upon suitable data in making its assessments regarding $PM_{2.5}$ emissions is appropriate for adjudication. Essentially, there was no dispute among the parties as to the conclusion that $PM_{2.5}$ presents an important health risk to humans. See, e.g., TR 590, 655. In this case, the applicant has performed an analysis of $PM_{2.5}$. See, DEIS, IC Ex. 7, Appendix H.2. This matter is thus distinguishable from American Marine Rail (AMR), 2001 WL 172285 (Interim Decision, Feb. 14, 2001) or recent power plant cases such as the New York Power Authority's analysis in its sub-article X proceedings in New York City, e.g., UPROSE v. Power Authority of New York (NYPA), 2001 WL 830817, 285 AD2d 603 (2d Dep't 2001), motion for lv to appeal denied, __ NY2d __ (Nov. 20, 2001). However, based upon the dispute among the experts as whether the applicant has properly assessed the impacts of $PM_{2.5}$, we have found that this matter is adjudicable.

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46 Based upon research from a variety of sources set forth in the DEIS, the applicant assumed a certain percentage of PM_{10} emissions were $PM_{2.5}$. DEIS, IC Ex. 7, p. H2-6. The Coalition claims that this percentage was too low. Coalition Pet., IC Ex. 40, p. 21.

There are no regulations in effect that govern $PM_{2.5}$.[47] However, given the admitted potential public health impacts, there must be an analysis of an applicant's contribution of this pollutant to the affected community in order to comply with SEQRA's requirements to "take a hard look" at potentially significant environmental impacts and mitigate them to the extent practicable. ECL § 8-0109; Aldrich v. Pattison, 107 AD2d 258 (2d Dep't 1985) (hard look and reasoned elaboration extended to review of EISs). While uncertainty still exists as to DEC's and other states' implementation of the PSD program for $PM_{2.5}$, evaluating the impacts of this pollutant certainly meets the "rule of reason" given the certainty of its ill effects and an increase in particulates even based upon SLC's projected emissions. Jackson v. New York State Urban Devel. Corp., 67 NY2d 400 (1986).

In performing its analysis, SLC determined that there would be increases of $PM_{2.5}$ annual average concentrations in areas around the site ranging from 0.5 to more than 2.0 but less than 2.5 g/m^3. Id., p. H2-7; Figure H-1. To make this calculation, SLC compared Albany $PM_{2.5}$ monitoring data showing background concentrations of 8 to 11 micrograms per cubic meter (g/m^3) and data from Cementon showing PM_{10} background measurements of 18 g/m^3 . Then SLC applied a ratio of 40 - 60% stating that this would reflect concentrations of $PM_{2.5}$ to PM_{10} . This led to the applicant's determination that background concentrations of $PM_{2.5}$ would be from 7 to 11 g/m^3 and the demonstrated increases would still fall below the NAAQS annual concentration of 15 g/m^3. Id. For the 24-hour $PM_{2.5}$ concentration, SLC used a similar method and found that most of the areas around the project would experience increases of less than 4 g/m^3. Id., p. H2-8; Figure H-2.

In addition, SLC determined that the new facility operating under typical conditions would expect a decrease in secondary formation of $PM_{2.5}$ because reductions of SO_2 and NO_x in quantities of 2,700 and 1,200 tons respectively (due to the shut-down of Catskill). This would result in fewer of these pollutants that could react and become particulates throughout the region.[48] Id., pp. H2-9-10. However, SLC acknowledged that "it is still possible that small increases in particulate concentrations could result in those

47 See, ALJ's Ruling in American Marine Rail, LLC, 2000 WL 1299571, (Aug.25, 2000) for the background on the EPA rule. The Commissioner reversed the ALJ on the $PM_{2.5}$ conclusions in that ruling but since that decision (Interim Decision 2/14/01), the Supreme Court decided to uphold EPA's authority to promulgate the $PM_{2.5}$ regulations. Whitman v. American Trucking Ass'n, supra. There have been a number of DEC and Siting Board administrative decisions in New York that have rejected a $PM_{2.5}$ analysis as well as the Second Department's decision in UPROSE v. Power Authority of New York, supra, that rejected a negative declaration for failure to thoroughly address $PM_{2.5}$ impacts.

48 Particulates are of two varieties: primary (those emitted directly from the stack) and secondary (those formed later through the atomospheric conversion of gases such as SO_2 and NO_x). See, Bowers v. Pollution Control Hearings Bd., 103 Wn. App. 587, 599 (Wash. Ct. App. 2000).

areas very close to the Greenport plant. . ." SLC concluded that these increases would meet the particulate standards. Id., p. H2-10.

At the issues conference (TR 655-666) and in a subsequent filing (IC Ex. 111), SLC reiterated and supplemented its conclusions in the DEIS that its efforts to reduce SO_2 and NO_x, particulates will be reduced (based upon Catskill's closure). This is because these gases are significant contributors of regional PM, particularly the fine particulates. DEIS, IC Ex. 6, p. 14-25. The applicant presented two experts (Drs. Godleski and Koutrakis) from the Harvard School of Public Health who maintained that there are two types of particulates - toxic and non-toxic - and stated that SLC's new facility will significantly diminish the toxic particulates. According to SLC's experts, the non-toxic particulates are not of great concern. Dr. Koutrakis explained that the emissions that come from SLC's Greenport kiln, and which are of more concern because they are derived from a combustion source, will be much less than Catskill's, because of (1) the controls, (2) the plant's location at a higher elevation; and (3) the higher stack. Dr. Koutrakis also stated that the application employed overly conservative information with respect to some meteorological data and that the NOAA trajectory analysis indicates that the plume will drift away from the City. (TR 655-664). Dr. Godleski supported these conclusions from a health perspective by stating that current studies reveal that cardiovascular and pulmonary impacts are more related to traffic-derived combustion products.[49] TR 664-666.

Dr. Thurston is the expert presented by the Coalition and FOH on this matter. He is an Associate Professor at the NYU School of Medicine and has participated in the drafting of the EPA criteria documents on $PM_{2.5}$ (TR 606). Dr. Thurston disagreed with the categorization of $PM_{2.5}$ as toxic and non-toxic while stating that there are certainly some particles that are more toxic than others. TR 607-609.

This forum is not appropriate to debate the merits of these doctors' theories. Rather, EPA's NAAQS, which are health-based standards, do not distinguish between these types of particulates. Thus, it is not necessary to delve into that question.[50] In the EPA Office of Air Quality Planning and Standards Staff Paper (OAQPS): Review of the National Ambient Air Quality Standards for Particulate Matter: Policy Assessment of Scientific and Technical Information (July 1996), EPA staff acknowledges that particulates "represent a broad class of chemically and physically diverse substances" and that "[t]he health and environmental impacts of PM are strongly related to the size of the particles." July 1996, IV-1, 2. The most recent statements by EPA with respect to this particulate standard continue to support a correlation between

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49 Both Drs. Godleski and Koutrakis have participated in studies that are referred to in EPA's Second External Review Draft of revised Air Quality Criteria for Particulate Matter that assesses scientific information available between 1996 and December 2000 [http://cppub1.cpa.gov/ncea/cfm/partmatt.cfm]. See, *e.g.*, Godleski, J.J.; Verrat, R.L.; Koutrakis, P.; Catalano, P. (2000) *Mechanisms of Morbidity and Mortality from Exposure to Ambient Air Particles*, Cambridge, MA, Health Effects Institute; research report no. 94 (laboratory dogs exposed to ambient PM showed little pulmonary influence but did find heart rate reaction that was not attributable to any "specific components of the particles").

50 While DEC staff opposes any further examination of $PM_{2.5}$ in this proceeding, it never mentioned support for SLC's toxic vs. non-toxic theory.

inhalation of fine particulates and many illnesses.[51] In the June 2001 Preliminary Draft of the OAQPS Staff Paper on Review of the NAAQS for PM, EPA staff confirm that "particles that deposit in the thoracic region . . ., i.e., particles smaller than 10 g/m^3, were of greatest concern . . ... no basis has emerged to change that fundamental conclusion." p. 3-5. http://www.epa.gov/ttncaaa1/t1/reports/pmstdrft.pdf

In EPA's 2001 External Review Draft of Air Quality Criteria for Particulate Matter, the agency confirms associations between mortality and long-term exposure to fine particles. 2001 Staff Paper, p. 3-33. Throughout the staff Paper there are references to confirmations of negative health impacts derived from exposure to PM such as lung cancer, cardiorespiratory mortality, infant mortality, chronic obstructive pulmonary disease, life-shortening, and hospital visits for a host of respiratory diseases. Staff Paper, pp. 3-35 - 3-38. See also, Control of Air Pollution from New Motor Vehicles: Heavy -Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements; Final Rule, Vol. 66, No. 12, Fed Reg. January 18, 2001. "The key health effects categories associated with ambient particulate matter include premature mortality, aggravation of respiratory and cardiovascular disease (as indicated by increased hospital admissions and emergency room visits, school absences, work loss days, and restricted activity days), aggravated asthma, acute respiratory symptoms including aggravated coughing and difficult or painful breathing, chronic bronchitis and decreased lung function that can be experienced as shortness of breath." Id., p. 5018.

FOH noted that the modeling performed by SLC with respect to $PM_{2.5}$ as well as the other pollutants was based upon the Albany NWS data. TR 641. As discussed above at pages 14-18, CDM reported that the modeling it performed using the on-site data reaches a different conclusion with respect to particulates showing an exceedance of the PM_{10} PSD increment. This mandates further assessment of particulate impacts from this project. Id.

FOH and others pointed out that the application did not address $PM_{2.5}$ emissions from large facilities such as Athens Generating. SLC relied upon data from Cementon, where the major facility is its Catskill plant, as background . Air permit application, IC Ex. 7, App. H2, p. H2-7. The proposed intervenors argue that this is not likely to reflect conditions in Hudson due to the greater number of facilities in the latter location. The staff posits, without specificity, that other major sources would not bear on the impacts from SLC and the use of Cementon data by SLC is also not appropriate. TR 650-651. Mr. Sedefian, on behalf of staff, disagreed with SLC's presentation regarding the NOAA trajectory analysis, stating that this information does not relate to local effects. TR 649. He disagreed with FOH that maximum effects would occur at the school or hospital. Instead, Mr. Sedefian found that the dock and an area a half

[51] While SLC and DEC staff note that the recent reports from EPA indicate a continued evaluation of the $PM_{2.5}$ NAAQS, the Clean Air Act requires EPA to both set NAAQS for the criteria pollutants and to periodically review these standards to ensure that they provide adequate health and environmental protection. CAA § 109(d). In Volume II of the *Second External Draft*, it is indicated that studies have shown that some components of particulates are more toxic than others. 8.7.1.1. In this section, the Draft notes that acid aerosols cause blood pressure changes and impacts to those who have allergies, particulates associated with metals cause cellular damage, and diesel emissions cause allergy rhinitis and asthma. We failed to find a conclusion that indicates that any particulates are benign.

mile east of the facility would be primarily affected. TR 650. These disputes should be heard as part of the consideration as to whether SLC performed an accurate examination of these impacts.

In addition, FOH's petition asserts that its consultants, using SLC data, demonstrate significant increases in $PM_{2.5}$. FOH Pet., IC Ex. 39, pp. 39-49. FOH does not contend, however, that even with these increases the NAAQS for $PM_{2.5}$ would be exceeded. Given the health-based nature of that standard, the grounds under SEQRA to examine this matter further rest on a showing that there will be significant adverse local impacts to demonstrate a need to limit emissions more stringently. 42 USC § 7409(b)(1), CAA § 109(b)(1); Lead Indus. Ass'n., Inc. v. EPA, 647 F.2d 1130 (D.C. Cir. 1980); Foster Wheeler-Broome Co. (Issues Ruling, April 26, 1990), p. 11.

In a December 2000 edition of the New England Journal of Medicine, the research of Dr. Jonathan Samet of John Hopkins University School of Public Health is reported. Dr. Samet found small increases of fine particulate pollution, measured on a daily basis, were followed by proportional increases in death rates, with greatest weight on heart and lung-related causes of death. Fine Particulate Air Pollution and Mortality in 20 US Cities, 1987-1994, 343 New Eng. J. Med. 1742-49.[52] In a June 2001 supplement to Environmental Health Perspectives, Joel Schwartz of the Harvard School of Public Health reported that PM_{10} is associated with higher than normal concentrations of blood agents that signal heart problems. Volume 109, Supplement 3, p. 405. In light of these documented relationships, the proximity of this facility to a large population (unlike the situation at Catskill) compels an examination as to whether further analysis of the potential health impacts is needed. This determination would be based upon an examination of the increases SLC admits will occur, and the potentially greater increases if the met data indicates there has been an underestimate of particulate emissions.[53]

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. The record that is developed will form the basis of the Commissioner's decision as to whether there will be significant adverse local impacts that require more stringent $PM_{2.5}$ limits. The issue is significant because the adjudicated outcome could result in a substantial modification of the draft permit, or permit denial.

SLC and staff argued strenuously at the issues conference and in their closing briefs that $PM_{2.5}$ is not

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52 This article is based upon an analysis of PM_{10} levels and notes that "the PM_{10} level is an imperfect surrogate for the $PM_{2.5}$ level." Id, p. 1748.

53 While staff expressed general concerns as to the Department's ability to address $PM_{2.5}$ impacts (TR 647-648), in at least one project in Washington State, the regulatory agency conducted an analysis of $PM_{2.5}$ impacts, including a health risk assessment. Bowers v. Pollution Control Hearings Bd., 103 Wn. App. 587 (Wash. Ct. App. 2000).

an appropriate subject for adjudication based upon administrative and judicial precedent indicating that the implementation process for $PM_{2.5}$ is not complete and therefore, it is premature to require applicants to examine its impacts. Principally, these parties rely upon Commissioner decisions in American Marine Rail, *supra*, (February 14, 2001)and Consolidated Edison, *supra*, 2001 WL 935244 (August 16, 2001) to support this viewpoint as well as the Seitz memorandum to EPA Regional Directors on Interim Implementation of New Source Review Requirements for $PM_{2.5}$ (October 23, 1997).[54]

In AMR, supra, Commissioner Cahill decided that such examination was unnecessary because: (1) the $PM_{2.5}$ regulations were invalidated by the decision of the D.C. Circuit in American Trucking Ass'n v. EPA, 175 F.3d 1027 (D.C. Cir.1999), (2) an EPA-approved model for construing $PM_{2.5}$ emissions and reliable baseline information had not been established, and (3) that particular non-manufacturing project (a rail/barge facility that would not rely on truck transportation) would not significantly increase particulates. As noted above, the Supreme Court has reversed the D.C. Circuit in American Trucking, upholding EPA's promulgation of the $PM_{2.5}$ standards. Whitman v. American Trucking Ass'n, 531 US 457 (2001). While we are not aware of what, if any, additional guidance EPA has provided the states regarding implementation of the standard, four years have elapsed since the Seitz memo of 1997 and DEC has collected more data.[55] Thus, unlike AMR, in a situation concerning a stationary source, in which the applicant admits there will be increases in the emission of fine particulates that are a known public health hazard, the Department must take "the hard look" at these potential impacts if it is contemplating permitting the facility. See, e.g., Jackson v. UDC, supra.

In UPROSE v. NYPA, supra, the Appellate Division determined in a matter involving the siting of a power plant that the failure to address $PM_{2.5}$ impacts meant that NYPA had failed to take the "hard look." According to the court, given the potential for significant adverse environmental impacts, an EIS was required. The court also criticized NYPA's cursory particulate analysis.

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54 This reluctance appears predicated on the mandate by Congress and President Clinton to EPA and the states to gather three years of $PM_{2.5}$ monitoring data prior to attainment designations. Pub. L. 105-178, Title VI, June 9, 1998, 112 Stat.463, Sections 6101 and 6102. But this directive does not relate to environmental review of specific projects.

55 In AMR, Commissioner Cahill noted that in a later EPA memo the Director of the EPA Region II Division of Environmental Protection and Planning stated that "analysis of $PM_{2.5}$ emissions would be appropriate if the project or plan involves significantly increased PM2.5 emission. . ." (Kathleen Callahan to Annette M. Barbaccia, City of New York dated April 20, 2000). There has been other guidance confirming this view, such as the June 27, 2000 letter from Robert W. Hargrove of Region 2 EPA to Deputy Commissioner Hirst of the New York City Department of Sanitation (attached to IC Ex. 97 in AMR) and a September 19, 2000 letter from EPA Regional Administrator Jeanne M. Fox to Division Administrator of the Federal Highway Administration regarding the Gowanus Expressway Project (annexed as Attachment F hereto).

Consolidated Edison Company of New York, supra, concluded that because an environmental impact statement was prepared, PM_{10} impacts were adequately addressed. That matter is distinguishable from the Greenport project because SLC has performed the analysis but the intervenors identified a potential underestimation of emissions and health impacts. Accordingly, unlike Consolidated Edison, in which the Commissioner concluded that health impacts were considered and the appropriate standards were met, such conclusions cannot be made as to the Greenport project at this point. Moreover, the project under examination in Consolidated Edison is distinguishable from this project because Greenport will be a manufacturing facility, not a power plant. SLC's Greenport facility's particulate sources are found not only in the facility's fuel, but also in the raw material used to make cement. Moreover, we understand that Greenport will be much larger than the facility contemplated in Consolidated Edison. SEQRA mandates not only a disclosure of significant adverse impacts but also mitigation. ECL § 8-0109(8). Conflicting modeling and background data makes a full understanding of particulate impacts impossible. Thus, there can be no determination as to whether or not mitigation is required in this case or whether the permit may be granted.[56]

In the context of this discussion as well as others such as noise, the applicant maintained that intervenors were precluded from addressing matters in their petition that they failed to raise in the scoping process. We disagree with this conclusion based upon our reading of the precedent cited by the applicant and our review of the applicable regulations. In the Matter of Al Turi Landfill, Inc., Orange Environment complained that issues they had raised in the scoping process had not been included in the DEIS. 1998 WL 1670484, *17 (Issues Ruling, June 19, 1998). The ALJ stated it was the Department staff's determination what comprised the DEIS. However, this ruling addressed whether such items raised in scoping had to be included in the DEIS. The ALJ did not find that the intervenor was precluded from raising them in the issues conference based upon the standards in Part 624. In Matter of Palumbo Block Co., ALJ Dubois specifically noted that the issues raised by the petitioners did not meet the substantive and significant test that is applicable in permit proceedings such as this one. 2001 WL 176029, *18 (Issues Ruling, Feb. 9, 2001). A review of the Final Generic Environmental Impact Statement for Proposed Amendments to Part 617 reveals that the Department's intent regarding changes to 617.8 was to limit the scoping process by requiring information "raised after the preparation of the final written scope and prior to the completion of the DEIS to meet a strict test for inclusion". [emphasis added]. This period does not include the Part 624 issues conference and hearing. Compare, 617.8(g) and 624.4(c).[57] Given SEQRA's mandate to consider all

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56 As we were completing this ruling, Commissioner Crotty issued an interim decision in Matter of New York Power Authority, 2001 WL 1512094 (Interim Decision, Nov. 26, 2001) finding that there was no basis to examine $PM_{2.5}$ impacts related to this Article X application in Queens, New York because the intervenors had not "alleged any factual issue regarding PM $_{2.5}$ or NYPA's particulate matter analysis that could result in any substantive change to the project or denial of the air permit." Based upon these circumstances and the Commissioner's determination that the applicant had conducted an appropriate particulate analysis, ALJ Goldberger finds this case to be distinguishable.

57 Even if SLC's interpretation of the SEQRA regulations was correct, 617.8(g) provides for the submission of a written statement to support late inclusion of a subject in a DEIS and these petitions would meet that requirement. Moreover, at least with respect to $PM_{2.5}$ health impacts, these are certainly subsumed by the general topic of $PM_{2.5}$.

potentially significant environmental impacts, SLC's interpretation of this regulation does not comport with statutory requirements.

Monitoring/Enforcement

In their petitions, the City and CHP expressed the need for an independent, on-site consultant, funded by SLC, who would monitor the facility and review the facility's air emission data. The City also seeks to have air monitoring equipment placed throughout in the City so as to accurately assess emissions. These petitioners sought to have "real time" data available to the municipalities. CHP Pet., IC Ex. 46, pp. 3-5; City Pet., IC Ex. 48, pp. 8-10. Related to these matters, but not satisfying them completely, is the stipulation between the County and SLC in which the applicant agreed to post all air quality data on its website within forty-eight hours after submission to DEC. SLC also agreed to copy the County on air-quality related correspondence sent by SLC to DEC. IC Ex. 59, p. 2 (Attachment G hereto). In addition, SLC agreed to submit environmental monitoring data to the County on a monthly basis. Id.

RULING: These requests for permit conditions that are meant to ensure compliance with any permits that result from these proceedings and the applicable laws and regulations are not appropriate subjects for adjudication as stand-alone issues. It is possible that as a result of any hearing that is held with respect to the air emissions issues, conditions requiring placement of air emission monitors may be appropriate. In any case, any data that the Department receives from SLC should be available to the petitioners or any member of the public by virtue of FOIL. Public Officers Law § 87. The agreement between SLC and the County appears to allow anyone with access to the Internet to review the air quality data provided to DEC. IC Ex. 59, p. 2. A requirement that SLC compensate the petitioners for funds spent to review this data is unwarranted. The Department is the agency charged with administration and enforcement of the environmental laws and personnel at DEC are paid to perform those duties. To the extent that these petitioners wish to further police the company, they will be obliged to bear that expense, as they have not shown any reason why DEC's supervision would be inadequate, or any legal authority supporting their request for compensation.

Notwithstanding DEC staff's concern about budgetary procedures (TR 734-735), we find no reason why an environmental monitor could not be required as part of the permit conditions for this facility. Mr. West argued that such monitors are only required at solid waste facilities; however, we are unaware of any legal basis that would prevent such a requirement at any permitted facility where circumstances warrant it. See, C.I.D. Landfill, Inc. v. DEC, 167 AD2d 827 (4th Dep't 1990), app. denied, 77 NY2d 809 (1991) (DEC has authority to impose any permit condition rationally related to protecting environment; citing ECL §§ 1-0101, 3-0101). In the event that this facility is permitted it will be one of the largest facilities that DEC must monitor in the region if not the state. There will be multiple permits with many special conditions. In addition, the facility is located near a significant population that has many concerns regarding its operation. See, e.g., concerns expressed by City at July 23 session, TR 745-750. At this point in the proceedings it is premature to make a determination regarding this suggested condition. We will reconsider this request at the conclusion of any hearings.

SPDES

Stormwater Control

FOH's petition asserts that SLC's stormwater control structures are inadequate to store and treat runoff from operations at the facility. FOH Pet., IC Ex. 39, pp. 60-61. FOH points to statements in the DEIS and the application that appear contradictory regarding the capacity of the detention ponds. Id., p. 60. FOH performed calculations that indicated that this capacity is inadequate. Id. In addition, FOH stated in its petition that based upon the substances that SLC will be using in its processes, the SPDES application is deficient because it does not provide information about the discharges that will result from these materials. Id., pp. 61-63.

After construction is completed, this facility will have three stormwater detention areas. Two of these will be at the manufacturing site and these will control runoff from buildings, parking lots, etc. For the first system, the runoff will be directed to a detention basin for sediment settling, oil/water separation and sampling, and then to the mine impoundment. The second system will collect runoff from the material storage area. This water will be re-used in the manufacturing process. SPDES permit application, IC Ex. 11a, Attachment 1, pp. 2-3. The third detention area is located at the dock and will address stormwater runoff that could associate with the storage of raw materials such as coal, coke and gypsum. Id., Section 1.

At the July 23 issues conference, the applicant acknowledged that there had been errors made in the calculation of the expected runoff at the dock area and accordingly, a new SPDES permit application would be submitted by August 3, 2001. TR 777, 797, IC Ex. 11a. In addition, SLC agreed to design its impoundments so that these would accommodate the average daily flow in the month which has the maximum rainfall. TR 778. Accordingly, SLC agreed to FOH's proposal that it use a 90 percent coefficient and 4.8 inches of rain event for design at the plant site and a coefficient of 100 percent at 4.8 inches of rain for the dock. TR 779, 789.

RULING: We do not find any issues for adjudication regarding the SPDES permit. Staff has represented, without dispute from FOH, that typically for these circumstances an applicant would receive a general stormwater permit for what is considered a minor discharge. SLC agreed to a facility-wide SPDES permit to provide the extra level of environmental protection that staff was seeking. TR 781-782. However, this permit is not for an industrial discharge but is meant to address stormwater runoff.

SLC and FOH came to an agreement during the issues conference regarding the appropriate design parameters for the facility and this was confirmed at the August 15 session of the issues conference. TR 2081. With respect to the constituents of the discharge that have not yet been limited in the permit for outfall 001 at the dock area (aluminum, sulfate, titanium, magnesium, manganese, sodium), monitoring data will be submitted to DEC (and available to the public via FOIL). Staff noted that after it has some data to review, it can set limitations for monitor-only parameters in the permit if there is a need. TR 799. Staff has also represented that it established parameters based upon the materials that will be stored at that location. TR 785. The final design for the dock impoundment will be determined once the dock configuration is decided.[58]

58 Due to concerns of staff and others regarding impacts of the dock on aquatic habitat, this design was still under discussion at the issues conference. A revised plan that accepts a "T" configuration was submitted on October 19, 2001.

TR 776-777.

The applicant provided its revised SPDES application to the staff and issues conference participants on August 3, 2001. IC Ex. 11a. At the issues conference on August 15, staff commented with respect to outfall 001 (the dock area) that all of the effluent limits with the exception of copper could remain as technology-based limits as proposed in the original draft permit. TR 2078-2079. Staff provided a revised version of the SPDES permit and also noted that it added an effluent limit for settleable solids (0.1 milliliters per liter) and this parameter would provide a good indication of settling pond performance. TR 2079, 2080, 2174; IC Ex.12d. At the August 15 session of the issues conference, FOH maintained its position that it was improper to put off a determination as to appropriate limits for specific constituents related to the stockpiled materials at the dock. TR 2082-2083. DEC Environmental Engineer Dzierwa explained that the technology-based standard set with respect to the materials identified will "eliminate that discharge . . . " TR 2085. The limitation will ensure an appropriate limitation on all solids. TR 2086.

With respect to the plant site outfall (002) staff determined that no revisions were necessary to the limits or monitoring requirements based upon the revised flow rate of 100,000 gallons per day. TR 2079. Based upon the information provided in that submission, and the comments of staff at the issues conference supporting a finding that appropriate permit measures have been set, this matter appears largely resolved.

Now that the "T" configuration has been agreed to for the dock, SLC should be able to design the impoundment at that location, and we direct SLC to make that information available. In addition, with respect to outfall 001, staff shall revise the draft SPDES permit to clarify that it will, after six months, revise the monitor-only parameters should the discharge monitoring reports indicate that such steps are necessary to preserve water quality.

Pug Mill Leachate/CKD

As a result of the discussion regarding SO_2 controls, it came to the attention of the issues conference participants, including staff, that the wet scrubber would generate process water that would be added to the CKD to be landfilled at Catskill, where SLC currently has a permit to landfill CKD. TR 727, 1463. FOH complained that this process would create a mercury-laden effluent, mandating a SPDES permit and further review. When this matter first arose in the issues conference, staff was unclear about whether there was need for additional permitting review. At the July 27 session of the issues conference, Regional Engineer Tom Cullen explained that SLC has a SPDES permit with a discharge to the Hudson River from the Catskill CKD landfill.[59] TR 1463. He stated that the key limit in that permit is pH because the discharge must be neutralized before being discharged to the river. TR 1463. Mr. Cullen did not think staff had looked at whether the sludge from the new facility would be substantially different. Potentially, such a result would require a modification of the SPDES and Article 27 (solid waste) permits. Accordingly, we determined to table the discussion until staff had an opportunity to examine this matter. TR 1463-1474.

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59 He also clarified that the Catskill facility has two landfills (one is under construction) and that either could take the CKD waste from the Greenport facility. TR1465. SLC Vice President Mr. Phillip Lochbrunner, explained that because the existing landfill will be closed before Greenport comes on line, the new landfill would accept this waste. TR 1471.

At the August 15 session of the issues conference, staff stated that it found there would not be significant changes in the nature of the leachate from the Catskill landfill due to the disposal of the Greenport CKD. SLC provided a report under cover letter dated August 10, 2001 (IC Ex. 111) that estimates a concentration of mercury in the CKD sludge of .058 parts per million. Staff compared that number with the average from other cement plants and the RCRA TCLP limit of 0.2 mg/L established by EPA and determined there would be minimal impacts. TR 2070-2072. DEC staff member Forgea indicated that the current SPDES permit for SLC's Catskill landfill leachate would have to be modified to accept CKD from Greenport but otherwise did not find any significant modifications.

In its report of August 10 and at the issues conference, SLC explained that most of the mercury in the system is captured in the main baghouse and returned to the process. TR 2073, CKD Report, IC Ex. 111, pp. 5-8. Some mercury does go to the alkali bypass in CKD and this material will be landfilled. TR 2073, CKD report, p. 6.

In response, FOH submitted a short report from its expert, Mr. Sapienza. The report states that there is a contradiction in SLC's description of the state of the mercury. Consequently, Mr. Sapienza concludes that the SO_X scrubber will emit more mercury than previously estimated. IC Ex. 121; TR 2074-2076. At the issues conference, Ms. Brubaker, on behalf of SLC, explained that FOH had misunderstood, and that when the mercury vapor is in the scrubber system it is condensed onto the particles and scrubbed and then becomes salts which stay with the sludge that is part of the gypsum used in the final product. TR 2077. Our understanding from reviewing SLC's report is that the other part of the system Ms. Brubaker referred to is where the mercury entering the kiln system may enter the alkali bypass. This material goes to the pug mill to become paste that is recycled or landfilled. SLC CKD report, IC Ex. 111, p. 6.

RULING: This matter is not one for adjudication as it appears to be one of interpretation rather than an issue that would significantly change or preclude permitting. However, there should be clarity with respect to the destination and constituents of the CKD leachate at the Catskill landfill. We direct staff to include in the draft SPDES permit a copy of the permit for the Catskill landfill so that it is clear how this leachate is treated and that it is discharged to the Hudson River. The ALJs have not had an opportunity to review a copy of the existing permit for this facility but we assume that there is a sampling regime and that in the event there is any significant change in the discharge with respect to mercury or any other constituent, monitoring reports would reflect that condition. In the event that is not the case, we direct that the permit be modified accordingly.

Mining

SEQRA

FOH and TOP raised concerns regarding the mining aspect of this project. The overarching dispute revolves around SLC's position that the mine is exempt from SEQRA review based upon the grandfathering provisions contained in ECL § 8–0111(5)(a), 6 NYCRR § 617.5(c)(34), and a consent order that SLC and Region 4 of DEC entered into in 1990. FOH Pet., IC Ex.39, pp. 41-42; TOP Pet., IC Ex. 41, pp.24-25. Staff's position supports the applicant although the DEIS

indicates that staff initially maintained that the applicable MLUP imposed a mining rate of 2 million tons per year. DEIS, IC Ex. 6, p. 8-3; DEIS Appendix, IC Ex. 7, pp. A-3-4. As a result of this former position, SLC agreed to examine impacts related to the proposed increased rate of extraction (6.7 million tpy) in the DEIS. Id., pp. 8-3 - 8-9; TR 926-930 .

FOH maintains that staff's position to exempt the mine from SEQRA has resulted in a failure to analyze adverse effects such as the mining of the Becraft Mountain ridge, blasting, and noise.[60] TOP contends that the destruction of Becraft Mountain will have an adverse visual impact on Olana. FOH Pet., IC Ex. 39, pp. 41-45; TOP Pet., IC Ex. 41, p. 46-49. All three of these concerns are addressed in other parts of this ruling related to visual impacts, blasting, and noise and therefore, we will limit the discussion here primarily to the legal issue of the grandfathering.

The applicant proposes to mine a total of 1,028 acres out of the 1,222-acre mine property. Updated MLUP, Appendix to DEIS, IC Ex.7, p. 1. The mine is located in an area known as Becraft Mountain. Id., p. 3. The mine has been operated as a surface consolidated mine, and SLC intends to continue this process. Id., p. 5. SLC will strip soil overburden and proceed to drill and blast upper benches and move downward. Id., p. 5. There were to be five phases to the mine with the latter phases occurring after the cement plant is removed from the mine floor. Id., pp. 6-7. However, based upon the agreement with Columbia County to preserve the Becraft Mountain ridge, we understand that these latter phases will be altered. IC Ex.101; Attachment G hereto.

The mine and the cement plant will be accessed from Route 9. MLUP, IC Ex. 7, p. 10. Production blasting will occur up to two times per week. Id., p. 17. The goal of the eventual reclamation is for open space, wildlife habitat, recreation or possible residential development. Id., p. 21. The MLUP contemplates three reclaimed ponds of approximately 720 acres. Id. SLC proposes to remove all structures and equipment that will not be used as part of reclamation and closure. Id., p. 22; decommissioning and demolition, special condition 16, IC Ex. 12(a)(i). There will be some concurrent reclamation as explained in the proposed MLUP at pp. 25-26.

RULING: This legal question is not a matter for adjudication because there are no contested facts. Based upon the undisputed facts regarding the status of SLC's mining operations, we have reached the legal conclusion discussed below. The alleged blasting, noise, and visual effects related to the applicant's mining segment of this project are taken up on pp. 65, 72, and 98 respectively.

We find that SLC's proposed mining activities fall within the "ungrandfathering" sections of ECL §§ 8-01111(5)(a) (i), (ii). This section of the law states:

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60 Mr. West noted at the July 24 session of the issues conference that SLC had entered into a stipulation with Columbia County that provides for the preservation of a portion of the Becraft Mountain ridge (the "military crest"), or the portion of the ridge that can be seen from Route 9. IC Ex. 59; TR 908-910; Attachment G hereto. At the July 30 session, SLC further agreed to preserve the entire ridgeline that includes Phases 4b and 5 of the mining sequence. TR 1624; IC Ex. 101. However, SLC has declined to agree to include this agreement as either a permit condition or as part of its MLUP.

> Exclusions. The requirements of subdivision two of section 8-0109 of this article shall not apply to:
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> a) Actions undertaken or approved prior to the effective date of this article [September 1, 1976], except:
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> (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 regulation, 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.

While no one disputes that mining has occurred in this vicinity for one hundred years or more (the proposed MLUP [Appendix A, DEIS, IC Ex. 7, p.3] states that mining in this area has been ongoing since 1680), the applicant's proposal to mine well over 6 million tons per year appears unprecedented at this site. IC Ex. 119a, p. 3; DEIS, IC Ex. 6, p. 8-11. The 1990 mined land use plan presented to DEC by SLC's subsidiary and predecessor, Independent Cement Corporation (ICC), provided for the mining of approximately 2.0 million tons per year in this quarry known as the Hudson Quarry. DEIS, IC 6, p. 8-2; IC Ex. 119a, pp. 5, 10. In the 1996 MLUP, as part of the discussion on truck traffic, ICC provided that there would be 504,000 tons per year of saleable material leaving the quarry. IC 119b, p. 2-5. The extraction history of the mine from 1995-2000 is set forth in Table 8-2 of the DEIS . The greatest extraction (773,000 tons) occurred in 1995. According to the DEIS, the peak production period for the Universal Atlas Cement plant was between 1950 and 1975 when the rock extraction rate was estimated to have reached 1.5 million tons/year. IC Ex. 6, p. 8-11. Current output is estimated at approximately 500,000 tons/year. Appendix A, DEIS, IC Ex. 7, p. A-5.

In SLC's 1998 report submitted in support of its application to renew, transfer and modify the mined land reclamation permit for the 1998-2003 period, there is reference to the 1990 and 1996 MLUPs for a description of the operations. The permit that was issued to ICC by DEC required that the operation be conducted pursuant to the 1990 MLUP. DEIS, IC 6, p. 8-2. In the 1990 consent order, Region 4 agreed to forego applying its Life of Mine review policy to the mining operations that were depicted on maps submitted with the permittee's 1989 MLUP. IC Ex. 12b, p. 2. However, the consent order specifically stated that "nothing in this agreement shall preclude (1) the future application of SEQRA upon the circumstances set forth in ECL 8- 0111[5][a][i] and [ii] as they may apply; or (2) other common law or statutory pronouncements relating to ungrandfathering under SEQRA." Id.

Staff argues that neither the increase in the extraction rate nor the removal of the ridge would qualify for ungrandfathering. Regional Attorney Leslie maintained at the issues conference that "a substantial change in operations" that would merit this review would be either one in geographical scope or operational character. TR 933-936, 952. He explained that a substantial change would be one expanding into areas previously not revealed as part of the mine, increasing the depth of the mine, or changing the method of extraction. The applicant points out that it has analyzed the extent of the impacts that go beyond what

would have occurred at the mine without this project and thus has mooted out any claim of failure to apply SEQRA. TR 938-940; DEIS, IC Ex. 6, pp. 8-1-8-9; DEIS Appendix, IC Ex. 7, pp. A-4.

SLC has a permit to mine and it can continue to operate the quarry with or without this project. However, the combination of the mine, the plant, the conveyor and the dock activities do make for a significantly different project and those cumulative effects are properly the subject of these proceedings.[61] These are analogous circumstances to those that former Commissioner Berle found in Matter of City of Rochester (DEC Commissioner Decision, June 13, 1978) with respect to a regional shopping center. While he acknowledged the investment the developers had already made in the project, he found this commitment relatively small in light of the entire development. Moreover, the potentially large impacts engendered by this project led the Commissioner to ungrandfather.

We find that even if the project did not advance, and SLC were to consider a similarly greater extraction rate, that too would require scrutiny pursuant to SEQRA. With respect to the mootness claim, to the extent SLC has looked at impacts in its DEIS as it would under SEQRA and we find no issues with respect to those analyses, there is no need to revisit these matters.
See , e.g., discussion regarding traffic, pp. 80-83. But, in instances where SLC has failed to adequately assess impacts such as the visual effects of the removal of the Becraft ridge, those effects must be addressed pursuant to SEQRA. The applicant's agreement to leave the ridge intact as part of its settlement with the County (IC Ex. 59) cannot substitute for this analysis because SLC will not agree to place this condition in either the MLUP or the mined land reclamation (MLR) permit based upon its determination that it is not subject to SEQRA.[62] TR 1624. Accordingly, as discussed on p. 105, the removal of the ridge is an appropriate subject for adjudication based upon the potential for significant adverse visual impacts.[63]

A review of the cases cited by staff and the applicant in support of their position indicate that short of a substantial change in operation, a grandfathered facility maintains that status. SLC Br., IC Ex. 140, p. 17; Staff Br., IC Ex. 139, pp. 13-16. See, e.g., Salmon v. Flacke, 61 NY2d 798 (1984); Fletcher Gravel Co., Inc. v Jorling, 179 AD2d 286 (4th Dep't 1992). But there are distinctions to be drawn. In Fletcher, the prior permit was approved with no restriction on regular quarry activities and therefore, the court found that changes in placement of equipment and quarry roads or expansion of mining into different areas conformed

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61 SLC points out in the DEIS that with or without the project, the mine and the conveyor would remain. IC Ex. 6, p. 8-13.

62 The DEIS provides that SLC will leave the ridge intact until it removes the cement plant structures at the end of their useful life. DEIS, IC 6, p. 8-15.

63 Regional Attorney Leslie's stated position that a DEC decision to limit this phase of mining would constitute a "taking" is incorrect. TR 952. The takings law is well-established to require a deprivation of all reasonable value of the property. See, e.g., Gazza v. NYSDEC, 217 AD2d 202 (2d Dep't 1995), aff'd, 89 NY2d 603 (1997); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 94 NY2d 96, cert. denied, 529 U.S. 1094 (2000). And, as noted by Mr. Baker at the issues conference, this Department has already declined to issue a mining permit entirely in Lane Construction due to the visual impacts that would occur from the mine. Commissioner's Decision (June 26, 1998).

with this condition and a SEQRA review could not be required at this later stage. In Atlantic Cement Co., Inc. v. Williams, 129 AD2d 84 (3d Dep't 1987), the Third Department found no significant change in blasting and also determined that the wetland question had already been reviewed and therefore, ungrandfathering was not appropriate. However, SLC proposes in its application to greatly increase the 2.0 mty extraction rate that had been presented to DEC in the 1990 MLUP. (In ICC's 1996 application to modify its permit, the company described only extracting 500,000 tons per year.[64] DEIS, IC Ex. 6, p. 8-2.) The DEIS notes that for the last five years the extraction rate has not exceeded 773,000 tons per year. In addition, this plan is part of an entire manufacturing project. These are actions that will have impacts well beyond what has been the operation for many years.

Staff contends that changes in the depth of mining and the kind of mining would be circumstances in which ungrandfathering could apply, but does not explain why these would be considered substantial, and a 300% increase in the extraction rate would not. The cases cited above indicate that where Department has already reviewed the potential impact, or where the conduct is a continuation of prior action, the conduct will be grandfathered under SEQRA.

The purpose of grandfathering is to allow those who have conducted activities prior to the enactment of a statute like SEQRA to continue without undue burdens. The New Shorter Oxford English Dictionary defines "grandfather clause" as a "legislative clause exempting certain pre-existing classes of people or things from the requirements of a regulation."[65] Where proposed activities are substantially changed it is appropriate to apply SEQRA because these are new actions in which the operator or owner has not yet vested. As ECL § 8-0111(5)(a)(i) provides, with respect to the Greenport project it is still quite possible to modify or mitigate the project's potentially adverse effects because they are not underway. Accordingly, this ruling will examine those impacts to see whether and if there is a basis to require a hearing or supplementation of this record.

SLC also maintains that the mine is exempt from SEQRA review because the 1990 consent order resolved an enforcement proceeding and such actions are exempt pursuant to 6 NYCRR § 617.5(c)(29). We find this regulation to be inapplicable as this matter is not an enforcement proceeding but rather addresses new activity that was not the subject of the prior consent order. Cases cited by SLC in its brief are inapposite because they all relate to challenges to specific consent orders. See, SLC Br., IC Ex.140, pp. 15-16. For example, NY PIRG v. Town of Islip, 71 NY2d 292 (1988) concerned DEC's decision to allow the expansion of a Long Island landfill to resolve an enforcement proceeding and the petitioners sought to have

64 While staff maintain that DEC does not typically restrict the rate of extraction, clearly this factor would dictate many environmental effects. Moreover, 6 NYCRR § 422.1 states that after DEC issues a mining permit, "the permittee shall not deviate or depart from the mined land-use plan without approval by the department of an alteration or amendment thereto." Thus, as the extraction rates were part of past MLUPs, increases to these would typically be subject to Department scrutiny.

65 In If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity, author Heidi Gorovitz Robertson provides the origins of grandfathering - the attempt to exclude certain groups from the democratic process by allowing only those people whose grandfathers had the franchise to vote. 45 Cath. U.L. Rev. 131 (Fall 1995).

the consent order set aside. Similarly, in Stephentown Concerned Citizens v. Herrick, 280 AD2d 801 (3d Dep't 2001), the petitioners challenged activities that were to take place pursuant to a consent order. In this matter, the consent order is not being challenged. Rather, this issues conference is concerned with activities not envisioned by the consent order. The consent order itself left room for such future review. This is similar to the circumstances in Merion Blue Grass Sod Farm, 1984 WL 19248, *3 (Commissioner's Decision, Jan. 27, 1984). In that decision, Commissioner Williams provided that while SEQRA was inapplicable to the specific measures addressed by the consent order, it would apply to subsequent activities undertaken by the municipalities to implement alternative means of waste disposal.

As noted in the City's brief, both exceptions to the grandfathering provisions of SEQRA apply here. IC Ex. 133, pp. 2-3. The proposed project constitutes a major increase in the mining that has occurred at this site and there remains an opportunity on the part of the applicant and staff to devise means to mitigate potential impacts. See, Matter of Orange County Department of Public Works,1988 WL 158310 (Commissioner's Decision, July 20, 1988).

As for the language in ECL § 8-0111(5)(a)(i) that indicates it is the Commissioner who will make a determination with respect to ungrandfathering, it will be the Commissioner who ultimately makes a final decision in this permitting matter and such decision will entail a determination as to whether the ALJs' ruling is correct on this legal issue. Pursuant to ECL § 3-0107(2), the Legislature gave the Commissioner authority to appoint employees to carry out her duties. In a delegation and deputization order dated April 19, 2001, Commissioner Crotty delegated to the ALJs (as prior Commissioners have before her) the authority to "convene and conduct any hearing and to undertake any inquiry or investigation authorized by the ECL . . . and to perform any and all ALJ functions authorized by any such law or code to the full extent that the Commissioner is empowered to deputize . . . " This procedure enables the ALJs to conduct permit proceedings and make rulings and recommendations that will create a record upon which the Commissioner may make a determination pursuant to law. See, City of Peekskill v. Williams, 124 AD2d 584 (2d Dep't 1986), app. denied, 69 NY2d 583 (1987).

Blasting

The project as proposed contemplates that blasting activities will take place in connection with the mining at the site. At present, blasting occurs at the Colorusso Mine, which is adjacent to the location proposed for the manufacturing facility. The applicant's proposed MLUP would allow two blasts per week, with a duration of five to seven seconds per blast. The current MLUP permits three blasts per week with three to five seconds per blast, although at this point, the Colorusso operation only blasts approximately twice per month. The applicant and staff assert that the U.S. Bureau of Mines Guidelines (Guidelines) are controlling on this issue, noting that the project will comply with those standards. Several intervenors raised issues with respect to the blasting that would result from the hard rock mining at the site. As set forth in the discussion that follows, we have not found those issues to be adjudicable.

The City and the Town were concerned about the effect that blasting at the site might have on nearby sewer lines and water mains (specifically, those situated on Route 9), as well as the effects on the Town's bubble water storage tank and high pressure water tank and their associated water lines.

FOH commented on the increased rate of extraction, with a potential for corresponding increases in blasting, which could amount to three times as many blast events, in FOH's view. According to FOH, the cumulative impact of the increased blasting is likely to cause damage to structures in the vicinity, and no studies have been done to assess that possibility. FOH contended the Guidelines cannot be relied upon in this instance, because those standards relate only to the magnitude of individual blasts, not the cumulative effects of frequent blasting over the long term.

FOH's expert, Henry Boucher, asserted that reliance on the Guidelines would be inconsistent with SEQRA, and would permit much stronger blasts than had occurred previously. TR 1108. Mr. Boucher stated that in some jurisdictions, a more restrictive standard of 0.5 inches per second is employed, which would be one fourth of the two inches per second maximum allowed in the Guidelines. TR 1109. According to Mr. Boucher, the 0.5 standard would be more appropriate, and would protect not just against injury but a diminution in the quality of life of those in the vicinity of the mine operation. TR 1110.

FOH observed that despite the applicant's assertions that blasting would be limited to twice a week, the permit contained no conditions to that effect. TR 1095. It should be noted, however, that the applicant and staff have since agreed to additional permit language with respect to blasting, set forth in IC Ex. 12c, which limits blasting to no more than two events per week, except where adverse weather conditions in the previous week prevent those blasts from occurring. The additional conditions provide for notification and consultation with the Department in the event that such additional that blasting occurs, and state that blasting will not take place during adverse weather conditions.

Mr. Boucher also observed that the DEIS does not contain information with respect to pre- and post-project levels of noise and vibration, and argued that a pre-blast survey should be undertaken. TR 1110-1111. FOH pointed out that the Department would, as a matter of course, require a pre-blast survey for a new mine in this region, and has not required such a survey for the SLC project, even though mining operations will increase if the project is approved. TR 1094.

FOH also provided letters from residents concerning the test blast effects, which were marked as IC Exs. 78 and 79. In addition, Peter Young, who lives on Rossman Avenue in Hudson, made a statement concerning his observations during the test blasts. Mr. Young stated that the blasting caused his home to shake, and that there was also a loud, concussive noise. TR 1117. Mr. Young characterized the blasts as "alarming, disturbing, and disorienting," and stated that, by implication, SLC's offer to refrain from blasting on holidays indicates that blasting will have a major effect on local residents. TR 1117-18. The increase in blasting from the present two times per month to two times per week, according to Mr. Young, would be "an intolerable imposition" on his quality of life. TR 1119. Finally, Mr. Young stated that he has been offered the opportunity to purchase his home, which he rents, but he is reluctant because of his concerns about the blasting effects from the mining operation of the proposed project. TR 1119. According to FOH, Mr. Young was an example of the type of witnesses who would testify as to the impacts of that blasting on residents' quality of life. Id.

The Coalition contended that the DEIS fails to address the adverse environmental impacts that the project will have on the surrounding community and properties listed on, and eligible for listing on, the National and State Registers of Historic Places. The Coalition raised a number of issues with respect to

information that, in the Coalition's view, is lacking in the DEIS. According to the Coalition, the DEIS should have included specific measures related to safe operation, community notification and warnings of blasting, particularly with respect to community facilities, such as hospital operating rooms, that are potentially sensitive to blast vibrations. In addition, the Coalition asserted that the DEIS does not indicate the frequency of vibrations generated by the delay sequencing and local geology at the current mining operations, and thus provides no basis for comparison. Moreover, no mention is made in the DEIS of any provisions for, or rationale against, pre-blast inspections. The Coalition argued further that documentation available to the public, dispute resolution procedures, and public contact information were not included in the DEIS, and the DEIS did not discuss specific measures to be taken in response to vibrations and/or airblast with potential for damage or persistent annoyance. According to the Coalition, the DEIS should provide parameters for the charge per delay, total explosive charge and hole diameter.

According to the applicant, Mr. Anderson, the Coalition's expert who could not attend the issues conference on the day that blasting was addressed, concurred at a community forum meeting that SLC could design the blasts associated with mining to insure that the blasting impacts do not exceed existing baseline levels. TR 1132. In addition, the applicant stated that Mr. Anderson had taken the position that the Guidelines were the appropriate measure in this instance. Id. The applicant offered to meet with the Coalition's expert in an effort to address the concerns set forth in the Coalition's petition with respect to blasting. TR 1133-34. The Coalition replied that the applicant should meet with staff, and noted that Mr. Anderson had also indicated that the results of the test blast were critical to an evaluation of blasting impacts. TR 1134. The applicant and staff indicated a willingness to meet. TR 1135.

The applicant took issue with FOH's offer of proof, noting that the proposed intervenor had not retained an expert to take measurements or collect data to substantiate FOH's claims regarding existing conditions and the changes to be expected as a result of the project. TR 1129-30. FOH responded that the proposed intervenors were not provided sufficient notice to do so. TR 1147. The applicant replied that blasts occur several times a month, and, as part of FOH's offer of proof, FOH should have placed seismographs to obtain data concerning the blasts. TR 1154. The applicant also argued that FOH's expert's contention that the use of the Guidelines would permit stronger blasts than has occurred was only speculative. TR 1130. The applicant questioned Mr. Boucher's credentials, noting that he had not responded to the applicant's presentation which contended that given modern blasting design, even if the tonnage of rock affected during a given blast increases, there is not a corresponding increase in impacts. TR 1131.

The applicant noted that there is no regulatory standard, and that the Department typically relies upon the Guidelines. TR 1131-32. As for the effects of the test blast, counsel for the applicant stated that those effects were more pronounced because of the adverse weather conditions, which tend to magnify the perceived impacts, particularly the air blast. TR 1151. In addition, the test blasts were single hole shots, rather than the multiple hole shots with millisecond delays that would be typical of production blasts. Id. Counsel for the Coalition reiterated the request for the test blast data, asserting that the report was an essential part of the evaluation of the project's impacts, and that there was no substantiation of the applicant's explanation in connection with the test blasts. TR 1153.

RULING: The proposed intervenors have not raised a substantive and significant issue with respect to

blasting impacts. The project conforms with the U.S. Bureau of Mines Guidelines, and the proposed intervenors have not made an adequate offer of proof that would demonstrate that those guidelines are not sufficiently protective, particularly in light of the revisions to the draft permit.

At the issues conference, the applicant maintained that the intervenors had not shown that blasting impacts would increase as a result of the proposed project. TR1058. The applicant pointed out that blasting has become a more exact science in recent years, done under controlled conditions to maximize the energy directed toward releasing rock, rather than creating vibration or noise. TR1059-60. The applicant noted that the Guidelines set limits in order to prevent structural damage, even to older, lath-and-plaster construction. See, DEIS, Appendix A, updated MLUP, p. 16.

As set forth in the DEIS in graph form, the vibration guidelines are based upon frequency, measured in Hertz (Hz). As the frequency increases, the likelihood of damage to sensitive structures decreases. TR 1063. The applicant noted that the chart in the DEIS, which is based upon the Guidelines and has been incorporated into the draft permit, does not in fact allow blasting to be increased, as FOH's expert had contended. TR 1138. In fact, the chart reflects gradations based upon ground vibration frequency. Id. At higher frequencies, higher velocity blasts are permissible because of the reduced impact to structures. Id. Each blast is in actuality a series of small blasts, separated by millisecond delays, and those delays are adjusted in an effort to regulate the blast frequency and thus reduce impacts. TR 1066. The applicant has committed to reducing the number of blasts permitted from three to two per week, sizing the amount of rock affected by each blast to accommodate that reduction. TR 1067. Although more rock will be affected by each blast, the applicant stated that it was committed to compliance with the Guidelines, and that the tonnage of rock associated with a given blast is irrelevant. Id.; TR 1073.

Blasting has occurred in the past at the site, and will continue into the future whether the project is approved or not. Under the current permit, blasting is permitted up to two times per week. Staff concurs with the applicant's use of the Guidelines, and the proposed intervenors' offer of proof is inadequate to demonstrate that the additional safeguards set forth in the draft permit will be insufficient to address many of the proposed intervenors' concerns with respect to blasting associated with the project. The MLUP also details measures the applicant will undertake to reduce blasting impacts, including restricting blasting to certain times of the day and certain days of the week, and prohibiting blasting when weather conditions are adverse. MLUP at p. 19-20.

With respect to the arguments raised by the proposed intervenors concerning cumulative damage to structures, the applicant pointed out that the Guidelines have been designed to take such effects into account for the most sensitive structures. TR 1068. The applicant noted that when the hospital was expanded, the engineers designed the structure to address vibration from ongoing blasting activities. TR 1070. Furthermore, as the applicant observed, the proposed intervenors have not shown that any damage to structures has occurred, even though blasting at the site has been ongoing for many years. TR 1061.

In addition, the applicant has satisfactorily addressed the Town's and the City's concerns with respect to the sewer and water lines, and the water tank. At the issues conference, the applicant asserted that the Guidelines were developed with sensitive structures in mind, and that engineered structures such as water tanks and pipelines are designed to withstand forces far in excess of those set forth in the Guidelines.

TR 1074, 1136. In the event that blasting affected the water lines, SLC committed to remedy any damage. TR 1075.

As for the water tank, the blasting that is taking place at present is as close to the tank as blasting will ever occur, and once the project is constructed, blasting will occur in other parts of the mine, further south. TR 1075-76. The applicant also pointed out that, over the years, the structures have been shown to withstand blasting impacts. TR 1136-37. SLC has offered to replace the high pressure tank with a booster pump and a new line, not because damage is anticipated, but because the project will need a booster pump to supply water to the facility. TR 1137. In addition, with respect to blasting impacts associated with the access road, the applicant said that it would replace a section of the water line that was in need of repair. TR 1144. The applicant stated that the line, which is approximately thirty years old, is connected by flanges bolted together, which require repair even without taking blasting into consideration. Id. The applicant is willing to replace that line to ensure that the project's water supply will be adequate and reliable. Id.

Staff pointed out that blasting is economically driven, because it is in the operator's interest to assure that a blast crushes rock, rather than generate fugitive energy. TR 1076. Alan Hewitt of DEC Region 4 stated that in his nineteen years of experience, he had never seen blasting levels "go beyond a tiny fraction" of Guidelines levels, because it is imperative that blasts produce shattered, usable rock. TR 1077. Typical production blasts in this area of the State are a very small fraction of the limits allowed under the Guidelines, according to Mr. Hewitt. TR 1078. FOH asked that SLC agree to a permit condition that the vibration range of any blasting would not exceed 0.4 inches per second. TR 1148. The applicant responded that it would be inappropriate to agree to any specific number, inasmuch as the Guidelines chart accommodates a variety of different vibration levels, depending upon the frequency. TR 1148. Mr. Hewitt stated that blasting levels at this type of mining operation typically would be between .03 or .08, "nowhere near" the .5 that the proposed intervenors contended was appropriate, and reiterated that the blasting was limited by economic considerations. Id. Under the circumstances, FOH's suggested permit condition is not warranted.

ALJ Goldberger inquired as to the monitoring planned in connection with the blasting at the mine. Mr. Hewitt responded that the facility would be required to submit a report for each blast. TR 1140. The applicant pointed out a number of provisions in the draft permit that addressed seismograph monitoring, record keeping, and oversight of blasting operations. Id. The applicant clarified that it would prepare reports concerning the blasts, and maintain those for the Department's inspection. TR 1143. Mr. Hewitt and counsel for Staff concurred. Id.; TR 1145. In addition, the applicant and Staff agreed to incorporate as a permit condition language in the DEIS requiring seismographic monitoring of each blast. TR 1142, 1144-45.

FOH objected, stating that if the reports were not provided to the Department, those documents would not be accessible under FOIL. FOH requested that the reports be submitted monthly to the Department, or to FOH and the City or the Town. TR 1146. Staff responded that the Department has the authority to request blasting records in the event that a complaint is made, and observed that FOH's request would be administratively burdensome. TR 1149. The applicant noted that the mechanism for submitting blasting reports, as set forth in the draft permit, was standard throughout the Region, and argued that there was no basis for requiring more from SLC in connection with the submission of blasting reports. TR 1150.

According to the applicant, a pre-blast survey cannot be performed at this point, because blasting has

been ongoing for decades, although it has undertaken a voluntary study in an effort to lessen impacts associated with air blast and ground vibration. TR 1071. The applicant took the position that there was more ground vibration associated with the trains that run through the City of Hudson than from blasting at the mine. TR 1071-72. Mr. Hewitt pointed out, however, that pre-blast surveys can be done at any time, with any structure, in any condition. TR 1077. He also stated that it is a policy in Region 4 that pre-blast surveys be required for all new mining operations. TR 1079-80.

We direct that the pre-blast survey referred to at the issues conference be undertaken so as to assess the effects of blasting, particularly on historic structures that may be affected by the project. In addition, the applicant shall make its blasting records available for public inspection, which should obviate the administrative burden on the Department. These requirement should be incorporated in the draft permit as a permit condition.

As noted above, the Coalition requested that the applicant be directed to release the results of a test blast program done earlier in the year, arguing that the failure to produce that information made it impossible to assess what impacts could be expected from the proposed blasting. According to the Coalition's petition, residential and commercial neighbors reported significant adverse effects as a result of the test blasts. At the issues conference, counsel for the applicant indicated that the study was part of a voluntary effort by SLC to explore possible additional mitigation, and that the report was not yet complete. The applicant stated that SLC would only consider introducing the study into the record of this proceeding if blasting were identified as an adjudicable issue. TR 1056-57.

The Coalition responded that a "negative inference" (that is, that the requested material would be unfavorable to the applicant's position) should be drawn from the applicant's failure to provide the data requested. TR 1124. The applicant reiterated that the report was not yet ready for distribution, and that it would not be voluntarily produced. TR 1125-26. According to counsel for the applicant, SLC would follow up on and likely implement most, if not all, of the report's recommendations. TR 1126-27.

With respect to the Coalition's argument that a negative inference should be drawn from the applicant's refusal to provide the study results, the regulations provide that a negative inference may arise when a party fails to comply with an ALJ's order to produce information requested. 6 NYCRR § 624.7. In this instance, the request for the test blast information comes from the proposed intervenors; disclosure was not directed by the ALJs. Under the circumstances, no "negative inference" will be drawn from SLC's refusal to provide the report. The proposed intervenors' arguments to the contrary are without merit. 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.

Town Water Supply

In its petition, the Town raised a potential issue regarding impacts from the mine, plant, and conveyor on its well fields. Town Pet., IC Ex. 51, pp. 4-7. This matter is resolved as a result of the Town's decision to withdraw its original petition based upon its pending agreement with SLC. IC Ex.132. However, in the course of the issues conference discussion on potential water supply impacts, there was agreement to

develop permit conditions to address any possible effects to private wells. TR 1009-1011, 1013-1016. This language has been incorporated into the revised draft mined land reclamation permit - IC Ex. 12(a)(i), blasting, special conditions 9a-e.

City of Hudson Water Supply

In the event that this project is approved, the City of Hudson will be host to the docking facilities as well as the conveyor system. The City Planning Commission is an involved agency pursuant to SEQRA because it must decide whether to approve, deny or approve with conditions the proposed site plan. In addition, the Planning Commission must make independent findings pursuant to ECL § 8-0109(8). City Pet., IC Ex. 48. The City states that it is not opposed to the construction of a new cement plant in the area but remains concerned about certain potential environmental impacts. Id., p. 3. The third issue raised in the City's petition concerns the City's reserve water supply that holds approximately a hundred million gallons and is situated in an abandoned quarry adjacent to the applicant's quarry and proposed cement plant. This water supply fills the quarry south of the Colarusso Quarry, to the east of the proposed location of the applicant's quarry across Newman Road, and to the north of the portion of the applicant's quarry that lies to the east of Newman Road. This water supply is depicted on Figure A-2 of the Appendix to the DEIS, IC Ex. 7 and the mining plan map, IC Ex. 101.

The City is concerned that given the proposed existence of quarries on three sides of the reserve, there is a risk that the reserve will be drained. City Pet., IC Ex. 48, p. 11. The City maintains that the DEIS does not address these potential impacts and the applicant has failed to do the necessary fracture analysis to determine the relationship between the City's reservoir and the proposed excavations and blasting at the mine. Id., pp. 12-13, City's Post-Issues Conference Brief, IC Ex. 133, p. 3.

RULING: This is not an issue for adjudication because the applicant has agreed that to the extent it affects the City's back-up water supply, it will remedy that problem. TR 1052. That is the basis for this determination. Due to this resolution, the experts' dispute as to the extent of effects on the water supply need not be addressed in a hearing. However, given the lack of detail from SLC as to how it would remedy impacts on the City's back-up water supply, there does need to be development of detailed conditions that will demonstrate the ability of the applicant to meet this promise.

SLC maintained at the issues conference that the City's water supply was not set up to function because it was not connected to the City's filtration facility and the City has never used the system. TR 1018. However, Mr. Shaw, on behalf of the City, represented that this supply was connected and that it has come close to using the system during drought conditions. TR 1027-1028, 1046. The applicant also argued that because the City established this system knowing of the existence of mining in the area and because it sold some of this property to Colarusso which engages in mining, the City is foreclosed from raising this issue. TR 1046-1047. The City disputes this based upon SLC's larger project and because the agreement with Colarusso foreclosed mining in the area of the water supply based upon a study that had been prepared by Clough Associates. TR 1050-1051.

The applicant does not contest that there may be impacts from mining. However, SLC contends that in terms of the northeast quarry, such effects were unlikely to occur for at least fifty years because the

cement grade rock sought for the project does not extend below the surface elevation of the impoundment. TR 1021. The area to the south will be mined below the surface elevation of the backup water supply. TR 1022.

The City stated that the proposed MLUP briefly addresses the matter of the City's water supply, but the distance between the supply and the mining area is that document is incorrect. TR 1029; DEIS Appendix, IC Ex. 7, p. 19. The City's hydrogeologist, Russell Urban-Mead from The Chazen Companies, explained at the issues conference that there was no evidence that groundwater was not migrating through the neighboring rock structures. He stated that, based upon the hydrogeology of the area the mining activities would eventually disturb the recharge areas, thereby draining the back-up water supply. TR 1033-1041. The City commissioned a report in 1998 from which IC Exhibits 75 and 76 (showing groundwater elevations on Becraft Mountain) were derived and this report is said to conclude that mining impacts "would have a gradual effect on the water levels in the reservoir." TR 1040. The staff and SLC point to elevations shown on Exs. 76 and 76 and conclude that these indicate that the permeability that the City believes exists is not present. TR 1042-1043.

The City's point is that the DEIS contains no data reflecting any serious consideration of impacts to the water supply. We would agree, but based upon the applicant's agreement to remedy any impacts to the system, a hearing would be academic and not a wise use of resources. See, Matter of Empire Bricks, Inc., 1990 WL 179755 (Interim Decision, Aug. 1, 1990). Accordingly, we direct the staff and the applicant to devise permit conditions that are protective of the City's secondary water supply, similar to the conditions provided for the residential wells. These parties are to provide these conditions to the City so that it can comment on them. If necessary, should the City find these conditions inadequate, there will be opportunity to raise this matter again in these proceedings.

Noise

Under SEQRA, noise is an aspect of the "environment," and a substantial adverse change in existing noise levels is among the indicators of a significant, adverse impact on the environment. 6 NYCRR §§ 617.2(l) and 617.7(c)(1)(i). In addition, the Department's mining regulations contain provisions regarding noise control. See, 6 NYCRR § 422(c)(4)(i) (use of screening and muffling equipment).

According to the DEIS, the principal noise sources from the facility would originate from the operation of mechanical equipment at the manufacturing plant; the conveyor system; the dock area; and project-generated vehicular traffic. DEIS at 15.1. The DEIS goes on to state that noise generated from increased mining operations, including the operation of additional mining equipment (not including blasting), was considered, "although these effects should not be viewed as part of the project because these noises would occur with or without the project." DEIS at 15.1. Revisions to the draft permit clarify that for purposes of the permit's special noise condition 1, "noise emissions associated with the Greenport Project shall include noise emissions resulting from all activities beginning with the primary crusher through operations at the dock area and equipment and operations in between and mining activities." Draft Permit, p. 8a.

The applicant has agreed, and the draft permit provides, that

> increases to ambient sound levels resulting from those aspects of the permittee's on-site project operations that are associated with the Greenport Project shall be < 10 dBA during daytime operations (6:00 a.m. to 10:00 p.m.) and < 5 dBA during nighttime operations (10:00 p.m. to 6:00 a.m.) . . .

Id. The draft permit includes a chart of Daytime Equivalent Sound Levels, measured in dBA, for various receptors. Id.

According to the DEIS, because sound is not constant, it is necessary to describe noise over periods of time. DEIS, at 15.1. The DEIS defines the equivalent sound level, or L_{eq}, as "the time-weighted average sound level that, in a given situation and time period (e.g., 1 hour, denoted by $L_{eq(1)}$), . . . conveys the equivalent sound energy as the actual time-varying sound." Id. L_{eq} is measured in dBA, the "A-weighted sound level," which is an adjustment or weighting of decibel levels to correspond to the frequencies discernible by the human ear. Id.

The Department's noise guidance, entitled *Assessing and Minimizing Noise Impacts* (October 2000, revised Feb. 2, 2001) (Noise Policy), explains that L_{eq} integrates fluctuating sound levels over a period of time to express them as a steady state sound level. Noise Policy, at p. 7. Thus, "if two sounds are measured and one sound has twice the energy but lasts half as long, the two sounds would be characterized as having the same equivalent sound level." Id.

The DEIS and the Noise Policy also refer to the L_{90} sound descriptor, which is used to indicate noise levels that are exceeded 90 percent of the time. DEIS at 15-2. L_{90} is "usually regarded as the residual level, or the background noise level without the source in question or discrete events." Id. The Noise Policy explains that L_{90} refers to the sound pressure level that is exceeded for ninety percent of the time over which the sound is measured. For purposes of the DEIS, a maximum one-hour equivalent sound level, or $L_{eq(1)}$, was chosen. The applicant pointed out that the L_{eq} and L_{90} systems are both mentioned in the Noise Policy, and that there is no preference specified in that document for either system. TR 1180.

In order to assess noise impacts, it is necessary to establish accurate, current ambient level measurements and to evaluate the effects of noise from the proposed plant on receptors. As noted in the Noise Policy, sound pressure level ("SPL") increases "of more than 6 dB may require a closer analysis of impact potential depending on existing SPLs and the character of surrounding land use and receptors. SPL increases approaching 10 dB result in a perceived doubling of SPL." Noise Policy at p. 13-14. The Noise Policy goes on to note that "[t]he goal in an industrial/commercial area, where ambient SPLs are already at a high level, should be not to exceed the ambient SPL." Noise Policy at p. 14.

At the issues conference, staff noted that the draft permit conditions are intended to implement a three-step process to address project noise. TR 1244. First, the applicant must comply with the 70 dB standard for noise at the property line, as set forth in the local ordinances. Id. Second, the applicant must address any impact greater than ten dBA during the day or greater than 5 dBA during the night, even if that

impact does not exceed the 70 dB level. TR 1245. Third, an assessment must be made as to whether the impacted receptor will be affected by an increase in noise over ambient levels. TR 1245.

Both the Town and the City have noise ordinances. At the issues conference, the applicant noted that the Noise Policy does not supersede any local noise ordinances or regulations. TR 1165; Noise Policy at p. 5. The applicant stated that the SLC facility would be designed, built and operated in conformance with the Town and the City's noise ordinances, as those ordinances were applied to and enforced against other activities in those municipalities. TR 1170. Counsel for the City indicated that the existing noise law was under review, and a new noise ordinance was being drafted. TR 1381-82. The new law will be more comprehensive and detailed than the existing law, and the City believed that it was important to keep SLC informed of the changes to ensure that the project was designed with the new standards in mind. Id.

Several proposed intervenors raised issues with respect to noise, making reference to both the local ordinances as well as the Noise Policy and SLC's proposed mitigation. The City pointed out that, for the City's receptors, the DEIS did not include any of the ambient noise information that is included for other receptor sites. TR 1385-86. In addition, the City asserted that the quality of the sound (for example, the river in the background) should be considered as well as the quantity. TR 1386. The City also noted that the DEIS indicates that noise receptors were placed in a park near the center of the City, rather than the park close to the waterfront, where SLC's dock activities would occur. TR 1387. According to the City, the L_{90} sound descriptor should be used, and there was no showing as to why a 10 dBA increase would be appropriate, inasmuch as the City's experts contend that an increase of that magnitude is perceived as doubling the noise. TR 1388. Because the Town has withdrawn its petition for party status, the Town's arguments with respect to noise will not be addressed here, except as set forth below in connection with the Town's interpretation of its noise ordinance.

FOH disputed the DEIS's interpretation of the sound level limits in the Town's and the City's ordinances, which prohibit noise exceeding 70 dB at the nearest property line. DEIS, Appendix F, Attachment A, p. 9006 (Town); p. 7306 (City). The DEIS states that the 70 dB limit in the local codes translates to an L_{eq} of 70 dBA. According to FOH, the time-weighted averaging inherent in the L_{eq} measurement would allow exceedances of the 70 dB level. FOH argued further that because the limits in the local ordinances refer to dB, rather than dBA, there is a likelihood that low frequency noise from the project, which would be extremely annoying, would still not exceed the levels in the local ordinances and would be allowable. TR 1228. FOH also pointed out that the municipalities' noise ordinances do not specify a time limit, and thus are of limited utility in assessing noise impacts. Counsel for the Town clarified at the issues conference that the Town would take the reference to dB in its code to mean dBA, and further, would interpret this as an L_{eq} level based on the standard one-hour average ($L_{eq(1)}$). TR 1232. Counsel for the City provided similar clarification. TR 1381.

At the issues conference, FOH's expert stated that, in measuring background noise, the receptor location must be taken into account when using the L_{eq} measurement, because of the potential for a higher average based upon discrete, significantly louder events during the monitoring period. TR 1221. The Coalition argued that existing ambient levels were not clearly defined, and stated that its expert would testify that, at the time the Town's and the City's ordinances were established, there were no sound level meters

capable of making L_{eq} measurements. TR 1241. As a result, according to the Coalition, it was inappropriate to use the dBA scale. TR 1241.

The Coalition's petition raised similar arguments, asserting that the DEIS employed incorrect standards to establish ambient noise levels. According to the Coalition, the L_{90} method should have been used, rather than the L_{eq} measurement used by the applicant. The Coalition contended that the L_{90} method of measurement establishes the ambient noise level for ninety percent of the time, and excludes peak noise events, while the L_{eq} measurement takes into account all noise. The Coalition took the position that the L_{90} measurement was more appropriate for the SLC facility, which would form the baseline ambient noise for the surrounding receptors twenty-four hours a day, seven days a week. At the issues conference, the applicant argued that the use of the L_{eq} method was recognized in the Noise Policy, and its use was approved by the Department. TR 1180. The applicant also pointed out that some of the activities, particularly some of those associated with mining, will not take place around the clock. TR 1259.

As a general matter, the applicant asserted that FOH's offer of proof was fatally defective, because FOH did not address the draft permit conditions or SLC's proposed noise mitigation measures. TR 1200. This argument, also raised by the applicant as part of its response to the City's noise issues (TR 1197), is addressed in our ruling, set forth below. SLC also contended that the draft permit conditions are consistent with the Noise Policy, and thus, there was no need to refer to other standards. TR 1201. The applicant pointed out that while the local codes speak to compliance at the property line, the permit condition requires a mitigation plan to be prepared in accordance with the Noise Policy, which requires evaluation of noise impacts on sensitive receptors. TR 1173. The applicant emphasized that it had made a commitment to implement the Noise Policy and mitigate pursuant to SEQRA, taking into account those receptors, rather than simply addressing property line noise levels. TR 1193. The applicant noted further that staff had required that SLC include in its Noise Mitigation Plan provisions for the use of strobes for nighttime operations, as well as discriminating alarms for daytime. TR 1173-74. In addition, the applicant maintained the plant's location behind the ridge line would reduce noise from operations. TR 1189-90. According to the applicant, all of the offers of proof were defective, because they failed to take into account the Department's permit conditions with respect to noise. TR 1260.

FOH contended that the applicant's reliance on local ordinances was misplaced. Rather, according to FOH, project noise should be evaluated against more stringent guidelines, such as those in 6 NYCRR Part 360, or the federal Department of Housing and Urban Development site acceptability standards. The applicant responded that there is no basis to compare the Part 360 regulations to this project, where there are

existing noise ordinances.[66] TR 1199. According to staff, the A weighted scale (dBA) is the measure most commonly used, and there was no basis to apply other agencies' guidance or standards, as asserted by the proposed intervenors. TR 1246.

FOH's petition asserted that the project would result in unmitigated noise impacts, and that the applicant had underestimated noise impacts by overstating current background noise levels and understating potential noise generated by the facility. TR 11219-20. According to FOH, increased mining operations will result in more noise, and the resulting impacts were not fully considered in the DEIS. FOH disputed the applicant's statement in the DEIS that, under the Future No-Build scenario, increased off-site handling of an additional 500,000 tons per year of aggregate would increase noise only by 0.8 dBA. FOH also maintained that the noise impact of the primary crusher on the Federation of Polish Sportsmen club had not been adequately addressed.

The applicant responded that FOH was incorrect because, in fact, the Federation of Polish Sportsmen was further from the primary crusher than FOH had indicated in its petition. The applicant also pointed out that the Federation is a shooting club, and thus questioned FOH's characterization of the Federation as a sensitive receptor. TR 1208. In rebuttal, FOH's expert stated that the applicant had underestimated noise impacts by taking maximum credit for decibel reductions, even where those deductions were not appropriate given distance from the source. TR 1223-24.

FOH contended that the noise levels allowable under the draft permit did not take into account sensitive receptors, and noted that, at several of the monitoring locations, predicted project noise increases would be greater than 5 dBA, and in some instances could exceed 10 dBA, a significant increase in FOH's view. FOH also asserted that the project did not comply with the Noise Policy, because the levels predicted at several of the receptors exceed the limits set forth in that guidance. At the issues conference, FOH pointed out that a ten dBA increase in noise is perceived as a doubling of existing noise levels. TR 1215. FOH asserted that, in permitting such an increase over ambient levels, noise from the project was not adequately mitigated. Id. In addition, according to FOH, the five dBA increase at night would be significant, because of quieter conditions during the nighttime hours. TR 1216. FOH also pointed out that there was no time measurement specified for the increased sound. TR 1217.

FOH contended that many of the monitoring locations were located too close to roadways, and criticized the lack of a spectral analysis of project noise levels in the DEIS, as well as the use of Saturday noise levels rather than Sunday noise levels, arguing that Sunday noise levels are often below those on Saturday. ALJ Goldberger questioned the applicant concerning the receptors' location, and the applicant

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66 With respect to the applicant's argument that other noise standards, such as those found in 6 NYCRR Part 360, are not appropriately applied or considered in this instance, several prior administrative decisions make clear that such standards may in fact be taken into account in assessing noise impacts. See Matter of Palumbo Block, 2001 WL 651613, *15 (Interim Decision, June 4, 2001) ("Interim Decisions in prior DEC hearings about mines have stated that consideration can be given to the noise standards in Part 360 and other standards applicable to noise from comparable operations, and that such standards may be used as guidance to held [sic] accomplish the SEQRA objective in mining cases" (citing Matter of Sour Mountain Realty, 1996 WL 566247 (July 18, 1996); Matter of Dailey, 1995 WL 394546 (June 20, 1995)).

responded that when noise levels were to be measured at a residence, the measurement was taken at the house itself, not the roadway. TR 1203. The applicant later clarified that where SLC could not obtain access to install receptors near a residence, those receptors were placed near the road, and noted that traffic was not as heavy on those roads, in any case. TR 1255.

The Coalition also asserted that the measurements in the DEIS were taken at the wrong locations (for example, too close to the road), and that the DEIS erroneously used passenger car equivalents to predict noise associated with heavy-duty diesel truck traffic. The applicant responded that there was nothing improper in including road noise as part of an evaluation of ambient conditions, and criticized the proposed intervenors for failing to raise their objections earlier in the process, since that information was available at that time. TR 1180-81. The applicant also pointed out that there would be no increase in heavy truck traffic as a result of the project. TR 1182. As for the arguments concerning a spectral analysis, the applicant took the position that there was no regulatory requirement or showing of necessity for such an undertaking. TR 1204. FOH's expert responded that, given the potential for loud, low frequency noise from the facility, a spectral analysis should be done. TR 1228-29.

FOH took the position that the measurements of noise at Catskill were not necessarily representative of potential noise impacts at Greenport, and objected to the lack of information in the DEIS concerning noise from the dock operations. Similarly, the *amicus* petition filed by the Village of Athens voiced concerns about noise emanating from the dock, and inquired whether baseline ambient sound monitoring results considered the acoustic effect of sound over water. At the issues conference, the applicant stated that Department Staff had made a specific request that SLC revise its analysis to include the Village as a sensitive receptor, and that SLC had done so. TR 1207.

Staff stated that highway noise is part of the ambient conditions in and around the SLC property, and maintained that it was appropriate to include highway noise in any measurement of the ambient baseline. Id. Staff asserted that it was reasonable for SLC to employ noise measurements from the Catskill operation in estimating noise from the proposed facility. TR 1247-48. Staff pointed out that a receptor had been added to assess noise at the dock. TR 1249.

With respect to noise at the dock area, the applicant represented that, as was the case with all noise issues, SLC would design and construct its facilities at the dock area to comply with the City's noise code, however that code was "reasonably and fairly interpreted." TR 1379. According to the applicant, SLC would be required to address best management practices in connection with mitigation of noise, and those measures would be incorporated into the final design for the dock area. TR 1380-81. The applicant also noted that the noise associated with activities currently taking place at the dock must be taken into consideration, including the unloading of HudsonMax ships and heavy equipment operation. TR 1191-92. The applicant observed that, contrary to FOH's assertion, noise at the dock area was considered, including the loading and unloading of barges. TR 1257-58.

ALJ Goldberger questioned the staff as to the derivation of the mitigation numbers, and was referred to the table on page 15 of the Noise Policy. TR 1250. Upon reviewing that table, Judge Goldberger inquired as to why a level of 5 to 10 dB, characterized as "intrusive," was determined to be a satisfactory level. TR 1250. Staff replied that, in fact, levels for nighttime were below 5 dB ("unnoticed to tolerable"), and that with respect to daytime levels, an effort had been made to balance the applicant's legitimate concerns with

the needs of the public. Id. According to staff, the higher levels are less noticeable during the daytime. TR 1250-51. The applicant contended that staff had considered the project's location in an industrial area, and in an operational mine, in deriving the noise levels in the permit. TR 1262. In rebuttal, FOH responded that there were residential areas in proximity to the industrial setting that must be considered, and pointed out that the Noise Policy states that noise levels for receptors in non-industrial settings should not exceed 6 dBA. TR 1265; Noise Policy at p. 14.

RULING: The proposed intervenors have raised a substantive and significant issue with respect to noise. The applicant consistently stated that it would comply with local codes, as those codes were fairly and reasonably applied in the municipalities where the project will be located. The local ordinances, however, provide only limited guidance as to appropriate noise levels for the project. Although the applicant and staff have also agreed to additional permit conditions which limit noise, and provide for mitigation through best management practices, the record does not include sufficient detail in this regard.

Staff stated at the issues conference that it had no objection to SLC offering the mitigation plan as part of this process. TR 1247. Given the uncertainty raised by the proposed intervenors on this issue, it is appropriate to require the applicant to submit that plan so that the participants will have the opportunity to comment, and to develop a complete record for the Commissioner's review. Staff indicated that the applicant would be expected to develop a mitigation plan based upon best management practices, and that the plan would be a fluid one. Id. In staff's view, SLC will be required to address complaints and propose mitigation measures for the Department's approval, which will allow staff to balance the applicant's and the receptors' concerns. TR 1247. However, it is difficult to evaluate the effectiveness of a mitigation plan that is not yet in existence, particularly where fact issues exist with respect to the noise analysis the applicant has performed.

For example, in connection with the discussion of mitigation, the applicant introduced as an exhibit documents concerning an acoustic screen and portable enclosure for a drill rig, stating that the screen and enclosure were examples of noise attenuation equipment that is available to the applicant as part of its development of its best management practices to address noise. See

IC Ex. 83; TR 1188-89. Nevertheless, as counsel for the Town pointed out, although the equipment is available, it has not yet been determined that the equipment will be used. TR 1236.

The proposed intervenors' offer of proof with respect to the selection of receptor locations, as well as the methodology employed in establishing baseline noise, is sufficient to raise doubt as to the applicant's noise analysis. For example, with respect to Saturday vs. Sunday noise levels, the applicant contended that the proposed intervenor's argument was speculative. TR 1205. FOH's expert responded that Saturday is typically a busier day than Sunday, and that as a result, background noise levels on weekends are probably overestimated in the DEIS. TR 1227. Moreover, because the facility will operate twenty-four hours a day, seven days a week, Sunday noise is likely to be more annoying. Id. Staff took the position that the Department would not object to a study to determine whether Sunday noise levels are lower than those on Saturday, but that Staff was not aware that there would be a significant difference. TR 1248. Similarly, disputes regarding the increased noise levels and the effect of those increases on sensitive receptors are appropriately submitted to adjudication. There is sufficient doubt, given this record, that the measurements in the DEIS are adequate for this purpose, because of the standard of measurement employed, the location of the receptors, and the mitigation levels chosen. See Matter of Dalrymple Gravel & Contracting Co., Inc., 2001 WL 1172598, *8 (Issues Ruling, Sept. 25, 2001) (finding noise adjudicable where actual ambient sound level had not been adequately determined, thus making it impossible to ascertain whether or not mitigation measures proposed were appropriate).

Similarly, the applicant's position that noise from blasting at the mine should not be included as part of the project's noise analysis overlooks the fact that, as FOH's expert pointed out, all noise sources are part of the general noise environment, and should be included where it is reasonable to do so. TR 1226. At the issues conference, the applicant responded that blasting was not considered as part of the noise analysis, because it is an instantaneous, infrequent, short-term event. TR 1205. Nevertheless, there is not enough information in the record to assess these contentions.

FOH's expert also disputed the applicant's claim that mobile source noise at the project site would only increase by 0.8 dBA. TR 1224; DEIS at 15-17-18. FOH's expert asserted that, given the undisputed doubling of off-site quantity from five hundred thousand to a million tons of material annually, the estimate should be revised upward, because doubling the level of the activity usually results in a three percent increase. Id. FOH's expert also criticized as conclusory SLC's statement in the DEIS that on-site movement of rock would result in only a negligible increase in noise. TR 1225. These disputes should be the subject of a hearing.

At the issues conference, the applicant argued that to the extent a proposed intervenor does not address proposed mitigation measures in its petition, that petition is defective as a matter of law. The applicant cited to Matter of Jay Giardina, 1990 WL 181271 (Interim Decision, December 21, 1990), as support for its argument. In that decision, Commissioner

Jorling considered appeals of an ALJ's ruling that found no substantive or significant issues for adjudication. In upholding the ALJ's determination, the Commissioner noted that:

> [I]t 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 . . . 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 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.

1990 WL 181271, *2 (citation omitted). This language does not support the applicant's contention that a proposed intervenor's offer of proof is fatally defective if it does not make reference to mitigation measures. The quoted language expressly refers to the proposed intervenor's burden at the issues conference, not the intervenor's petition.

Traffic

The Coalition's petition contends that the DEIS failed to follow approved New York State Department of Transportation (DOT) guidelines for assessment of traffic impacts. Coalition Pet., IC Ex. 40, p. 18. In addition, this petitioner maintains that SLC failed to apply Institute of Transportation Engineers (ITE) guidelines that are authoritative for traffic studies. Id., p. 19. The Coalition argues that there are twelve steps contained in a comprehensive traffic study such as accident history, assessment of existing traffic, and analysis of sight distance. Id. The Coalition states that vehicle trip generation and distribution are understated in the DEIS when compared with ITE projections. Id. FOH's petition asserts that the methodology in the DEIS appears acceptable but it is based upon an assumption - 80% of the finished product will be shipped from the site via conveyor to the dock with 120 trucks carrying cement - that is not contained in any permit conditions. FOH Pet., IC Ex. 39, p. 63. FOH maintains that if this scenario were to change due to market conditions requiring that more trucks be used, traffic conditions will cause significant adverse impacts. Id.

In a letter dated July 2, 2001 to ALJ Goldberger, Akhter A. Shareef of NYS DOT stated that "the newly added traffic as part of this proposed project (expansion of an existing facility) would have minimal impact on the existing state highway system." IC Ex. 54.

RULING: We do not find that the project's traffic impacts warrant a hearing. In Chapter 13 of the DEIS, SLC describes the methodology it employed to analyze traffic impacts. IC Ex. 6. SLC analyzed current traffic levels at the intersections involved in accordance with the *Highway Capacity Manual* (HLM) published by the Transportation Research Board. Id., p. 13-1. SLC provided the data from this analysis at

the issues conference.[67] IC Ex. 77. This methodology sets forth the average delays associated with level of service (LOS) ranging from A to F with LOS A and B indicating good operation conditions and minimal delay, C - greater vehicle stopping but light congestion, D - noticeable congestion, and E and F - poor service. The DEIS notes that at peak periods, a level of D or better is deemed to be an acceptable operating condition. IC Ex. 6, p. 13-2. The HCM methodology also calculates the volume-to-capacity (v/c) ratio and delay in addition to the LOS. The DEIS provides a description of the involved intersections as well as the existing traffic volumes and LOS. Id., pp. 13-3 - 13-7. It then describes how conditions would change with or without the project including the addition of the plant driveway on Route 9. Id., pp. 13-8 - 13-16. Counts were taken in June 1999 and November 2000 while school was in session to reflect typical traffic conditions. Id., 13-3. Based upon this analysis, the DEIS concludes that there would not be significant changes in service and indicates that no intersection would have a LOS less than C during peak hours. Id., pp. 13-14 - 13-15, Table 13-17, p. 13-17. In addition, SLC performed an analysis for DOT that addresses traffic impacts for the years 2010, 2015, 2020 and 2025 with and without the project and found that there would be no significant impacts to traffic. Appendix E2, IC Ex. 7.

As noted by FOH, the application includes an important river transportation component that will have 80 percent of the finished product leaving the facility by conveyor and barge. Id., p. 13-10. Raw materials will also be transported to the plant via this method. Id. The remaining product will be shipped by truck from Greenport to Catskill, and will result in approximately 120 trucks trips per day. Id., p. 13-13. In addition, approximately 130 people will be driving to the facility on a daily basis over the course of a 24-hour period. The number of people per shift is set forth in Table 13-3. Table 13-4 demonstrates that a small number of employees would be commuting during peak hours. Other truck traffic associated with deliveries of materials would occur throughout the day. Id. The traffic study was reviewed by DOT, and that agency concluded that there would be minimal impacts associated with the project. IC Ex. 54.

FOH does not contest the methodology but expresses concerns about a potential increase in traffic in the event that SLC could not move its product by conveyor and barge. SLC responds that it does not foresee any eventuality that would require the company to cease transportation by barge. The Coast Guard keeps the river open during the winter. Mr. West also explained that the "local market will only take so much cement." TR 1275-1277. We respond to this concern by directing staff to devise a permit condition that addresses a circumstance in which SLC could not move its product by barge; necessitating a large increase in truck traffic. This permit condition is necessary because the applicant did not explore such an eventuality, since the project is not intended lead to such a result. But contingencies are needed and have been provided for in other permits such as in American Marine Rail and Matter of Saratoga County Landfill, 1996 WL 566374 (Hearing Report attached to Commissioner's Decision, Sept. 3, 1996). As noted by ALJ Goldberger, in AMR the draft permit (special condition 34) required that activity cease at the transfer station after 72 hours if the waste could not be removed by barge and rail. TR 1274. Contrary to the applicant's suggestion that truck traffic cannot be limited, in Saratoga County Landfill, the Deputy Commissioner adopted the ALJ's determination that trucks be limited to ten per hour in order to mitigate noise effects. See, pp. 27, 111

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67 At some point, an earlier iteration of this data made its way into the DEIS, but the correct information is contained in IC Ex. 77. TR 1304.

of ALJ Buhrmaster's Ruling.[68] Moreover, in the recent issues ruling in Dalrymple Gravel and Contracting Co., Inc, 2001 WL 1172598 (Issues Ruling, Sept. 25, 2001), ALJ Wissler recommended that the permit be clarified to indicate conformity with the EAF that limited truck traffic to 10 trucks an hour. Accordingly, to ensure that truck traffic levels are kept to the numbers that are envisioned by this project, we direct staff to prepare a permit condition restricting movement of product in the event that it cannot be transferred through the use of conveyor and barge. This condition should limit daily truck traffic to the 120 vehicles SLC projects in its DEIS will be used to ship product locally.

The Coalition's concerns do not rise to the level of adjudicable matters. While the Coalition puts forth an expert who would have done the analysis differently, there is no convincing proof that SLC's analysis is incorrect, and in fact, the agency that has primary responsibility for analysis of traffic impacts found otherwise. IC Ex. 54. As decided by the Commissioner in Matter of Dailey, Inc., 1995 WL 394546 (Interim Decision, June 20, 1995), SEQRA does not require the Department to hold a hearing to resolve all comments related to the DEIS, and DEC can rely upon DOT in the Department's SEQRA review. In addition, with respect to the ITE guidelines that the Coalition's expert stated SLC should have used, Mr. West explained that the applicant did apply them in the analysis. TR 1278.

As for sight distances on Route 9, SLC agreed that it had not looked at these in the DEIS, but provided measurements at the issues conference that it determined meet American Association of State Highways and Transportation Officials (AASHTO) standards. TR 1281. Mr. West explained that DOT will address this specific matter in the highway work permit. Id, IC Ex. 54. The Coalition also complains about the omission in the DEIS of an accident analysis but it did not provide any information indicating how this would change the outcomes here. The Coalition's expert agrees that the traffic volume is "very small" but expresses concerns about the nature of the traffic and its impacts on community resources such as the Columbia Memorial Hospital. But these concerns are speculative and are based largely on existing road conditions that do not relate to this project. TR 1291-1292.

Waterfront

Potential Conflicts With City Planning

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68 We do not agree with the ALJ's statement in Ungerman Excavating, Inc. at p. 16 (Issues Ruling, May 18, 2000) that DEC has no authority to limit truck traffic; that statement is contradicted in that ruling where the ALJ stated that there would be a prohibition on truck queuing. Pursuant to SEQRA, the Department has wide authority to develop permit conditions that mitigate adverse environmental impacts. See , e.g., Matter of Reapplication of Pyramid Crossgates Company, 1981 WL 142208 (Decision, Sept. 18, 1981) (permit not to issue until DOT completed road analysis); Matter of Fulton Co. Bd. of Supervisors, 1987 WL 55373 (Decision, Feb. 12, 1987) (inspection and monitoring required during construction of landfill); Matter of Tantalo Construction, Inc., 1981 WL 142271(Decision, May 7, 1981) (fund required for on-site monitor). SEQRA requires that each involved agency attach reasonable conditions that minimize or avoid adverse environmental impacts revealed in the EIS in its decision. Town of Henrietta v. DEC, 76 AD2d 215, 218-225 (4th Dep't 1980).

The City, Riverkeeper as part of the Coalition, FOH, and the Village have raised a number of potential issues regarding SLC's plans for development at the waterfront. The City is concerned about interference by SLC with the commercial and recreational goals of the City with respect to lands along the waterfront adjacent to the project site. City Pet., IC Ex.48, pp. 3-7. Noise, ship traffic, fuel spills, and particulates are the specific matters that the City alleges will interfere with the revitalization of this area. Noise, potential for fuel spills, and fugitive dust measures have been addressed elsewhere in this ruling. TR 1369-1370. The City has begun the process of developing lands to the north of SLC's property as parkland so that the public will have access to the waterfront for boating. TR 1376. The City is concerned that the use of the HudsonMax ships and the barges will interfere with small craft boating and that the SLC's activities at the dock will also discourage such use. City Pet., IC Ex. 48, p. 6; TR 1371-1372.

RULING: There is no issue for adjudication with respect to potential conflicts between recreational craft and the shipping activity at the SLC dock. The City has agreed to the applicant's proposed permit condition that would require an SLC employee to alert the public using the park and launch facility that a HudsonMax ship is on its way to the dock. TR 1373-1379. These ships will not be at the dock constantly, but rather up to 22 times per year. The dock is already used by these ships 5-6 times a year and while the park may not be developed yet, certainly boaters use the river. As for the barges, SLC maintains without any dispute that these will be farther south of the park and should not present any conflicts. TR 1375-1376. We ask that the applicant and City develop language that can be added to the draft permits reflecting the applicant's stipulation to provide notice to the public of HudsonMax ship arrivals.

Lands Underwater and Public Access

In its petition, FOH contends that SLC and/or its predecessors illegally filled the Hudson River in excess of grants previously received from the State. FOH Pet., IC Ex. 39, pp. 46-47. In support of this claim, FOH contends that in State Legislative Acts, Chapter 195, Laws of 1855 and Chapter 167, Laws of 1861, authority was given to fill of the 1400 feet along the river now occupied by SLC's dock. Id., p. 46; IC Exs. 85, 86. According to FOH, this legislation mandated that certain areas be kept available for public use and that the failure to do so by SLC and its predecessors should result in permit denial or the imposition of conditions that restore "direct public access to the river..." Id, p. 47.

RULING: This written determination confirms ALJ Goldberger's ruling at the July 26 session of the issues conference that this matter is not appropriate for adjudication in this forum. TR 1438-1440. Essentially, FOH contends that SLC's predecessors disregarded the terms of this land grant and this has resulted in a denial of public access to the waterfront. Based upon SLC's current plans, FOH maintains that the grant of any permits to dredge, fill, and otherwise use this area will continue this illegal use. Attorney Baker argued at the issues conference that FOH is not asking DEC to make a determination on property rights or whether there should be a further grant of lands. TR 1416, 1433-34. Rather, he attempts to frame the issue as one of whether SLC's failure to comply with the original land grant affects SLC's ability to mitigate impacts resulting from its proposed plans. TR 1433.

We agree with SLC's representative Galt that regardless of how FOH frames its argument, its complaint requires an analysis and determinations as to the property rights involved here. Clearly, these determinations are not within the scope of DEC's jurisdiction. See, e.g., Matter of Waste Management, 1999

WL 33290786 (Issues Ruling, Dec. 31, 1999); Matter of 110 Sand Company, 1991 WL 161006, *11 (Decision, June 19, 1991). FOH is correct that the Office of General Services (OGS), to which SLC has applied for a grant of lands under water (Article 6 of Public Lands Law § 75), will consult with this Department in making its determinations pursuant to 9 NYCRR § 270-3.2. See, IC Ex. 9. But this consultation is based upon DEC's findings with respect to impacts on the environment or natural resources. Moreover, it is during the DEC hearing process that the Department will compile a record concerning SLC's potential impacts on the river for the Commissioner and any other interested agency to consult in making a final determination with respect to permitting and other matters. The Part 624 process does not include an examination of title or conditions associated with land grants. Instead, the regulations governing OGS's decisionmaking provide that when an applicant for a grant "relies on adverse possession to establish title to said adjacent upland, the claim of title shall be determined by Judgment in an action pursuant to article 15 of the Real Property Actions and Proceedings Law." 9 NYCRR § 270-4.6(h)(1). Based upon other DEC administrative decisions concerning Article 15 permits, it is common for OGS to make its determination after this agency's process is concluded. See, e.g., Matter of SUNY at Brockport, 1990 WL 98259 (Decision, Feb. 26, 1990); Matter of Point Breeze Camp, 1989 WL 88102 (Decision, June 8, 1989). Accordingly, there is no need to address SLC's other arguments concerning standing and the merits of FOH's claims.

Coastal Zone

The Preservation League and the National Trust for Historic Preservation jointly filed a petition for *amicus* status. The joint petition argued that the proposed project "is patently inconsistent with at least three (3) Coastal Policies." The policies cited are 23, 24, and 25 of the State's Coastal Zone Management Program (CMP). Pet., IC Ex. 49, pp.6-9. TOP's petition also maintains that the project is inconsistent with these policies. Pet., IC Ex. 41, pp. 33-38. HVPC maintains that the project is incompatible with the CMP for similar reasons. Pet., IC Ex. 40, p. 11. Citing to policies 4, 23, and 25 as well as its own Local Waterfront Revitalization Plan (LWRP) that was approved by the Village in 1999 and the Secretary of State on September 20, 2001, the Village of Athens, seeking *amicus* status, expresses its concerns that the DEIS does not adequately address impacts of the project on its historic waterfront. Pet, IC Ex. 43; IC Exs.145, 146.

The City had also raised a potential issue with respect to the conveyor crossing over Route 9G, an area that the City considers to be its gateway. City Pet., IC Ex. 48, p.14, TR 1728. This matter appears resolved based upon SLC's agreement to work with the City to screen the conveyor and to address its concerns in the City's Site Plan Review Process. TR 1729-1732.

Development and related activities in New York's coastal area that require state funding or approval must be consistent with the policies and purposes contained in Article 912 of the State's Waterfront Revitalization and Coastal Resources Act (Article 42 of the Executive Law, the "Waterfront Act"), the CMP, and applicable LWRPs. 19 NYCRR §§ 600.1-600.5. Essentially, an agency's basis for determining whether there is such consistency is part of its SEQRA review of the project. 19 NYCRR § 600.1(d). Compliance with the requirements of 6 NYCRR Part 617 "constitutes a determination of consistency as required by Executive Law Article 42." 19 NYCRR § 600.4(a). At an early stage of the review process, the state agency is required to complete a coastal assessment form (CAF). 19 NYCRR § 600.4;
6 NYCRR § 621.3(a)(8). In this matter, staff did not fulfill this requirement until the issues conference was

underway and the DEIS had already been prepared. IC Ex. 57. The Department of State is also required to review any activities undertaken by state agencies related to the achievement of the coastal policies and make recommendations accordingly. Executive Law § 919. See, Matter of Xanadu Properties Assoc., (ALJ Ruling, Sept. 10, 1990), p. 5. DOS also reviews the actions of federal agencies to determine consistency with the CMP if they would affect New York's coastal area. In this application, because the Army Corps of Engineers has jurisdiction to approve aspects of SLC's project, DOS will need to make this consistency determination. 15 CFR Part 930.

The specific CMP policies identified by the various intervenors are as follows:

Policy 4 - "Strengthen the economic base of smaller harbor areas by encouraging the development and enhancement of those traditional uses and activities which have provided such areas with their unique maritime identity." The explanation of this policy provides that the action under consideration should give priority to traditional uses dependent on proximity to the water, and should not detract from these uses.

Policy 23 - "Protect, enhance and restore structures, districts, areas or sites that are of significance in the history, architecture, archaeology or culture of the state, its communities or the nation." The CMP explains that the program seeks to "actively promote the preservation of historic and cultural resources which have a coastal relationship." The policy identifies resources on the National or State Registers of Historic Places as well as locally designated historic landmarks and historic districts. Examples of actions considered adverse to this goal are actual alteration or destruction of a building that is recognized as historic and proposed actions near the property boundary of the resource. This explanation speaks to scale, design, lighting, and proportion as some of the features to consider.

Policy 24 - "Prevent impairment of scenic resources of statewide significance."

The Department of State (DOS) has designated certain areas of the State as scenic areas of statewide significance (SASS). 19 NYCRR § 602.5(c). DOS has designated two SASSs in the vicinity of this project - Columbia-Greene North and Catskill-Olana. See, *Scenic Areas of Statewide Significance*, DOS, Division of Coastal Resources and Waterfront Revitalization (July 1993). The CMP requires agencies considering actions in or near these areas to determine whether and how a project will affect the SASS. Impairments that are listed in the policy are (i) irreversible modification of geologic forms; removal of vegetation and structures and (ii) whether the addition of structures because of siting or scale will reduce identified views and diminish the scenic quality of an identified resource. To protect the scenic qualities of SASS areas, this policy also sets forth guidelines including the following: (1) siting structures to maintain the attractive quality of the shoreline and views to and from the shore; (2) clustering or orienting structures to retain views; (3) incorporating sound, existing structures (especially historic buildings) into overall development scheme; (4) removing deteriorating and/or degrading elements; (5) maintaining or restoring the original land form, except when changes screen unattractive elements and/or add appropriate interest; (6) maintaining or adding vegetation to provide interest, encourage wildlife, obscure unattractive elements; (7) using appropriate materials, screening unattractive elements; (8) using appropriate scale, forms and material to ensure that buildings and other structures are compatible with and add interest to the landscape.

Policy 25 - "Protect, restore or enhance natural and man-made resources which are not identified as being of

statewide significance, but which contribute to the overall scenic quality of the coastal area." The policy explains that agencies in reviewing proposed actions should ensure that these will not adversely affect the overall quality of these areas and that the policies enunciated with respect to Policy 24 should be used here to guide review.

RULING: Because the matters raised with respect to coastal zone consistency relate primarily to visual impacts, we find that there is no separate issue for adjudication. We find that there is an issue for adjudication with respect to whether or not the mitigation/offset measures proposed by SLC are sufficient to overcome the visual impacts resulting from its project including those that relate to the CMP. Coastal zone consistency will be heard as part of any other issues related to visual impacts. Concerning the Village of Athens' petition for *amicus* status, we agree with the Village and other intervenors that more detail must be provided in this record as to the potential for conflicts between this project and the Village's plans for its waterfront.

The Waterfront Act declares it to be state policy to balance economic development and preservation for beneficial use of the coast. Executive Law § 910; 6 NYCRR § 600.4(b). However, as stated in *Managing New York's Coastal Zones* by Gerrard and Kass (NYLJ 2/23/88), the 44 policies set forth to implement the goals of the Act are often contradictory and it is difficult, for example, to both promote economic development while safeguarding wildlife. SLC's position that it conforms with the CMP in many respects is supported. For example, policy 1 is "restore, revitalize and redevelop deteriorated and underutilized waterfront areas for commercial, industrial, cultural, recreational, and other compatible uses." As stated by SLC in its DEIS, the proposed project would take a dock area that has been allowed to deteriorate and put it to a new industrial use. DEIS, IC Ex. 6, p. 19-3. Policy 2 encourages the siting of water- dependent uses and SLC's project does rely upon the water for transport of raw materials and product. Id. Policy 19 seeks to "protect, maintain, and increase the level and types of access to public water-related recreational resources. . . " While the project is located on privately-owned land, SLC has proposed the creation of a public walkway and park as part of its plan and these would introduce public access to the waterfront in this vicinity. Id., p. 19-9.

As noted by petitioners, the main stack associated with this facility as well as the waterfront elements would appear to conflict with other identified policies of the CMP. While the CAF prepared by staff answers in the negative the question whether the proposed action will have a significant effect upon "structures, sites or districts of historic, archeological or cultural significance to the State or nation", this response was corrected by DEC staff person Benas at the July 30 session of the issues conference. TR 1709. Overall, we understand staff's position on the visual impacts to be that it has determined that the mitigation and offsets provided by SLC constitute the balance mandated by SEQRA and the coastal policies. TR 1694-1696; IC Exs. 102, 103.

Nevertheless, there is a dispute, supported by the views of visual expert DeWan and historic expert Neuman on behalf of TOP and HVPC that the visual impacts created by the project would be counter to the coastal policies and that the mitigation offered does not lessen those impacts. TR 1661-1662, 1698-1701. Concerning policy 23, from the Hudson-Athens Lighthouse and Olana there is no dispute that a portion of SLC's stack will be visible. In addition, the Lower Village District in Athens will have a view of the plant as well as the dockside features. With respect to policy 24, although the project is not in an SASS, views from

Olana will be affected by the siting of the plant. And policy 25 is implicated in the views from the Village and Olana. Since most, if not all, of the concerns raised with respect to coastal zone are truly ones of visual impacts, the adjudicable issue of whether the mitigation/offsets proposed by the applicant are sufficient to overcome these conflicts will be addressed in any hearings on visual issues.

The Village of Athens has criticized the DEIS for not addressing impacts to its waterfront. In its petition, the Village has described its efforts to redevelop this area in order to provide recreational opportunities that will draw people to its environs. In its *amicus* letter dated August 30, 2001, the Village reiterates its concerns about visual impacts and noise stemming from SLC's activities and their impacts on the Village's scenic and historic resources. IC Ex. 131. The Village asserts that the FAA aviation warning lights on the stack, the potential 24-hour activities at the dock, and the appearance of the stack and other structures will detract from the Village's waterfront park; consequently, these impacts contravene CMP policy 4 with respect to development of small harbors.

While addressing the draft LWRPs of Hudson and Catskill in the DEIS, SLC does not address the Village's LWRP (now approved) nor does it provide detail on the potential impacts to these resources. SLC stated that the project need not obtain a consistency determination from the Village because the project is located across the river from Athens. However, 6 NYCRR § 617.11(e) requires that no state agency may make a final decision on an action that would affect the implementation of an LWRP until it is found that the action is consistent to the maximum extent practicable. See also, Executive Law § 915(5). The record needs augmentation because the plans of SLC and Athens appear to conflict. The Village is seeking to enhance its waterfront so that visitors will come to view the Lighthouse, enjoy the river and make use of enhanced facilities including commercial enterprises in Athens. TR 1639-1649, IC Ex. 144, pp. II-12-14, policies, 1, 2 , 4, 23, 25. The proposed activities of SLC, such as twenty-four hour activities and lighting at the dock, may conflict with these goals. See, *e.g.*, DEIS, Appendix, pp. B1-57-59, B106-B109. More information is needed with respect to these potential conflicts in order to make findings under SEQRA and to make a consistency determination.

DOS has not yet made its own consistency determination regarding the federal permits involved. 42 USC § 1456(c)(1); 15 CFR 930. Rather, it has agreed with the applicant to defer its decisionmaking until 30 days from the issuance of this ruling. IC Ex. 110a. As ALJ Goldberger stated at the issues conference, this is unfortunate because given the expertise of DOS's Division of Coastal Resources, it would have been helpful to have had the benefit of their analysis. TR 1635-1638. However, as noted by all the parties, DEC must make its own determinations pursuant to 6 NYCRR § 617.11(e) and will do so.

Wetlands, River and Terrestrial Ecology

Assessment of Biota in Wetlands and Uplands

FOH presented a report by Eric Kiviat, Executive Director of Hudsonia, Ltd., critiquing SLC's analysis of the existing flora and fauna, including the tidal habitat. Dr. Kiviat took the position that, based upon his findings, the DEIS does not comprehensively assess the biota in the area of the project. FOH Pet., IC Ex. 39, Appendix J. In the fall of 2000, Dr. Kiviat toured the area with Malcolm Pirnie, SLC's consultant. At that time, Dr. Kiviat observed a species (swamp agrimony [*Agrimonia parviflora]*- listed on the State's

Natural Heritage Program Watch List) that was not included in the information provided by the applicant in support of the application.[69] He criticized the application for failure to describe wetlands HS-100 (in the mine) and HS-3. Dr. Kiviat's report states that the project may affect habitat of rare species such as ribbon snake, common nighthawk, and common raven; and that the application provides no basis to conclude that wildlife would not be affected by the towers and other activities. Dr. Kiviat also noted that demolition of some of the structures at Catskill may result in loss of habitat for a number of species.

RULING: We do not find this issue to be appropriate for adjudication based upon the degree of impacts to these wetlands proposed by the applicant and the significant amount of study that SLC has done in the area of the project with respect to these locations. There is no demonstration by FOH that more days of survey, even focusing efforts in a manner suggested by Dr. Kiviat, would likely produce different results.

According to the DEIS, the applicant engaged in surveys of the vegetation on the site for the facility on 13 days over a three-year period (from 1998 to 2000), in addition to an unspecified number of dates in the spring and summer in 1989.[70] DEIS, IC Ex. 6, p. 12-2; TR 813-816. Two days in 1999 - June 26 and August 27 - were specifically noted as days when wildlife surveys were performed. Id. Five days in 2000 were devoted to studying the existence of herpetiles. Id. The DEIS also notes that the use of a number of reference materials were consulted, such as the *Ecological Communities of New York State*, March 1990, the Nature Conservancy and the *1982 Heritage Operations Manual New York Natural Heritage Program*, NYSDEC. Id.

The property consists of a variety of environments ranging from forest, field, wetland, and industrial. DEIS, IC Ex. 6, pp. 12-3 - 12-11. As a result of the field studies performed during 1998-2000, the applicant states that it did not find species that are endangered or of concern. Surveys previously done revealed that two species of birds that are listed as of special concern - the red-shouldered hawk and the osprey - were observed in the spring and summer of 1989. Id., p. 12-18. SLC did not observe these species during its field visits. Id. A crushed shell of a yellow-spotted turtle was discovered in June 1999 along Route 9G; however, areas that could be viable habitat for this turtle are not located near proposed areas of disturbance for the facility. Id., p. 12-19. With respect to the swamp agrimony, SLC states that it was found during a field investigation but that due to an oversight, the plant was not included the DEIS. TR 855. Mr. West represented however; that based upon this discovery, the path of the conveyor was altered. Id.

The mine activity and construction and operation of the cement plant will displace animals. At the July 23 session of at the issues conference, DEC staff wildlife biologist Maynard Vance stated his disagreement with the applicant's assessment that these animals can move to surrounding areas. TR 811-812, DEIS, IC Ex. 6, pp. 12-20 - 12-21. However, no one has raised a specific concern about any species and

69 We did not find this plant listed in 6 NYCRR § 193.3 - Protected native plants. In that section of the Department's regulations, endangered, threatened, rare and vulnerable native plants are listed. Apart from the listing, the 6 NYCRR § 193.3(f) prohibits a person from removing or damaging these species without the permission of the owner.

70 This data does not include the information submitted by SLC with respect to its mitigation plan in August 2001. IC Ex. 118.

its use of the mine area. In addition, the construction and operation of the plant will occur in the mine site on sparsely vegetated hard ground that has limited capability as wildlife habitat. Id., p. 12-22. When reclamation of the mine occurs, there will be opportunities to establish wildlife habitat. Proposed MLUP, DEIS, Appendix A, IC Ex. 7, pp. A-17-18.

The tall structures that are part of the plant site may potentially lead to bird strikes. Mr. Vance stated that this is an area of "ambiguity," because there is not enough data to ascertain the extent of the capacity for harm. TR 810-811. In the DEIS, SLC concludes that this likelihood is not great and also states that the towers are designed to minimize these occurrences by minimizing artificial lighting and glare. Specific measures listed in the DEIS are: utilization of dimmer switches, lighting of silos and the tower on an as-needed basis and use of reflective materially internally to increase usefulness of lighting without adding fixtures and low-glare fixtures. DEIS, IC Ex. 6, pp. 12-23 - 12-24. However, without more suggestions about how to address this potential impact, there does not appear to be more to discuss. Given the lack of information, should this project go forward we recommend that the applicant maintain records concerning bird strikes, and provide this information to DEC staff.

Conveyor Route

The main area of concern with respect to habitat impacts unrelated to the Hudson River is the conveyor route. The conveyor route will affect the adjacent area of HS-2 and also wetland FWD (an isolated wetland of 4.66 acres). See, Figure 11-1 of DEIS annexed as Attachment H to this ruling. With respect to FWD, a wetland not subject to DEC Article 24 jurisdiction, a portion of the original conveyor still exists in this area, as well as footings that will be re-used for the tube conveyor. DEIS, IC Ex. 6, p. 11-17. SLC proposes to use a limited corridor for the tube conveyor and to site it along the existing access road. Id., p. 12-25. In addition, SLC proposes to locate the conveyor eight to twelve inches above the ground along level stretches so that small wildlife can cross beneath the conveyor. The applicant also plans to construct a combination of underpasses or vegetated earthen ramp crossings for larger wildlife. Id. While portions of the conveyor will affect the adjacent area of HS-2, staff does not find any significant impacts resulting from this construction and FOH has not specifically identified any. With respect to HS-3, the DEIS does not indicate any work planned for this area which appears outside of the boundaries of the Greenport Facility. DEIS, Figure 11-2, Attachment H.

Catskill Structures

FOH questioned whether certain species of birds such as the common raven may be using the structures near Catskill that SLC proposes to demolish as part of its visual impact mitigation. Mr. Vance explained that there has not been investigation of those structures. TR 813. In light of the possibility that these structures may be in use by species of concern to the State, we direct the applicant to perform a survey prior to any demolition of these structures and provide this information to staff. In addition, SLC agreed that it would not perform demolition of these structures during bald eagle nesting season. TR 849- 850, 862. These conditions should be added to the Decommissioning and Demolition section of the Visual conditions in the draft permit. IC Ex. 12a(i), p. 6.

Pied-Billed Grebe

Dr. Kiviat pointed out that on the species list appended to the DEIS the pied-billed grebe (*Podilymbus podiceps*) is listed. This species is on New York's threatened species list. 6 NYCRR § 182.6(b)(6)(i); TR 838, IC Ex. 7, p. D-10. Dr. Kiviat criticizes the lack of information on this animal in the DEIS and whether it was using the site to migrate through or breed. TR 838. This information alone does not appear to be a basis to have a hearing but the applicant must provide more data on where this animal was noted and what, if any, measures are required to protect it. ECL § 11-0535 prohibits, *inter alia*, the taking of any endangered or threatened species. "Taking" under the federal Endangered Species Act (ESA), 16 U.S.C.A. §§ 1531 *et seq* has been interpreted by the U.S. Supreme Court to include the destruction of a species habitat. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). Similarly, this position was adopted by DEC and supported by the Second Department in State v. Sour Mountain Realty, Inc., 183 Misc.2d 313 (Dutchess Co. Sup. Ct. 1999), aff'd, 276 AD2d 8 (2d Dep't 2000) (construction of snake fence to impede travel of threatened rattlesnake found to constitute "taking" which includes lesser acts of disturbing and harrying pursuant to definition of "taking" in ECL § 11-0103[13]).

County-SLC Agreement Re: Access Road

A last point on terrestrial impacts concerns the agreement between SLC and the County that would allow the latter a right-of-way or deed to construct an access road. This road would run parallel to the conveyor between Routes 9G and 9. SLC agreed to this access subject to two conditions: 1) that the road would not interfere with the facility and 2) no government entity objected to its construction. IC Ex. 59, p. 2. The applicant has made clear that it does not consider this potential project part of its application and we do not find a basis to consider it as part of these proceedings. However, at the July 23 session of the issues conference, ALJ Goldberger requested that staff and SLC make clear to the County that this agreement does not mean that the proposed access road has any endorsement from DEC staff. TR 863-864. To the contrary, wildlife biologist Vance stated that such an endeavor "can be a real problem for wildlife in that area" due to the heavy traffic that would be associated with this road and the conflict with crossings for wildlife, particularly for amphibians. TR 863.

Wetland HS-100

In its petition, FOH criticizes the applicant for failure to address impacts to HS-100, a State-designated wetland located in the southeast portion of the area to be mined on SLC's map. IC Ex. 101; Attachment H hereto. The map provides "'[f]reshwater wetland designations in the permitted mine area is disputed by SLC and will subject to a reservation of rights.' SLC will not include this area in the area to be affected during the permit term until this dispute is resolved." According to SLC and the staff, there has been an agreement to disagree about DEC's wetlands jurisdiction based upon the number of years likely to elapse before SLC would expect to mine this area. TR 879-886. SLC contends that this area is not freshwater wetland and in any case, SLC should not have to obtain any permits to mine this area because it is part of the grandfathered lands. DEIS Appendix, IC Ex. 7, p. 6.

RULING: Essentially, staff and the applicant are seeking to segment consideration of potential impacts of a portion of this project. We think that is appropriate because SLC represents that it will be decades until it seeks to mine the wetland area. Given the changing nature of wetland boundaries, it would be more

appropriate to address the environmental impacts associated with work near or in the wetlands at the point that the issue presents itself. Review of this matter would take place during the MLR permit renewal prior to the period SLC anticipates mining this area. Sometimes, such segmentation is permissible under SEQRA. See, e.g., Schultz v. Jorling, 164 AD2d 252 (3d Dep't 1990), app den, 77 NY2d 810 (1991).

The applicant contends that the 1990 consent order between DEC and SLC's predecessor, ICC, relieve the company of the obligation to apply for any permits that relate to the grandfathered mine area. IC Ex.12a attachment, p. 5. This consent order makes no mention of designated freshwater wetlands and appears solely directed at addressing the application of SEQRA and DEC's mined land reclamation program to these lands. SLC's position appears contrary to the extensive body of law interpreting Article 24 and upholding DEC's authority to amend maps and thereby protect even unmapped freshwater wetlands at any time up until a landowner has performed substantial construction on the subject site. See, e.g., D.B.S. Realty, Inc. v. DEC, 154 Misc.2d 424 (Dutchess Co. Sup. Ct. 1992), aff'd, 201 AD2d 168 (3rd Dep't 1994). Here, the applicant has prior notice of the designation of the wetland and admittedly is years away from any work affecting that resource. Therefore, there should be little question that SLC will have to apply to DEC for a freshwater wetlands permit prior to any mining of the wetland or regulated adjacent area. ECL § 24-0703. At such time, SLC can raise any jurisdictional disputes. Accordingly, staff shall include conditions in the draft mined land reclamation and Article 24 permits that specifically mandate such application.

Riverine Habitat Mitigation Plan

The applicant owns a 14-acre active dock area between the CSX rail right-of-way and the river in the City of Hudson. This waterfront contains an undeveloped shoreline on its southern end and a bulkhead to the north. DEIS, IC Ex. 6, p. 1-8. The old Atlas stock house is located on the northern end and is currently used for salt storage. SLC proposes to enhance this building architecturally and reuse it for storage. DEIS, IC Ex. 6, p. 1-40; Joint Permit Application (JPA), IC Ex. 10, p. 9. There is also a 147-foot-tall tank and loader at the dock (to be removed) and a railroad trestle over the CSX tracks (trestle may or not be removed depending on outcome of review by Town and SHPO). Id. SLC possesses an Article 15 permit and water quality certification and Army Corps of Engineers (ACOE) permit to perform maintenance dredging at this location. However, due to the expansion required for the dock, SLC proposes to dredge approximately 62,000 cubic yards to accommodate the draft of the HudsonMax vessel, as well as the area for cement barge loading at the new bulkhead. Id., p. 1-29.

The HudsonMax ships would deliver gypsum, GBFS and coal/coke. These materials will be stockpiled at the dock and removed within 24 to 36 hours of arrival, and occasionally up to 100 hours. Materials would be unloaded 16 to 22 times per year. IC Ex. 6, pp. l-28-29. From the stockpiles, a horizontal overhead conveyor system would run parallel to the riverbank and go to an 82-foot pump house. An enclosed dock conveyor will be used to transfer raw materials from the dock to the main tube conveyor and to the cement plant. DEIS, IC Ex. 6, 1-41. Loading of finished cement product onto the barge will be done with a pneumatic loading system (cement product from the plant will go to the pump house via the conveyor and into tanks that will send it to the barge through a pipe). DEIS, IC Ex. 6, p. l-40; JPA, IC Ex. 10, p. 10. The DEIS provides that about 80 percent of the cement produced will be shipped by barge and during peak periods this will occur 2-3 times a week. IC Ex. 6, pp. 1-28, l-30. Separate dock facilities are required for receipt of raw materials and transport of cement. IC Ex. 10b, p. 1.

The applicant states that these activities will result in loss of 0.26 acres of intertidal habitat associated with placement of riprap and revetment, 0.20 acres associated with pilings and other structures and 5.45 acres resulting from dredging activities including the loss of approximately 0.05 acres of submerged aquatic vegetation. SLC also proposes to place an additional 0.89 acres of revetment at or below the contour of the existing river bottom following dredging to resurface the bottom and stabilize the new slope. This revetment is to be designed to provide fish habitat. Attachment 3, Mitigation/Restoration Plan for Impacts to Riverine Habitat Associated with the Greenport Dock Project (October 2001), IC Ex. 10b.

Initially, to compensate for impacts associated with the fill and dredging, the applicant proposed to investigate improvement of the flow of water into the South Bay area by evaluating the connection between the Hudson River and South Bay and to restore 3.0 acres of tidal riverine wetland habitat that had been filled in the South Bay.[71] IC Ex. 10a. In addition, the applicant proposed that as a result of the dredging it performs, the resulting bottom would increase deepwater habitat for short-nose and Atlantic sturgeon and that compensation would be obtained with the decrease of the Catskill facility's withdrawal of Hudson River water (2,500,000 gpd to 15,000 gpd).[72] Id., pp. 8-9. SLC also plans to build a park (Lookout Park) to provide public waterfront access. Id., p. 9.

At the issues conference on July 26, on behalf of FOH, Dr. Kiviat stated that the mitigation proposal was short on detail and failed to provide an adequate analysis of whether its goals were both achievable and appropriate. He explained that certain aspects of the mitigation plan, such as Lookout Park, did not provide any benefits with respect to habitat. TR 1356-1360.

In a supplemental petition, the Coalition through Riverkeeper asserted that SLC's mitigation proposal was deficient because it had not set forth "practicable and reliable measures to mitigate the adverse impacts to river habitat." IC Ex. 123, p. 2. Riverkeeper contends that SLC's study was not adequate to determine that the mitigation proposals would do anything to compensate for the loss of fish habitat resulting from the dredging and filling needed to construct the SLC dock. Id.

At the July 19 session of the issues conference, SLC submitted to the ALJ a revised Wetlands Mitigation Plan for Impacts to Riverine Habitat Associated with the Greenport Dock Project (IC Ex. 10a, June 2001). Because this document was different from what had been proposed in the DEIS and the Joint Permit Application, both Riverkeeper and the staff requested additional time to review and comment in

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71 While SLC continues to propose the 3.0 acre South Bay restoration, based upon additional research, it has determined that further evaluation of the flow between South Bay and the river is unnecessary and that the flow is established. Letter dated 11/6/01 from attorney West to Riverkeeper counsel Waters and Seggos. IC Ex. 173, p. 5.

72 The October 2001 submission does not rely upon the deepened channel resulting from the dredging as mitigation. IC Ex. 10b, pp. 3-6.

response to this information. TR 1331, 1334-1336, 1341-1344, IC Ex. 91.[73] Based upon the recommendation of SLC and the staff, ALJ Goldberger decided to postpone the discussion regarding this matter to the August 15, 2001 session. TR 1354.

In response to IC Ex. 10a, the staff submitted a letter dated August 10, 2001 to Mr. Lochbrunner, Vice President of Major Capital Projects at SLC. IC Ex. 114. In this letter, staff identified a number of items that required supplementation in the report with respect to the submerged aquatic habitat areas, the relationship of the proposed mitigation to the loss of habitat, the feasibility of the mitigation plans and the effect of the dock's location on the SAV beds. IC Ex. 114. Based upon additional field study, SLC distributed an Environmental Baseline Assessment Report (August 2001, IC Ex. 118) that includes supplemental information regarding habitat and mitigation associated with its plan to compensate for loss of habitat resulting from dock construction. This report contains information gathered on July 31- August 2, 2001 by SLC's consultants regarding soils, wildlife, plants, and fish in the area of the proposed mitigation site.

By cover letter dated October 19, 2001, SLC submitted a revised Mitigation/Restoration Plan for Impacts to Riverine Habitat Impact Associated with the Greenport Dock Project (IC Ex. 10b, October 2001). The applicant contacted ALJ Goldberger for guidance regarding the submission of this latter plan. The ALJ requested that SLC convene a conference call with interested intervenors to discuss the plan. As a result of the call which was held on October 25, 2001, the participants agreed that comments on the recent plan would be submitted by November 7, 2001. IC Exs. 169, 172.

The applicant has agreed to accept DEC's condition that the "T" dock configuration be adopted to minimize impacts to the SAV beds. IC Ex. 169, p. 2. SLC proposes to enlarge the bay between the proposed dock and the existing bulkhead to create riverine habitat of 0.92 acres with three one-tenth acre beds of planted submerged aquatic vegetation. IC Ex. 172, p. 2. This work would include the creation of 0.65 acres of new riverine habitat and the restoration of 0.27 acres of existing sub-optimal habitat. Attachment 3, p. 1 to October 2001 Mitigation Plan, IC Ex. 10b; Sheet 6 of 10 attached to IC Ex. 10b; Attachment 4 to IC Ex. 10b. This work is proposed adjacent to Wetland TWA, which is part of DEC-regulated wetland HS-2 located in the South Bay. See Attachment I annexed hereto. South Bay is hydrologically connected to the Hudson River via a tidal channel under the CSX railroad bridge. Attachment 5, IC Ex. 10b. In addition, SLC has retained its proposal to restore 3.0 acres of tidal wetlands in South Bay.[74] IC Ex. 169, p. 2.

In a letter dated October 24, 2001, DEC project manager Michael Higgins stated that staff finds SLC's revised plan (October 2001) to be satisfactory in its level of detail and in the compensation it offers to

73 Apparently, SLC distributed this revised plan to the issues conference participants on the first day of the issues conference but the ALJs had not received a copy. In addition, the staff wetland biologists had not received a copy of this plan until the July 26 session and therefore more time was needed for them to review it. TR 1343-44.

74 While this latest submission stands by that proposal, correspondence from the applicant provides that "SLC reserves the right to withdraw the proposed South Bay mitigation site if this issue is adjudicated." IC Ex.173, p.4, fn.1.

mitigate for impacts to the Hudson River. IC 171.

Comments received by this office in response to SLC's latest revision to its mitigation plan from FOH and the Riverkeeper criticized SLC's plan. IC Exs. 174, 175. Riverkeeper's consultant, CEA Engineers, P.C., whose representative, Ralph Huddleston, presented at the August 15 issues conference, states that there has been insufficient examination of existing conditions with respect to fisheries data and other material related to habitat function.[75] IC Ex. 175, Attachment A, p. 1. In addition, CEA argues that the mitigation plan does not explain how SLC will compensate for the anticipated loss of habitat resulting from the project. Id. Specifically, CEA maintains that critical to the success of this mitigation or any other plan is an in-depth look at habitat, the species that use it, and the soils and hydrology, to determine whether plans are beneficial or potentially negative with respect to species that use these areas. Id., pp. 1-2. CEA states that SLC's plan for a shoreline park would increase potential for human impacts to wildlife. Id, p. 2.

With respect to SAV beds, CEA notes a lack of detail with respect to the proposed establishment of new beds and the potential for impacts on these and existing beds from the vessels that will utilize the docks. Id., p.2. The report criticizes the lack of an association between the reduction of use of Hudson River water at the Catskill facility and mitigation of new impacts in Greenport. Id., p. 2. CEA suggests that SLC should consider the compensation potential of dedicating remaining on-site habitats as open space or as wildlife sanctuary. Id. CEA finds no basis for SLC's conclusion that, although there will be temporary impacts from the dredging, the result will be no net loss of subtidal habitat. Id., p.3. CEA wants more detail on planting in the South Bay Wetlands Restoration Area. Id. In this report, CEA questions the decision by SLC not to pursue further examination of the flow of water into the South Bay area. Id.

In its letter of November 6, 2001, FOH presents continued criticisms of the mitigation plan as identified by Dr. Kiviat.[76] Similar to CEA, Dr. Kiviat maintains that there has been inadequate study of the affected habitats and the creatures that dwell in the areas that SLC proposes to impact. IC Ex. 174, p. 3. In addition, this letter points to the August 10 comments of DEC staff, such as the lack of analysis to support the creation of fish habitat as a result of the dredging. Id., p. 4. FOH reiterated its concerns about the proposed park in terms of potential destruction of wildlife habitat. FOH also questions the relationship between the termination of the use of cooling water at Catskill and the Greenport impacts. Id., pp. 4-5. Dr. Kiviat also found inaccuracies in the October plan and a lack of data to support the South Bay mitigation plan. Id., p. 5. Among the flaws noted by Dr. Kiviat is the lack of substantial study of the fish and soils at the mitigation site. The letter also comments on a similar lack of information with respect to impacts to the SAV beds. Id., p. 6.

RULING: Section 608.5 of 6 NYCRR requires that those seeking to excavate or fill navigable waters of the State, or in marshes, estuaries, tidal marshes and wetlands that are adjacent to navigable waters, must obtain a

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75 Mr. Huddleston has a B.A. in Biology and an M.S. in Fisheries Biology. His c.v. is annexed as Attachment A to Riverkeeper's supplemental petition dated August 15, 2001, IC Ex. 123.

76 Dr. Kiviat has a Ph.D. in Ecology, an M.A. in Biology, and a B.S. in Natural Sciences. His extensive c.v. is annexed as Exhibit K to the FOH petition, IC Ex. 39.

permit to do so. The Department may issue a permit with conditions "as necessary to protect the health, safety, or welfare of the people of the State, and its natural resources; or deny a permit." 6 NYCRR §§ 608.7(a)(2), (3). Section 608.7(b) sets forth the issues to be considered in this process, including environmental impacts to aquatic, wetland and terrestrial habitats; unique and significant habitats; rare, threatened and endangered species habitat; water quality; and hydrology. The standards for issuance of a permit are ". . . that 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.

Based upon the variance in expert opinion between FOH, Riverkeeper and SLC with respect to whether the mitigation/compensation proposed by the applicant will substitute for the habitat that will be destroyed for the project, we find there is an issue for adjudication. 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.

Aggravating the situation are the differing viewpoints expressed by staff in its letters of August 10 and October 24. IC Exs. 114, 171. The first letter provides a detailed critique of the mitigation plans, expressing concerns regarding the SAVs and the failure of the plan to provide any mitigation for the dredging of deepwater habitat. The second letter is only one page, and summarily concludes that there is now sufficient detail to determine that the plan avoids impacts where possible, and that where it cannot, there is mitigation to the maximum extent possible. There is no explanation of how the applicant has addressed the previously expressed concerns of staff both in its letter and at the August 15 issues conference.

One example of a potentially important impact relates to the short-nose sturgeon. This species, listed on the federal ESA list, was identified in the DEIS as occurring in the Hudson within the vicinity of the dock location. IC Ex. 6, p. 11-4, 11-24. While SLC stated at the August 15 issues conference that Riverkeeper's concerns with respect to this species are speculative, DEC staff member Kahnle stated ". . . we have seen no data to make the decision one way or the other. Short nose sturgeon certainly spawn . . ., not very far upriver of the project site. As indicated in both the DEIS and in Riverkeeper's information impact could occur." TR 2229. Mr. Kahnle also explained that the dredging "would very likely lead to reduced diversity of habitat in front of the dock site and render the location less desirable as fish habitat." TR 2179. Based upon this information, he concluded that "it's not at all clear to me how dredging is mitigation here for the dredging." TR 2180.

While the applicant attempted to perform additional habitat investigation on three days in late summer, DEC staff member Forgea expressed the view for a need for additional wildlife study - "[t]hey kind of caught the tail end of the season for this year as far as bird and mammal species . . ." TR 2178. The applicant itself acknowledges the paucity of its review by commenting with respect to the fish survey it performed in the area of the proposed restoration site that it is "in no way representative of the total diversity and makeup of the fish community likely within HS-2 throughout the year." IC Ex. 10b, Attachment 5, pp. 9-10. Mr. Forgea provided that this review can be done later and that the mitigation plan was "plastic" at this stage. However, without a more sound basis it is impossible to conclude that 1) the

current habitat has been adequately studied to determine the impacts; and 2) the mitigation plan will enhance habitat so that a determination could be made that "the proposal will not cause unreasonable, uncontrolled or unnecessary damage to the natural resources of the State."

Throughout its comments on SLC's plans, staff expressed concerns about destruction to the SAV beds, yet even the latest version indicates that 0.05 acres of beds will be eliminated, and staff has not offered a clear explanation as to why this is now deemed satisfactory. IC Ex. 10b, Sheets 1, 6; IC Ex. 114, pp. 3-4; TR 2200, 2175, 2176, 2182, 2208.

With respect to the park, the staff does not address this aspect of the proposed mitigation in its latest submission. At the issues conference, Mr. Forgea was emphatic in his opinion that the park design would "basically destroy most of the wildlife habitat that is there now while providing habitat for only the most common species. . . " TR 2181. Mr. Forgea goes on to say that additional planning could result in good habitat and public access, but these changes are not reflected in the latest submissions by SLC. SLC's October 2001 submission provides that the applicant has amended this park plan to include only minor clearing for a pedestrian trail. This is responsive to the criticisms of staff and others but without more information on the current habitat and species supported in this area and the impacts of this project, the park as now construed cannot be considered as appropriate mitigation.

The reduction of river withdrawals at Catskill would certainly be a positive environmental impact, as it would lead to a corresponding reduction of entrainment and impingement of fish. SLC does provide data that was obtained during the Athens Generating proceedings regarding types of fish that would likely be saved annually as a result of reduction of water intake. IC Ex. 10b, p. 13. It is unclear that this addresses the question of how this positive impact will compensate for losses associated with the proposed dredging.

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 the staff, must be resolved in order to determine whether the requirements of Part 608 and Article 15 have been met.

Visual Impacts

This proposed issue was of concern to many of the petitioners. HVPC's petition argued that the DEIS did not address impacts on Olana, and that the project would be visually intrusive from many points along the Hudson, including the City of Hudson and the Columbia/Greene North SASS. HVPC points to the adverse visual impacts stemming from plant lighting, the plume, the conveyor, the dock area and the height of the structures proposed. The Coalition contends 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. The Coalition maintains further that the methodologies used to assess the visual impacts were inadequate, because the DEIS does not contain photographs or the methodology used to georeference the simulations. According to the Coalition, the simulations in the DEIS do not present an accurate contextual view, and as a result, the DEIS underestimates the project's visual impacts. HVPC Pet., IC Ex. 40, pp. 9-12. HVPC has retained Terrence J. DeWan, ASLA (American Society of Landscape Architects), as its expert and submitted a report by Mr. DeWan as part of its petition. Exhibits A and B to

IC Ex. 40.

TOP's petition emphasizes the visual impacts of the project on Olana. From the 1870s to the 1890s, the landscape painter, Frederic Church, designed and built Olana. Recommended Decision (R.D.), Athens Generating Co. (9/3/99), p. 94. See also, Scenic Areas of Statewide Significance, pp. 103, 121-123, New York State Department of State Division of Coastal Resources and Waterfront Revitalization (July 1993). The house is now a museum and is listed on the State and National Registers of Historic Places (the grounds are included in the Catskill-Olana SASS). R.D., p. 94. There are plans to restore the grounds as they were in Church's day. See, Affidavit of Robert M. Toole and *Historic Landscape Map* annexed as Exs. C and E to TOP Pet., IC Ex. 41. This would include plans to broaden the northern views. Olana also plans to erect a visitors' center. R.D., p. 94. TOP contends that the cement plant portion of the project would be immediately visible from "Cosy Cottage," and in the future, as a result of the planned northern view restoration, would be visible from the carriage road known as "Ridge Road," situated between the house and the river.

TOP takes issue with the applicant's position that it is sufficient to find that SLC has mitigated these impacts to the maximum extent possible. Citing Lane Construction v. Cahill, 270 AD2d 609 (3d Dep't 2000), app den, 95 NY2d 765 (2000); Matter of Lane Construction Company, 1998 WL 389019 (Decision, June 26, 1998), TOP argues that if the mitigation still results in significant visual impacts on historic resources, the application must be denied. TOP has also retained Mr. DeWan and as stated above, this expert has found that there will be significant adverse visual impacts to Olana. Mr. DeWan takes the position that the applicant's review of these impacts has been inadequate. TOP argues that the destruction of Becraft Mountain, and the plume generated by the facility's operations, will cause great harm to the viewshed from Olana. With respect to any weighing/balancing done to address the need for the project, the petition points to the large numbers of tourists drawn to Olana and the area to view these historic resources, in contrast to the lack of demonstrated need for the proposed project. TOP Pet., IC Ex. 41, pp.8-29.

The Preservation League and the National Trust for Historic Preservation's joint petition for *amicus* status argues that the impact of the project on the many historic sites in the area will be quite detrimental, by altering the scenic and visual character of the region. IC 49, p. 12. These intervenors state that the DEIS fails to address the project's visual impact on the "historic fabric and tourism development of the affected region." Id.

FOH contends that the primary cause of the negative visual impact is incongruity and the project's setting - historic, natural, residential, agricultural - is not appropriate. FOH's visual expert, Mack Rugg of CDM, found that while the visual resources chapter of the DEIS provides extensive information, it does not include an assessment of the visual impacts at the individual viewpoints chosen for use in the study. FOH posits that the negative visual impacts of the proposed cement plant far outweigh the positive impacts of the proposed changes at the former Atlas Cement plant and the Hudson dock. With respect to the demolition of buildings at Catskill, FOH contends that these will not offset impacts of the project, because the largest structures at Catskill are more than 200 feet shorter than the proposed preheater tower and stack. In addition, FOH has retained the services of Vincent Bilotta, a graphic designer with experience in animation and visual simulation. Mr. Bilotta presented simulations from some of the same viewpoints used by SLC. FOH attempted to use these simulations to show that visual impacts will be much greater than noted by SLC

in the DEIS. FOH Pet., IC Ex. 39, pp. 50–55.

As discussed at p. 85, the City's complaint with respect to the visual impacts of the conveyor appear to be resolved. City Pet., IC Ex. 48, p. 10.

The Village of Athens expressed its concerns regarding negative visual impacts to the Athens Riverfront Park and the Hudson-Athens lighthouse due to the visibility of the conveyor system, plumes and structures from the main plant. The Village is undergoing a $1.2 million restoration project to refurbish its historic ferry slip and Riverfront Park. This will increase the waterfront park area and include the development of dockage, walks and promenades. The 24-hour use of the dock in Hudson for the project, and the lighting that will be required for nighttime activities, are seen as potential eyesores. Athens Pet., IC Ex. 43, pp.1-5.

RULING: We find an adjudicable issue with respect to whether the applicant has mitigated and/or offset the visual impacts of the project sufficient to merit permit issuance. SEQRA requires that the lead agency consider visual impacts. ECL § 8-0105(6); Matter of Lane Construction, supra. As noted by all the participants to these proceedings, DEC has issued guidance on visual analysis to assist parties in evaluating the impacts of projects on sensitive resources. Assessing and Mitigating Visual Impacts (the guidance), Division of Environmental Permits (7/31/00).

The applicant and staff represent that SLC has done a thorough investigation of the visual impacts in accordance with the guidance and accepted methodology. At the issues conference on July 30, on behalf of SLC, Mr. Bristol and Matt Allen of Saratoga Associates (S.A.), a 33-year old firm comprised of landscape architects, architects, engineers and planners, described the applicant's visual analysis and mitigation/offset plans. TR 1749-1784. Mr. Bristol explained that the analysis encompassed an examination of 191 places of which 81 have a partial view of the facility. TR 1753. Six additional sites have a view of the dock area only. TR 1754. He also described SLC's mitigative process as having three components - professional design and siting, maintenance and offsets. TR 1754.

Mr. Bristol acknowledged that the company and its consultants recognized that this project could not be "hidden." The decision to move the proposed plant from the old Atlas site into the mine area was part of the effort diminish views of the plant, because the structures will be lower at that site. TR 1755. The layout and color of the facility is also intended to minimize views of the different structures. TR 1758-1759. The conveyor type chosen curves and will be able to follow the ground, and therefore be less noticeable in many locations. TR 1756. With respect to the dock structures, SLC has chosen a design that is intended to provide a "contemporary version of what the historic waterfront structures looked along the Hudson . . . about the late 1800s and the early 1900s." TR 1757. Landscaping and the park proposal are also meant to provide aesthetic benefits. TR 1757-1758. Mr. Bristol also described SLC's efforts to minimize lighting impacts. TR 1759-1760.

With respect to mitigation and offsets, SLC proposes to decommission the facility at the end of its useful life, to provide public access via a park along the River near the dock facilities, to remove some of the old Atlas structures and discontinue year-round stockpiling of materials at the dock, as well as remove silos at the Catskill facility and thus eliminate the plume at this facility. DEIS, IC Ex. 6, pp. 5-23 - 5-24, 5-35.

Matt Allen described the nine-step process that Saratoga Associates employed in assessing visual impacts. This involved (1) defining the study, concentrating on a five-mile radius but including certain points outside that , such as Lake Taconic State Park and the Catskill Escarpment Trail; (2) defining the regional landscape character (DEIS, pp. 5-5 - 5-11); (3) defining the projects characteristics - the plant, the dock, the conveyor - including the specific physical characteristics of the structures that make up these features and the lighting elements and vapor plume associated with them; (4) defining the viewshed by use of a map that defines the area from which portions of the project can be seen, using the high points of the facility to make these conclusions with the assistance of a computer program and GIS software; (5) identifying visually sensitive land uses; (6) determining which of these resources has a view of the facility and which, due to intervening structures or vegetation, do not - Tables 5-12, 5-13, 5-14, 5-15, DEIS, IC Ex. 6, pp. 5-44, 5-45, 5-47 - 5-49; (7) performing a balloon study to confirm view shed by tethering two 10-foot diameter helium-filled balloons at the location of the proposed preheater tower; (8) preparing photo simulations to depict what the facility will look like from these vantage points - DEIS, IC Ex. 7, App. B-1; and (9) contrasting these results to the landscape units, the different user groups and the distance zones.[77] TR 1764-1784.

Based upon our review of the analysis in the DEIS, the statements of Mr. Benas, DEC's representative on this matter, and the statements of SLC's consultants at the issues conference, we are convinced that the applicant did indeed employ an accepted methodology that was in accordance with the guidance. This review is quite detailed, as Mr. DeWan acknowledges. TR 1805. The complaints that the Coalition expresses regarding the analysis (including their contention that the photographs provided in the DEIS should have been much larger to better demonstrate the impact), are not grounds to require the applicant to do more. It is possible that SLC could have done a better job. The ALJs were aware of how selections of different points to take the photos could bear on the interpretation when, during the August 16 site visit we visited the Riverfront Park on Athens and compared the relevant photographs to our views. We found that if you walked a little further south, you could see beyond Middle Island Flats and would be likely to see the proposed plant more clearly. And, the intervenors brought up similar examples. See, IC Ex. 105 (photographs taken by Mr. DeWan).

Mr. DeWan's criticism of the analysis performed by Saratoga Associates with respect to the impact on user groups appears justified by comparison with other permit proceedings such as Athens and Matter of Amenia Sand and Gravel, 2000 WL 1207724 (Supplemental Issues Ruling, Aug. 10, 2000). TR 1817-1819, 1828-1829. In these two matters, the applicant subjected the visual analysis to scrutiny by peers and focus groups. In this application, the consultant identifies the user groups but makes the conclusions on the impacts of the project itself. DEIS, IC Ex. 6, pp. 5-17 - 5-20, 5-56 - 5-61. We are not aware of any regulatory requirement that would mandate SLC to perform this review in the manner recommended by the intervenors, but this step would certainly aid in the verification of the visual assessment.

As it stands the analysis presented is sufficient to show significant impacts. Simply relying on the DEIS, it is evident that there will be visual impacts on many resources. See, Table 5-15, DEIS, IC Ex. 6, pp. 5-48 -5-49. The simulations in Appendix B1 bear that out. The views from NYS Rte. 9G/23B, Rtes. 23 and 23/9H at Col. Co. Rte. 27, which are currently pastoral, would change if the plant were constructed. B1-4,

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77 Based upon complaints that the original set of these simulations contained within the DEIS were not reproduced appropriately, the applicant provided a second set to the ALJs.

B1-69, B1-70, B1-83. At night, this view will be considerably altered due to the facility's lighted structures. B1-5, B1-72, . From Promenade Hill Park in Hudson, the view will be altered, and would include a view of the stack. B1-9. From the area of the Rossman/Prospect Avenue Historic District, the cement plant and the dock facility can be seen, specifically, from the top of the Rossman Avenue hill and from the upper stories and backyards of the homes in that vicinity. B1-18. From the Village of Athens Riverfront Park and the Athens Lower Village Historic District, the cement facility and the dock will be visible. B1-42, B1-43, B1-44, B1-45, B1-47, B1-48. South of Athens on Route 385, there will be views of the plant and the dock. B1-49, B1-50, B1-51 On Columbia County Rte. 66 and Route 9H north of Claverack, which are rural roads with pastoral views, the stack will be visible. B1-74, B1-78. Hudson River Point 5, within the Columbia-Greene North SASS, and the Greenport Hudson River Conservation Area, within the same SASS, will have views of the plant in the background and far middle ground, respectively. B1-88, B1-90. Finally, from Olana's Cosy Cottage, the plant will be very visible. B1-102.

In some of these photos, the plant structures are not as noticeable due to distance. In other locations, such as Rte. 9, the many other commercial/industrial facilities make the facility appear less intrusive. B1-25, B1-27, B1-53. Moreover, in some of the photographs the viewer notes the old Atlas facilities that will be taken down as part of this project. See, e.g., B1-2; DEIS, IC Ex. 6, Figure 5-2. Nevertheless, there is no denying that from many sensitive receptors there will be a significant visual impact. The applicant does not skirt this issue. The DEIS states 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." DEIS, IC Ex. 6, p. 5-57. This is further borne out in the videotape of a second balloon test performed by the applicant that was provided to the ALJ by commenter Sarah Sterling. IC Ex. 61. The applicant's consultant was satisfied that because Ms. Sterling used her zoom lens on many occasions to highlight the presence of the balloons, this indicated that the facility will not be quite so visible. TR 1759. However, these balloons were only 10 feet in diameter while the structures at issue are much wider and more imposing. IC Exs. 61 and 61a-g; TR 1776.

The applicant maintains that its mitigation and offset proposals are adequate to overcome these impacts. TR 1920. SLC argues that the view from Olana will be improved because the Catskill silos will be removed. However, TOP responds that these facilities are much further from Olana then the Greenport project. SLC has taken steps such as moving the plant into the mine in order to reduce the visibility of the stack and surrounding buildings. However, as noted by Mr. DeWan, 200 feet of the stack will still be seen from Olana's Cosy Cottage at a distance of 3 miles; from the Greenport Conservation Area, the upper 313 feet will be visible at 2.1 miles; and along Rt. 385 in Athens, the upper 280 feet of the plant will be visible at a distance of 2.5 miles. Table 5-16 provides a summary of the cement plant visible elevations. DEIS, p. 5-51. The applicant maintains that the elimination of the plume from Catskill will also have a positive effect on the views from Olana; however, TOP disputes this by stating that from the vantage point of Olana, the Catskill plume is not as much of an issue. TR 1913-1914, 1950-1951.

The DEIS indicates in Table 5-2 that during daylight hours, the plume from the Greenport facility will be visible, on average, 38% of the time (in winter, 82%; in spring, 30%; in summer, 3%; and in the autumn, 50%). IC Ex. 6, p. 5-27. For 90% of the time, the plume would have a height plus length less than 1,968 feet. Id. According to Mr. DeWan, the removal of the old Atlas structures cannot be considered a quid pro quo, because the older facility has become a familiar part of the landscape. Moreover, with respect to the

Greenport plant, Mr. DeWan stated that at Olana, the viewer would be looking up at a structure up against the sky rather than down, compared to the Atlas structures, that are lower and somewhat obscured by vegetation. TR 1836. Compare, B1-102 and B1-103.

SLC has made efforts to minimize the impacts from its facility, particularly with an exit strategy that requires the removal of the structures upon closure. Draft permit, IC Ex. 12(a)(i), special visual condition 16. The issue becomes whether these efforts are sufficient to find that there will no longer be significant negative visual impacts stemming from the facility. This is a major point of contention among the participants to the issues conference, and one that should not be resolved short of an adjudicatory hearing. Mr. DeWan has explained how the mitigation is not sufficient and he maintains that "the visual impact [sic] that the plant will generate cannot and have not been mitigated." TR 1900. Mr. DeWan proposes to measure the adequacy of the mitigation and identify the viewer groups who are affected by the project and those affected by the offsets. He concludes that the project is incompatible with the existing landscape and land uses and substantially intrudes on significant receptors. TR 1941-1942.

Staff contends that the dismantling of the silos at Catskill is important because they are part of the southwest views from Olana and are currently the "fly in the soup." TR 1937. This offset, combined with eliminating obsolete structures at Greenport and the eventual decommissioning of that plant, are the measures that led staff to find the project visually acceptable. TR 1937-1939. Conceding that this is a "large project," the applicant argues that when mitigation is provided to the maximum extent possible as here, there is no need to investigate further. TR 1786. However, SEQRA and the specific precedent regarding visual impacts are at odds with this conclusion. ECL § 8-0109 provides that, when an agency determines to approve a project, it must make a finding that "consistent with social, economic and other essential considerations, to the maximum extent practicable, adverse environmental effects revealed in the environmental impact statement process will be minimized or avoided." In Lane, Deputy Commissioner Duncan found that the mitigation was not sufficient due to the project's impacts on the historic and scenic character of the community. He specifically cites to SEQRA's mandate that the "Department must identify and evaluate the project's potential adverse environmental impacts and determine whether they can be avoided or acceptably minimized or mitigated to the maximum extent practicable." [emphasis added.] Finding that the applicant was unable to avoid certain impacts related to visual and noise effects, he declined to issue the permit. While this decision did precede the visual impact guidance, the policy in no way detracts from that decision. The policy states, "[it is the burden of the applicant to provide clear and convincing evidence that the proposed design does not diminish the public enjoyment and appreciation of the qualities of the listed aesthetic resource." Visual Impact Policy, p. 8.

We reject the applicant's argument that when involved municipalities do not challenge the visual impacts, there is no issue for adjudication. There is no such line of demarcation in SEQRA. And while the guidance does state that local involved agencies are entitled to deference with respect to local resources, other than general statements of support for this project from the Town and Columbia County and to a degree from the City, there has been no specific presentation with respect to visual impacts. The Village criticizes the project based upon visual impacts in its *amicus* petition. IC Ex. 43. In addition, sites listed on the National and State Registers, the SASSs, and Olana which is a State park, have a regional significance that requires DEC to take a leadership role. The federal regulations concerning the NHL program support such a view: "the purpose of the National Historic Landmarks Program is to focus attention on properties of

exceptional value to the nation as a whole rather than to a particular State or locality." 36 CFR § 65.2(a). As Mr. Caffry noted, in Matter of Sour Mountain Realty, 1996 WL 566247 (Interim Decision, July 18, 1996), the Town of Fishkill strongly endorsed the proposed mining project. Even so, the Commissioner determined that visual impacts were an appropriate consideration in that application. While Mr. West contends that the intervenors in that matter had more well developed ideas with respect to proposed mitigation, that argument has no relationship to whether citizen groups may intervene on these issues in DEC permit proceedings.

With respect to mitigation, TOP maintains that potentially, there are other measures the applicant can employ, such as removing the kiln at Catskill and the power house at the Atlas site. TR 1790-1791. With respect to this latter structure, the applicant appears willing to remove that building in the event OPRHP does not require its preservation. TR 1791.

The applicant provided a Preliminary Aesthetic Mitigation Cost Estimate dated July 30, 2001, that sets out the estimated costs of the visual impact mitigation and offsets proposed by SLC. IC Ex. 99. SLC posited that the Department's guidance indicates that part of the demonstration of an effective mitigation strategy includes consideration of the monies expended on that mitigation by the applicant. TR 1763, 1786-1787, 1795. Mr. West interprets this guidance to mean that an expenditure of ten percent of the project costs equates to significant mitigation. TR 1795. The guidance poses a number of questions for staff to ask themselves when making a determination on the adequacy of mitigation. This includes a question that asks if the mitigation is insignificant. The guidance notes that one means to assess adequacy of mitigation is if the mitigation costs are less than 10%. Guidance, p. 8. But the guidance does not state that if mitigation costs are 10% or greater, mitigation is sufficient. Rather, it asks other questions such as whether the full mitigation menu was considered and whether those strategies selected will be effective. It is this latter query that is particularly germane to this dispute. At the issues conference, staff agreed that "[t]he conclusions . . . are the subject of what's in dispute here." TR 1848.

SLC argues that the Appellate Division and the Board on Electric Generation Siting and the Environment (Siting Board) have determined in the Athens Generating Co. (June 15, 2000) matter that the sole view from Olana that deserves protection is the southwest view.[78] TR 1632-1633, 1689-1690. SLC also maintained that the Siting Board's determination collaterally estopped TOP from arguing otherwise. Because it is the northeast view from Cosy Cottage, and potentially Ridge Road, that will be affected by the Greenport plant, SLC's arguments, if correct, would eliminate this issue. We agree with TOP that collateral estoppel does not apply in this matter. The facts in the Athens case and in this permitting matter are not identical as the facilities are of a different nature, are in different locations and therefore present different visual impacts. SLC's Greenport plant's visual impacts on Olana will be to the northeasterly views. In Athens, the plume was eliminated by the use of dry-cooling. And in Athens, the Hearing Examiners concluded that there would be no significant views of the facility under current conditions in contrast to this case in which there is no dispute that the facility would be seen from Cosy Cottage. R.D., Athens, p. 97. In Athens, a panel of landscape architects was employed to screen the simulations developed by the applicant. This panel concluded that there was no significant decrease in visual quality based upon the screening effect

78 While Athens was an Article X proceeding exempt from SEQRA, the Public Service Law provides an environmental impact review equivalent to Article 8 of the ECL. See, PSL § 168; Matter of Ramapo Energy Ltd. Pship., 2001 WL 470659, *2 (Decision, Apr. 4, 2001).

of topography and vegetation, the lower elevation or distance of the facility relative to most viewpoints, the impact-reducing effect of distance as well as other factors. R.D., Athens Generating Co. (Sept. 3, 1999), p. 73; see also, Ryan v. New York Telephone Co., 62 NY2d 494, 499-501 (1984).

SLC emphasizes that in Athens, the Siting Board and the Appellate Division determined that only the views from Olana to the southwest are worthy of protection. The Siting Board adopted the view of the Hearing Examiners in Athens that the north and northwest views were less important because the southwest views were more scenic due to the backdrop of the Catskill Mountains in particular. Athens, Siting Board opinion (June 15, 2000), p. 60. The Siting Board also states that "the insubstantial change in the north and northwest viewshed resulting from construction of the proposed facility does not constitute a significant adverse impact that would justify denial . . ." Id. See also, Citizens for the Hudson Valley v. NYS Bd. on Electric Generation Siting and the Environment, 281 AD2d 89 (3d Dep't 2001) (court acknowledged mitigation of visual impacts particularly elimination of plume and aviation warning lights). We read these rulings to mean that the Siting Board decision was based upon both the secondary importance of the north/north westerly views and the nature of the impacts. Given the variance of expert opinion in this permit proceeding with respect to the latter consideration, we find that a hearing is essential to provide the record necessary to make a determination on the visual impacts that will result from SLC's project.

The intervenors have also maintained their opposition to the elimination of the Becraft Mountain ridge. SLC has agreed to maintain this ridge as part of its settlement with the County. IC Ex. 101. But the applicant is not willing to make this agreement part of the MLUP or the permit conditions for this project. It is possible that the County's agreement would be subject to change without the benefit of an environmental review. The DEIS notes that the ridge will screen portions of the facility from view during the cement plant's tenure. DEIS, IC Ex. 6, p. 5-50. And, the intervenors also raise credible concerns about the impact that the elimination of this topographic feature would have on views from Olana and elsewhere. TOP Pet., IC Ex. 41, pp. 22-25; HVPC Pet. IC Ex. 39, pp. 19-20; FOH Pet., IC Ex. 40, p. 45. We find that the impact resulting from this action is properly the subject of an adjudicatory hearing.

As stated above, 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 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 (3) other historic sites that are registered or eligible for such listing in accordance with PHL § 14.09, and (4) 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 these resources.

TOP, HVPC, and FOH have employed experts in landscape architecture in presenting their petitions. In addition, FOH used the assistance of Mr. Bilotta to provide a visual simulation. IC Exs. 100a-100d. We do not dispute Mr. Bilotta's expertise in cinematic visual effects. However, there were sufficient potential discrepancies raised by the applicant with respect to the viability of his simulations, such as color and the

base accuracy, that, coupled with Mr. Bilotta's lack of expertise in the field of landscape architecture and visual assessment, the ALJs have not relied upon these simulations for the conclusions stated above. TR 1877-1879. Nor would we expect to have to address this offer of proof in the future.

Exit Strategy

Mr. McConville, counsel to CHP, wrote to ALJ Goldberger by letter dated August 27, 2001, informing the ALJ that CHP had not been able to come to an agreement with SLC with respect to closure of the facility. This matter is one of several that was raised by CHP in its petition for *amicus* status. IC Ex. 46. Generally, CHP has expressed its support for the project subject to certain additional conditions. Other than to provide general concerns with respect to the project in the nature of comments on the DEIS, CHP has not provided any specific information that would help define its proposed issues or explain how it has specialized knowledge that would assist this process. 6 NYCRR § 624.5(b). SLC and DEC staff have agreed to closure conditions that require dismantling of the facility. Draft permit, Decommissioning and Demolition 16, IC Ex. 12(a)(i).

Historic Resources

A number of petitioners raised the issue of the facility's adverse effects on the historic resources of this region of the State, arguing that the applicant had failed to establish that the project conformed with SEQRA in this regard. In addition, the petitioners claimed that, in the absence of an impact determination with respect to the project by the State's Office of Parks, Recreation and Historic Preservation (OPRHP), the ALJs cannot rule on the adjudicability of this issue. OPRHP has not yet made that impact determination. Each of these arguments is considered separately below.

SEQRA

SEQRA's definition of "environment" includes "objects of historic and aesthetic significance." ECL § 8-0105(6); see 6 NYCRR § 617.2(l) (defining "environment" to include "resources of . . . historic or aesthetic significance"). Section 617.7(c)(1)(v) of the SEQR regulations lists "the impairment of the character or quality of important historic, archaeological, architectural, or aesthetic resources" among the criteria for determining the significance of a proposed action. Several petitioners have argued that, given the magnitude of the project, the facility's effect on historic resources in the region should be adjudicated.

The Preservation League of New York State and the National Trust for Historic Preservation filed a petition for *amicus* status, pointing out that the National Trust had included the Hudson River Valley in its year 2000 list of "America's 11 Most Endangered Historic Places" due to concerns about proposed industrial development in the region. The petition went on to note that there are fewer than 2,300 National Historic Landmarks in the United States, and 46 of those Landmarks are concentrated along the 125-mile stretch of the Hudson River within which the project is located.

The Coalition's expert, Mr. Neumann, stated at the issues conference that there was an unusually high concentration of historic properties within the immediate geographic area of the project. TR 1973. As a result, the area was designated as a National Heritage Area in 1996, and the Hudson River was designated an

American Heritage River in 1998. TR 1973-74. Mr. Neumann noted that the Hudson River Valley has the highest concentration of National Historic Landmarks in the country. TR 1987. The Village of Athens observed that the Village is listed on the National Register, and that the Village believes that the project will impact its viewshed and therefore its historic character. TR 1958, 2015.

The Preservation League and National Trust's joint petition observed that the DEIS concedes impact to over eighty historic sites, including Olana, and that Section 7.5.2 of the DEIS states that the plant would result in "introducing a major, new industrial facility into a setting of essentially rural historic resources." According to these petitioners, the administrative record is deficient without the preparation of a supplemental DEIS that would comprehensively address the project's detrimental effects on the historic community character of the area, and offer mitigation beyond that contained in the DEIS. Moreover, the petitioners take issue with the applicant's statement in the DEIS that increased tax revenues from the project will permit local communities to invest in historic resources, and maintain that the project will be a disincentive to historic tourism and may render such investment futile. The petitioners argue that the "no action" alternative must be selected, because the limited benefits of the project will not outweigh the adverse effect on the region that would result from construction of the plant at an historically and culturally sensitive location.

In its petition, the Coalition contended that the DEIS fails to adequately describe and explain the proposed project's impacts on significant cultural and historic resources in the region, and that the DEIS does not provide a full description of those resources. The Coalition pointed out that the Hudson has been designated as an American Heritage River, and the Hudson River Valley has been designated as a National Heritage Area. According to the Coalition, the proposed project will conflict with cultural and historic resources in the area, including Olana; the Plumb-Bronson house (eligible for designation as a National Historic Landmark); a National Historic Landmark District on the east side of the Hudson, including all towns from Clermont southward to Staatsburg; Lindenwald (the retirement home of Martin Van Buren); the Luykas Van Alen House; Mount Lebanon Shaker Village; and Steepletop (the home of Edna St. Vincent Millay). Other locations listed in the Coalition's petition included the Hudson Historic District, the Front Street/Parade Hill/Lower Warren Street Historic District, the Rossman-Prospect Avenue Historic District, and the South Bay area including Mount Merino.

In addition, the Coalition pointed out the architectural and historic significance of the Village of Athens, the Town and Hamlet of Claverack, and the Town of Greenport. The Coalition asserted that the community's character is defined and relies upon the region's historic and cultural resources, and that the mitigation offered by SLC would not adequately preserve the historic character and fabric of the region or the individual properties that would be affected by the project. According to the Coalition, the DEIS did not adequately address the effects of air pollution, blasting, noise, truck traffic and degradation of the viewshed on the region's historic and cultural resources, or the detrimental effect the project will have on investment in the reclamation and restoration of historic buildings.

At the issues conference, the Coalition offered Ms. Ruth Piwonka, who had developed a "Working List of Historic Resources Within Five Miles of the Proposed St. Lawrence Facility," which was marked as IC Ex. 106A, as well as photographs accompanying that exhibit, which were marked as IC Ex. 106B. TR 1974-75. IC Exs. 106C through 106F consisted of USGS quadrangle maps. Various localities on the maps were numbered to correspond with the properties on the list. Ms. Piwonka opined that the discussion of

historic properties in the DEIS was "error-filled," and does not provide a sufficient context to understand the registered properties included in the DEIS listing. TR 2013. The Coalition argued that the DEIS was deficient in its consideration of the adverse impacts on community character, and that community character "is founded in large measure on the historic resources that are found in the area of the project." TR 1979-80.

Mr. Neumann explained that the American Heritage River program is intended to encourage heritage tourism in a particular region, with trips of three to four days for tourists seeking authentic experiences in an ongoing community. TR 1982. There are eighteen National Heritage Areas in the nation committed to preserving local culture. Id. According to Mr. Neumann, the region's "distinctive national story" is based on the local heritage resources and the historic landscape, not merely the historic resources defined in the DEIS. TR 1982-83. Mr. Neumann cited to the Secretary of the Interior's guidelines, and argued that individual historic properties must be understood in an historic context, including other similar properties in the area, and significant broad patterns of development in the locality where the historic properties are found. TR 1983. Mr. Neumann also stated that the Hudson Valley has between 1.5 and 2 million heritage tourists per year, and that heritage tourism generates between $140 to $200 million annually. TR 2009.

At the issues conference, the applicant argued that National Heritage Area and American Heritage River designations set forth only a general balancing goal or objective, and that while both programs encourage preservation, they also take into account economic development concerns. TR 1990-91. The applicant contended that neither of the programs led to the implementation of any federal regulations, and that the policy goals or objectives of those programs were not standards that the proposed intervenors could rely upon to raise a substantive and significant issue. TR 1991.

The Coalition responded that the Department has an independent responsibility under SEQR to assess the potential negative impact of the project on historic resources, and cannot rely on OPRHP's advisory role to complete the record in this matter. TR 2004. While the Department may look to OPRHP for guidance as to potential mitigation, the Coalition asserted that OPRHP's July 27, 2001 letter commenting on the project and identifying certain deficiencies supports the petitioner's claim that the DEIS is lacking in its treatment of the project's impacts in this regard. TR 2005. OPRHP's letter is discussed in greater detail below.

RULING: Based upon the offers of proof, the issues proposed for adjudication with respect to historic resources are not independent of other issues that have been deemed to be adjudicable; specifically, air pollution and visual impacts. See, Matter of Lane Construction, 1996 WL 33140734, *3 (Apr. 22, 1996) (visual impact on historic resources was not a separate issue for adjudication; such impacts would be considered as part of visual impacts upon the overall character of the community). Therefore, impacts on historic resources will be considered in the context of those other issues.

The offers of proof in connection with this issue did not demonstrate how those historic resources would be affected independently of, for example, visual or air pollution impacts. Ms. Piwonka's statements and the exhibits introduced in connection with her presentation included some properties or areas that were not listed on the national or State registers. Nevertheless, the DEIS contains information concerning those properties. In addition, the offer of proof as to the effects of the project on historic properties was speculative, and related largely to visual impacts.

In addition, it should be noted that, as part of the project, the applicant has agreed to restore the Heermance-Jones house. If the OPRHP determines that the stock house, the powerhouse, and/or the existing conveyor system are historic structures, those structures may be stabilized and maintained by SLC. DEIS at 7-37.

SHPA

The State Historic Preservation Act ("SHPA") (Article 14 of the New York State Parks, Recreation and Historic Preservation Law) is administered by OPRHP. Section 14.09(1) of SHPA requires the Department to consult with OPRHP whenever

> it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archaeological, or cultural property that is listed on the national register of historic places or property listed on the state register or is determined to be eligible for listing on the state register by the commissioner.

"Adverse impacts" are defined, but not limited to:

I. destruction or alteration of all or part of a property;
II. isolation or alteration of its surrounding environment;

III. introduction of visual, audible or atmospheric elements that are out of character with the property or alter its setting; or

IV. neglect of property resulting in its deterioration or destruction.

The agency must "fully explore all feasible and prudent alternatives and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property." Id. The statute goes on to provide that "[w]hen a project is being reviewed pursuant to section one hundred six of the national historic preservation act of 1966, the procedures of this section shall not apply and any review or comment by the commissioner and the board on such project shall be within the framework or procedures of the section one hundred six review." SHPA § 14.09(2).

By letter dated July 27, 2001, OPRHP provided comments on the project to the Department. IC Ex. 97. OPRHP commented that the Heermance-Jones House, the former stock house, and the railroad bridge are eligible for listing in the State and National Registers. With respect to archaeology, OPRHP indicated that it was still reviewing the reports concerning the Hudson River dredging and new dock facility, and the conveyor area and Heermance-Jones house. According to OPRHP, "there are a number of archeological sites that have been identified and are currently unevaluated within [SLC's] Greenport property. Although existence of these sites is known, insufficient testing and evaluation makes it impossible to assess their importance or significance at this time." IC Ex. 97, p. 2.

OPRHP noted that a comprehensive historic building survey had not been completed, and requested visual simulations from the Oliver Bronson house. In addition, OPRHP indicated that additional mitigation in connection with the project's visual impacts might be appropriate, and recommended that the historic building survey should be done within a five-mile radius of the plant, as opposed to the three-mile study radius in the DEIS.

By letter dated September 12, 2001 from the ALJs to OPRHP, the ALJs requested further information as to timing of the impact determination. See IC Ex. 143. OPRHP responded on October 3, 2001, noting that because the project was being reviewed pursuant to Section 106 of the National Historic Preservation Act, the § 14.09 procedures were not applicable. See IC Ex. 162. The letter went on to state that

> "any review or comment by the Commissioner shall be within the framework of §106 not §14.09. It is our understanding that this project will require an Army Corps permit so we anticipate providing comments to the Corps at a later date. When the Commissioner, acting as the State Historic Preservation Officer, reviews the project pursuant to her responsibilities under §106, we will provide you with a copy of her comments."

In summary, because the project will require a federal permit from the Army Corps, OPRHP's review takes place pursuant to the federal statute.

The Preservation League and National Trust's joint post-issues conference brief contended that the Department's failure to consult with OPRHP before deeming the application complete was arbitrary and capricious, and contrary to law. The petitioners cite to 6 NYCRR

§ 621.3(7), which provides:

> Where section 14.09 of the Parks, Recreation and Historic Preservation Law (New York Historic Preservation Act of 1980) requires that the department obtain a determination by the Office of Parks, Recreation and Historic Preservation on the impact of a project on properties listed or eligible for listing on the State Register of Historic Places, the application is not complete until that determination has been made.

The petitioners asserted that although the Section 106 consultation may occur in the future, that process does not satisfy SEQRA's "hard look" requirement, because the agency with primary jurisdiction over historic resources has not provided the benefit of its expertise.

Similarly, TOP's petition for party status raised issues as to whether the applications should be denied because staff and the applicant had not complied with SHPA, and whether the hearing should be adjourned pending a determination by OPRHP of the project's adverse effects upon Olana and its setting. Those arguments were reiterated in its post-issues conference brief, where TOP asserted that the issues conference should be adjourned until SLC provides OPRHP with the information requested, and the requisite determination is made.

At the issues conference, the applicant detailed the process that was undertaken to identify historic and cultural resources in the project area, evaluate those resources for potential impacts, and mitigate the impacts identified. TR 1992. A three-mile radius study area was selected, and, according to the applicant, OPRHP agreed when the study was undertaken in January 2000 that the three-mile radius was the appropriate range. TR 1993. The applicant's consultant visited OPRHP's offices and reviewed files there, met and consulted with OPRHP staff in compiling a list of historic resources, and performed additional research with OPRHP personnel. TR 1993. The final list, which appears in the DEIS at Table 7-2, includes 49 historic resources. TR 1993-94. The undertaking focused on national and state historic properties that are listed or eligible for listing. TR 1994.

The applicant then expanded the study area to include a five mile radius from the project site. TR 1994. Additional resources were identified within that area. TR 1995. OPRHP was apprised of this additional survey. Id. The applicant stated that during this survey, and as part of the visual analysis, the applicant's consultants used OPRHP's universal list of historic resources. Id. According to the applicant, the DEIS was prepared in consultation with OPRHP, which also commented on that document. TR 1995-96. Moreover, counsel for the applicant noted that properties Ms. Piwonka contended had not been included in the DEIS were in fact part of that document. TR 2017-18.

The Village of Athens pointed out at the issues conference that a memorandum of understanding was entered into among the Army Corps, the State Historic Preservation Office, and Athens Generating to provide funding to address the negative impacts of the Athens Generating Plant. TR 2015. The Village took the position that the applicant's facility is "far larger, far more visible, and far closer" than the Athens Generating facility. Id.

Staff stated that if OPRHP develops a mitigation strategy that would lend itself to a draft permit condition, such a condition would be added. TR 2016-17. Staff also indicated that it would follow up with OPRHP. TR 2017.

Staff's post-issues conference brief asserted that findings with respect to impacts on historic resources can be made without further input from OPRHP, and that while the Department must consult with OPRHP at some time before a final decision is made with respect to the application, the Department is primarily responsible for ensuring that adverse impacts to registered or eligible properties are mitigated or avoided. According to staff, the Department "must articulate a factual basis for its determination regarding the impact that a project will have on historic resources, but may disagree with OPRHP as to whether the impacts are so severe as to warrant permit denial." IC Ex. 139, at p. 44.

The applicant's post-issues conference brief pointed out that a number of properties on the list submitted by the proposed intervenors were not, in fact, listed on either register, and consequently, need not be considered. In addition, the applicant contended that even though OPRHP had not issued an impact determination letter, the record in this case can and should be held open. The Coalition argued that the Department's SEQRA findings with respect to impacts on historic resources and possible mitigation cannot be made until after OPRHP completes its SHPA review. In its reply brief, the Coalition claimed that the SEQRA and historic resource reviews must be conducted in conjunction with one another, and that the Department should not have declared the application complete without OPRHP's impact determination. Moreover, the Coalition argued that SLC's failure to include in the DEIS properties which might be eligible for listing allows SLC to avoid the SHPA process, since eligibility determinations often flow from the environmental review process. TOP's post-issues conference brief maintains that OPRHP's determination is a jurisdictional prerequisite, and must be issued before the hearing may proceed.

RULING: The lack of an impact determination by OPRHP at this stage does not require that these proceedings be adjourned until OPRHP makes that determination, particularly in light of our decision that impacts to historic structures can be considered in conjunction with other issues (for example, visual impacts and impacts on community character). Following the example set in Matter of Lane Construction Co., 1996 WL 33140733, *3, we shall hold the record open for OPHRP's impact determination, and issue a final ruling with respect to historic resources once that determination is received, particularly in light of OPRHP's continuing involvement in the project, and the consultation between the applicant, staff and OPRHP with respect to the review of historic resources.

Community Character

In Chinese Staff & Workers Ass'n v. City of New York, 68 NY2d 359, 365 (1986), the New York Court of Appeals noted that the term "environment" in the SEQRA statute and regulations is broadly defined, and "expressly includes as physical conditions such considerations as 'existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.'" See, ECL § 8-0105(6); 6 NYCRR § 617.2(l). The Court noted that

> the impact that a project may have on population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. That these factors might generally be regarded as social or economic is irrelevant in view of this explicit definition. . . . [p]opulation patterns and neighborhood character are physical conditions of the environment under SEQRA and CEQR regardless of whether there is any impact on the physical environment.

68 NY2d at 366. The SEQRA regulations provide that "creation of a material conflict with a community's current plans or goals as officially approved or adopted" or "the impairment . . . of community . . . character" are significant adverse effects in the context of a significance determination. 6 NYCRR §§ 617.7(c)(l)(iv) and (v).

Several petitioners asserted that community character issues should be adjudicated because the project will have significant adverse effects which were not objectively assessed in the DEIS. The applicant responded with two arguments: (1) that community character cannot be considered as a "stand alone" issue, but must be tied to some other environmental impact in order to be adjudicable; and (2) that the affected municipalities, whose intent is evidenced by local zoning ordinances, land use plans, and prior uses, are the only participants who may raise the issue of community character for adjudication. TR 1485-86, 1496. SLC's post-issues conference reply brief reiterated the applicant's arguments that local municipalities, not special interest groups or individual citizens, set the standard for what constitutes community character. According to the applicant, community character is established through local zoning laws, ordinances, land use plans, and prior and existing uses, and objective compliance with these laws, plans, and standards is "evidence of consistency with community character (as a stand alone issue) under SEQRA." IC Ex. 151a, pp. 16-17.

At the issues conference, the applicant observed that the Town of Greenport supported the project. TR 1486, 1496. The Town of Greenport submitted a "Post Issues Conference *Amicus* Brief" withdrawing its petition for full party status, and seeking *amicus* status with respect to the community character issue. The Town stated that, given the mixed uses presently found in the Town, the SLC project would be consistent with the Town's character. The Town maintained that the Town's character was defined by the Town's Comprehensive Land Use Plan, which was adopted in 1971, as well as existing and prior uses, and concluded that the proposed facility would not conflict with that character.

The applicant noted at the issues conference that the City of Hudson did not propose community character as an issue for adjudication, while Columbia County and the Columbia Hudson Partnership had filed in support of the project. TR 1497-98. The County of Columbia filed a post-issues conference brief describing the diverse character of the area, and concluded that the facility would be consistent with that character, because the project would not represent a new use. In addition, the County maintained that the County has a history of mineral extraction facilities being located within its borders, and "from a long-range perspective, Columbia County has a heritage of industrial uses that pass from the scene, as this one eventually will, only to be later regarded as part of the County's valued history." IC Ex. 141 at p. 2.

The County also noted that some facilities would be dismantled as part of the project, that the project contemplated decommissioning as part of the exit strategy, and that historic structures such as Olana and the Plumb-Bronson house would long outlive the useful life of the SLC project, which would be a relatively short fifty years in the County's long history. In addition, the applicant marked for identification a letter from Pierre Gontier, Chair of the Columbia County Environmental Management Council, in which Mr. Gontier stated, from his own perspective, that the proposed location was desirable because it would cause no loss of green space. See, IC Ex. 96.

The applicant's post-issues conference brief contended that community character could not be adjudicated in this case, because none of the affected municipalities found the project would negatively affect the existing and prospective character of their communities, and the project complies with all applicable zoning and land use plans. According to the applicant, determinations as to community character should be the province of local government, through its legislative function. The applicant maintained that SEQRA does not alter the jurisdiction between or among state or local agencies, and purely local concerns are not adjudicable under the statute. In its brief, the applicant noted that in administrative decisions where community character was identified as an issue, that issue was raised by an affected municipality. The applicant stated at the issues conference that it was not aware of any decision in which community character was adjudicated or found to be a basis for project denial absent opposition from local elected officials, and reiterated that no elected legislative bodies had indicated that the SLC project would adversely affect community character. TR 1545-46.

The applicant's presentation at the issues conference also focused on the lack of adjudicable environmental impacts to which community character could be related. TR 1543-44. According to the applicant, consideration of impacts from community-character related issues (e.g., noise and visual) could extend beyond the immediate boundaries of the municipality in the context of a review under SEQRA, but community character, by itself, was a question committed to the discretion of municipal elected officials, and ascertained by reference to local land use plans, zoning, and other legislative articulations of a municipality's intent.

The applicant also asserted that the project would not be inconsistent with the existing community character. In support of that contention, the applicant (1) pointed to the industrial and commercial properties that currently exist in the area, (2) noted that the project would be built at the site of an existing mine, and (3) noted that the dock facilities would be located in a part of the City of

Hudson that is zoned for industrial use. TR 1488-92. The mining operations will continue at the site, whether the project is approved or not. TR 1490. The applicant took the position that, in determining the character of the community, the inquiry centers on the community's existing nature, and does not allow for speculation as to the future development of the community's identity or direction. TR 1488. In addition, the applicant argued that all community-character related issues, such as noise and traffic, have been fully offset or mitigated to the maximum extent practicable. The applicant contended that the proposed intervenors' offers of proof consisted of differences of opinion as to which community values should be protected, and thus must fail.

The Coalition disagreed with the applicant, arguing that the municipality in which a project is located is not the only participant that can raise issues with respect to community character. TR 1509. The industrialization currently found in the area, according to the Coalition, is not representative of the magnitude and intensification of industrial use that this project will bring to the region. TR 1513. The Coalition's post-issues conference brief expanded upon that argument, citing to the Appellate Division's decision in Lane Construction Corp. v. Cahill, in which the court upheld the Deputy Commissioner's decision to deny a mining permit due to the project's significant, unmitigatable impacts on the historic and scenic character of the community. 270 AD2d 609, 611 (3d Dep't 2000).

In its petition, the Coalition stated that the DEIS "artificially circumscribed" the affected community in evaluating impacts to community character. IC Ex. 40, p. 14. The Coalition argued that the Mid-Hudson River Valley region as a whole should be included in that evaluation. According to the Coalition, the project would represent a dramatic intensification of industrial use in the area, according to the Coalition, and is at variance with the City of Hudson Vision Plan, the Village of Athens' Local Waterfront Revitalization Plan, and the New York State Coastal Policies. With respect to the City of Hudson's Vision Plan, the applicant pointed out that the City had made clear that the plan had not been adopted, and that in any case, the plan acknowledges that the waterfront parcel owned by SLC is used for industrial purposes, and that this use should be encouraged in the future. TR 1495.

The Coalition contended that matters relating to economics should also be addressed in any discussion of community character. At the issues conference, it was agreed that the two topics would be considered jointly. TR 1479.

The Coalition's expert, John Shapiro of Abeles Phillips, spoke at the issues conference. The Coalition's petition indicates that Mr. Shapiro is an expert in land use, real estate, economics and planning. Mr. Shapiro took that position that the entire viewshed should be considered in evaluating the impacts of the project on community character. TR 1516. Mr. Shapiro stated that the facility would bring a number of changes, specifically, that the physical plant would be significantly expanded, the dock facility would be in almost constant operation, and manufacturing in addition to mining would be part of the project. TR 1517. Mr. Shapiro emphasized that the facility would be the largest cement plant in the State, and would represent a change in the scale of local industry. TR 1517-18. According to Mr. Shapiro, the zoning ordinance is more properly read to characterize the site as being situated in a light industrial zone; consequently, the entire facility would run counter to

the intent of the City. TR 1519-20. Mr. Shapiro went on to note that generally, a zoning ordinance contemplates a hierarchy of industry, and thus disputed the inference that because the Town of Greenport had approved industry in the past, the Town favored industry of all sorts. TR 1520.

Mr. Shapiro stated that, in general, the communities in the Hudson Valley have been moving away from traditional industry for the last twenty-five years, toward a more diversified economy in which tourism and second home purchases play a larger role. TR 1521-22. According to Mr. Shapiro, communities such as Hudson and Athens rely upon the visual appeal of the area, its historic fabric and texture, its pastoral setting, attractions such as Olana, and general quality of life, a community character which will be jeopardized by the plant. TR 1522-23.

Finally, Mr. Shapiro noted that the project would jeopardize smaller investments and investments in historic preservation in favor of one large undertaking. TR 1523-35. Mr. Shapiro stated that the project should be evaluated taking into account the use, the intensity, and its proximity to the downtown Hudson area. TR 1529. On rebuttal, the applicant dismissed the Coalition's expert's statements with respect to the local zoning code, as well as the Coalition's offer of a survey of antique dealers which indicated that, if the project went forward, there was a high likelihood that one in four dealers would leave the Hudson area. TR 1547-48.

The Coalition's reply brief argued that local land use plans and zoning are only one factor to be employed in a SEQRA analysis of impacts to community character. According to the Coalition, the SLC project impacts are regional, statewide, and national, given the size of the project and the national prominence of the historic resources that will be affected. Given this, the Coalition asserted that "consistency or compliance with national, state and regional designations and plans must be also be considered in the community character analysis." IC Ex. 153, pp. 8-9.

Similarly, NRDC's post-issues conference brief argued that adjudication with respect to the issue of community character was required, because, in its view, the central issue in this case is whether the region should be subject to the disruption of scenic vistas and the introduction of a major new industrial facility into the area. According to NRDC, Mr. Shapiro's report on community character (which, in NRDC's view, should be more accurately titled "regional fabric"), as well as the other presentations made by the Coalition at the issues conference outweighed the unsworn, unsubstantiated arguments of SLC's counsel. NRDC argued that SLC's claim that the project "will not be seen or experienced as a change of use and the introduction of major industrialization into the area is fallacious on its face and contrary to common sense." IC Ex. 135, p. 15. Finally, NRDC asserted that the inquiry into community character cannot be limited "to impacts on, much less the attitudes of, municipalities that lie within the region." Id. at p. 29-30. According to NRDC, groups like the Coalition have a

sufficient interest to raise and seek adjudication of the regional impacts described by Mr. Shapiro.

The Preservation League and the National Trust's joint *amicus* petition argued that the DEIS contained no analysis of the project's potential to alter community character, or the effect the project will have on tourism related to the area's historic resources. According to these petitioners, historic tourism is a critical element of the area's community character, and will be endangered by expanded mining operations. The petitioners argued that impacts on community character must be considered because the project will amount to an "open invitation to local industry to exploit the same resources." IC Ex. 49, pp. 15-16. The Preservation League and the National Trust's joint post-issues conference brief contended that SEQRA's concern with community character transcends municipal boundaries. These petitioners pointed out that in Chinese Staff & Workers, the seminal case dealing with this impact under SEQRA, the issue of adverse impacts of a proposed condominium on community character was raised by a not-for-profit corporation, consisting of restauranteurs and garment workers who lived and worked in Chinatown.

At the issues conference, FOH joined in the Coalition's comments, and stated that while it had not identified community character as a separate and distinct issue, that issue was implicitly included in other issues FOH raised, including visual, noise, lighting, and air pollution impacts. TR 1531-32. FOH argued that the existing cement plants in Cementon and Catskill were more properly the enclave of industrial activity of this character, rather than the economy of Hudson and Greenport, which it said is not compatible with a heavy industrial presence. TR 1532-33.

Staff took the position at the issues conference that the applicant had established an appropriate study area, and noted that the project would be located entirely in an industrial zone. TR 1538. With respect to river access by the public, staff stated that the Lookout Point proposal would increase that access, and that the project would have no effect on the City's plans for development in other areas of its waterfront. TR 1539. In addition, according to staff, there was no offer of proof to show that revitalization of the City would be negatively affected, or that property values would decline, if the project is approved. TR 1539.

Staff's post-issues conference brief asserted that the proposed intervenors did not represent the community as a whole. Staff also contended that the proposed use is consistent with prior uses, and that none of the affected communities had taken steps to change zoning or land use plans in response to the proposed facility. Staff deferred to the municipalities, and pointed out that the Town had not adopted a zoning ordinance, and that the project did not conflict with the City's zoning ordinance. Staff's post-issues conference reply brief echoed The applicant's arguments, asserting that where there is a dispute as to which community values deserve protection, the decision maker should look to existing local laws, zoning ordinances and land use plans to ascertain the community's intent. According to Staff, a petitioner must establish that a proposed project conflicts with a community's stated plans in order to raise an adjudicable issue.

After the issues conference had concluded, the Village of Athens advised the ALJs that the Department of State had approved the Village's Local Waterfront Revitalization Plan. IC Exs. 145, 147.

RULING: The applicant's view that community character cannot be adjudicated, unless it is tied to another adjudicable environmental impact, is too restrictive. The court's holding in Chinese Staff and Workers makes clear that "community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis." 68 NY2d at 359, 366. As stated in Matter of Palumbo Block Co., 2001 WL 651613, *3 (Interim Decision, June 4, 2001), "the issue of community character may intertwine and overlap with issues such as noise, aesthetics, traffic and cultural resources, and a commissioner's final determination may "necessarily involve a judgment that integrates all of the relevant facts with respect to all of those issues. . . . the issue cannot necessarily be viewed in isolation and may include a myriad of diverse components" (citing Matter of Whibco Inc., 1998 WL 389014, *3 [Interim Decision, June 15, 1998] [community character, noise, visual impacts and traffic tend to overlap; final determination "will necessarily involve a judgment that integrates all of the relevant facts with respect to all of those issues]); Matter of Lane Construction Co., 1998 WL 389019, *2 (Decision, June 26, 1998) (project's impacts on the historic and scenic character of community, including visual and other impacts, could not be mitigated and were unacceptable).

Moreover, the applicant's contention that community character can only be raised by an affected municipality is not supported by case law. For example, in Chinese Staff & Workers, the issue was not advanced by a municipality, but by a citizen's group. As a result, we do not find it necessary to consider the arguments regarding standing which were raised by a number of proposed intervenors in the post-issues conference briefs on this issue. Unquestionably, adopted local plans are afforded substantial deference in ascertaining whether a project is consistent with a community's plans and goals. Matter of American Marine Rail, 2000 WL 1299571, *65 (Issues Ruling, Aug. 25, 2000) (finding that community character not adjudicable where project conformed with officially adopted plans such as zoning and waterfront revitalization plan)[79]. See Matter of Dailey, Inc., 1995 WL 394546, *7 (Interim Decision, June 20, 1995) (noting that "the existence of a local zoning ordinance is not a prerequisite to raise an issue of community character. 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"). Nevertheless, the applicant would have us articulate a test which is unduly narrow, arguing that such plans, or the position of the elected officials of a municipality, or even prior uses, are the only relevant evidence on this issue.

The decisions cited by the applicant are not to the contrary. For example, while the commissioner determined in Palumbo Block that adopted local plans "*can* serve as 'evidence of a community's desires for the area and should be consulted when evaluating the issue of community

79 American Marine Rail is factually distinguishable from this case. AMR dealt with a proposed facility that would be sited in an area of the Bronx that was predominantly industrial in character. The proposed intervenors in that case argued that the project would add to economic blight, create health hazards, eliminate access to the waterfront and open space and discourage more "sustainable" local development (AMR, 2000 WL 1299571, *63). Nevertheless, it was undisputed that the area was zoned for heavy industry. Planning documents introduced as exhibits (for example, the Plan for the Bronx Waterfront, were not officially adopted policy, and also emphasized "the revitalization of the working waterfront." Id. at 64.

character as impacted by a project," 2001 WL 651613, * 2 [emphasis supplied; citations omitted]), that decision does not state that such plans are the only evidence of those desires. The applicant points out that, in the administrative decisions where the issue of community character was deemed adjudicable, the issue was raised, "at least in part," by an affected municipality (citing Palumbo Block, supra; Lane, supra; Whibco, 1996 WL 33141599 [Issues Ruling, Apr. 26, 1996]; Amenia Sand & Gravel, Inc., 2000 WL 1207724, * 7 [Supplemental Issues Ruling, Aug. 10, 2000]; Matter of Dailey, Inc., 1995 WL 394546, *7 [Issues Ruling, June 20, 1995]). The applicant goes on to note that in the instances where the issue was not found to be adjudicable, community character was not raised by an affected municipality, or the municipality failed to make an adequate offer of proof (citing American Marine Rail, supra; Matter of Dailey, Inc., 1995 WL 394546 [Interim Decision, June 20, 1995]; Matter of Hyland Facilities Assocs., 1992 WL 1362374 [Issues Ruling, June 23, 1992]; Matter of Peckham Materials, 1993 WL 1480919 [Issues Ruling, Feb. 12, 1993]). It does not necessarily follow, however, that an affected municipality is the only participant that can raise the issue.

Despite the analysis set forth above, 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, the City, and the Village of Athens (as noted, the Village's LWRP was recently approved by the Department of State).

Economic Impacts

Under SEQRA, economics are relevant to a determination of significance. The statute requires an inquiry into "whether or not a proposed action may have a significant effect on the environment, taking into account social and economic factors to be considered in determining the significance of an environmental effect." ECL § 8-0113(2)(b). However, purely economic impacts are not adjudicable. Matter of Sithe/Independence Power Partners, 1992 WL 406387, *5 (Interim Decision, Nov. 9, 1992) (impacts of concern were purely economic; adverse economic impacts that are unrelated to environmental impacts are not within SEQRA's purview (citing Hyland); Matter of Hyland Facility Assocs, 1992 WL 290000, *4 (Interim Decision, Aug. 20, 1992) (potential loss of revenue derived from tourism not a community character issue, but an economic consideration which was not adjudicable). Nevertheless, "impacts which also have economic implications should be discussed in the EIS. For instance, changes to a community's infrastructure and the associated costs would typically be discussed under anticipated impacts." DEC, *Final Generic Environmental Impact Statement Including Final Regulatory Impact Statement and Final Regulatory Flexibility Analysis for Revisions to 6 N.Y.C.R.R. Part 617* (Feb. 16, 1987), at p. 36.

In its petition, FOH asserted that the DEIS overstated the economic benefits of the project, while understating the applicant's property tax obligations. Similarly, the Town of Greenport's petition argued that the future real property tax assessment on the project site was grossly understated. According to FOH, only one additional job would be created, and in fact, skilled workers

would be unlikely to relocate to the area because of the project's scale and adverse environmental effects.

FOH also contended that the DEIS incorrectly characterized the projected annual local input into the economy, as well as the economic value of the construction phase of the project, asserting that the actual input and value would be much less. According to FOH, there are not enough skilled construction laborers in the area to meet the demand during the construction period, and, in any event, that period will likely last only about two years. Moreover, FOH argued that skilled workers who demand higher pay would be reluctant to relocate to a community where the quality of life had been adversely affected by the project.

The Coalition's position was that the project would affect residential areas, roadways and public waterfront areas, and would hinder revitalization efforts. As a result, the region's economic base would be undermined, because the project would adversely affect tourism, second home ownership and the likelihood of businesses that rely upon the region's historic fabric and quality of life relocating to the area. Moreover, according to the Coalition, spending would be refocused on Columbia County, which would detract from Greene County's economy. The Coalition argued that the DEIS overestimated the fiscal benefits, and claimed that the project would weaken the property market for historic structures. As a result, efforts to restore those structures would suffer. The Coalition also referred to a survey done among the antiques dealers in Hudson, which indicated that one out of three of the antiques dealers surveyed would be inclined to move their businesses from the City of Hudson if the project were approved and constructed.

The Coalition argued that economic benefits asserted by an applicant with respect to a project become part of the balancing process undertaken pursuant to SEQRA. TR 1510. FOH took the position that, inasmuch as significant adverse effects from the project had been identified, the question of economic benefits comes into play. TR 1530. FOH asserted that it was unclear how the economic benefits set forth in the DEIS would come to the area. TR 1533-34. ALJ Goldberger questioned FOH's expert, Mr. Pauls, as to the basis for the projections in FOH's petition. TR 1536. FOH's petition indicates that Mr. Pauls is the managing partner of Robert B. Pauls, LLC, a real estate and planning consultant firm. Mr. Pauls responded that the numbers were taken from the DEIS itself, and observed that, in his view, the net gain in employment from the project would be minimal. TR 1537.

The Olana Partnership also addressed the issue of economics in its petition, stating that the advantages of the project did not outweigh its adverse effects, because there would be little or no net increase in employment, and there is no shortage of cement that might justify approval of the project. At the issues conference, counsel for TOP provided current estimates of the number of visitors to Olana, and noted that, with the implementation of Olana's comprehensive plan for the landmark, visitor numbers are projected to increase by 100,000 over the present annual number of approximately 125,000 visitors per year. TR 1501. Olana's counsel argued that improperly sited industrial facilities can have a negative effect on tourism, and clarified that TOP viewed the economic effects of the project as a factor to be weighed in considering visual impacts. TR 1502.

TOP contended that, assuming that the project's adverse effects had been minimized to the

maximum extent practicable, economic factors must be then be considered. TR 1541. On rebuttal, The applicant argued that any ruling on economic impacts should be deferred until after a determination has been made that there are adverse environmental impacts that have not been mitigated to the maximum extent practicable. TR 1549-50. According to the applicant, environmental impacts must be balanced with economic benefits only where there such impacts are found and cannot be mitigated. TR 1551.

As noted above, at the issues conference, counsel for the Coalition stated that economics relate to the overall issue of community character. TR 1479. The applicant took the position that purely economic impacts were not adjudicable, pointing out that issues relating to property tax assessments were not properly considered in this forum. TR 1504-05. The applicant noted further that the County supported the project, because of the influx of money into the community that was expected, the increase in the property tax base, and SLC's intention to provide corporate sponsorship to charitable and non-profit undertakings within the County. TR 1507. The County's petition stated that, from an economic standpoint, the SLC facility would have a positive impact. BRPC's petition claimed that the project would limit economic development in neighboring Massachusetts, because other projects would be unable to obtain air permits. The Planning Commission did not attend the issues conference on the day that these topics were considered, and thus did not elaborate on that position.

Staff asserted that there had been no offer of proof to demonstrate that property values would be adversely affected by the project. TR 1539. Staff stated further that the Department had no particular expertise regarding economic benefit and/or the question of property tax assessments, and took no position with respect to those questions. TR 1540.

RULING: The potential issue raised by FOH as to the real property tax assessment for the project is not adjudicable in this forum. See Matter of Red Wing Properties, Inc., 1989 WL 97001, *1 (Interim Decision, Jan. 20, 1989). In Red Wing, the commissioner noted that "[t]o the extent that the underlying causes of potential property value changes may be related to the environmental impacts of the project, they are reviewable under SEQRA. . . . The reduction in property values, considered in isolation, cannot, however, be considered an environmental impact even under the broad definition of 'environment' contained in ECL Article 8."

Economic issues are to be considered as part of the balancing required under SEQRA if it is determined that the applicant has mitigated adverse environmental impacts to the greatest extent practicable, as required under 6 NYCRR § 617.11(d)(5), and adverse impacts still remain. This is consistent with prior administrative decisions, and it appears that the participants do not dispute this. See, Matter of Palumbo Block, 2001 WL 176029, *20 (Issues Ruling, Feb. 9, 2001) ("Adverse economic impacts only come into the record to refute an applicant's allegations of economic or social benefits which offset unmitigatable harm. If a project is shown to have no adverse environmental impacts which are not mitigated or avoided through permit conditions, the economic need for or benefits from the project would not have to be evaluated."); Red Wing, supra, at *2 ("As a general proposition, economic, social and other consideration [sic] are intended to be taken into account under SEQRA, in situations where adverse environmental impacts have not been completely mitigated or avoided. In such cases, agencies are permitted to consider these factors to determine whether

anything less than complete mitigation or avoidance is justified. This is the essence of the balancing which is required by the findings provision of SEQRA [ECL § 8-0109[8])."

Here, the proposed intervenors have contended that economic impacts should be considered in tandem with community character. As noted above, we have not found community character, in and of itself, to be adjudicable. To the extent that economic considerations must be more fully developed in order to provide a complete record, and to permit the balancing required under SEQRA, those considerations will be taken into account during the course of the adjudicatory hearing, and in the context of environmental impacts that have been determined to be adjudicable. As these factors are not part of the assessment of the potential economic effects, but instead for a basis for the balancing required under SEQRA, the applicant will have the burden of going forward on this issue.

We find that, particularly in light of the questions with regard to adverse visual impacts, it is likely that the benefits of and need for the project must be considered. This will, therefore, be an issue for adjudication. We do not agree that the process should be bifurcated, because there should be one record upon which the Commissioner can rely in making a determination.

Alternatives

SEQRA requires agencies to "choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects." ECL § 8-0109(1). The SEQRA regulations, at 6 NYCRR § 617.9(b)(5)(v), state the requirements for consideration of alternatives to a proposed action in a DEIS. That regulation provides that a DEIS

> shall contain . . . a description and evaluation of the range of reasonable alternatives to the action that are feasible, considering the objectives and capabilities of the project sponsor. The description and evaluation should be at a level of detail sufficient to permit a comparative assessment of the alternatives discussed. . . The range of alternatives may also include, as appropriate, alternative:
>
> (a) sites;
> (b) technology;
> (c) scale or magnitude;
> (d) design;
> (e) timing;
> (f) use; and
> (g) types of action.

The EIS "should not contain more detail than is appropriate considering the nature and magnitude of the proposed action and the significance of its potential impacts." ECL § 8-0109(2). According to the court in Webster Assocs. v. Town of Webster, "the degree of detail with which each alternative must be discussed will, of course, vary with the circumstances and nature of each proposal." 59

NY2d 220, 228 (1983).

In the DEIS, consideration was given to plant location, including a description of the analysis undertaken in connection with the plant's relocation from the former Atlas Cement plant east of Route 9, to the present proposed location in the quarry. DEIS, 17.2.1. The DEIS also contains a discussion of alternatives explored with respect to transport of materials by rail, truck, pneumatic tube, elevated conveyor, and the conveyor presently proposed, which would run close to the ground. As discussed earlier in this ruling, the applicant also analyzed air pollution control alternatives.

Section 17.3.1 of the DEIS discusses a "no action" alternative. Section 17.3.2 addresses the feasibility of constructing a new facility at Catskill, and Section 17.3.3 contains a discussion of the possibility of constructing the plant at the former Universal Atlas Cement Facility. Finally, the DEIS discusses a reduced capacity alternative, at Section 17.3.4.

Several proposed intervenors asserted in their petitions that SLC's DIES failed to afford proper consideration to alternatives to the proposed project. FOH asserted that SLC's DEIS was deficient because the applicant did not consider a smaller-sized alternative. According to FOH, SLC has no vested right in a 2 million ton per year capacity plant, and a plant half the size of the proposed facility would reduce the mining and blasting rate, thus lessening impacts associated with that activity. In addition, air emissions and impacts from stormwater runoff would decrease. FOH also maintained that the visual impact would be less, both because the height of some plant structures could be reduced, and because the vapor plume would be diminished.

FOH argued further that SLC's Catskill facility was a more appropriate site for the plant, pointing out that the existing Catskill plant is located in a less populous, industrialized area where cement manufacturing is already taking place, and that the two-year shutdown the applicant stated would be necessary to demolish the existing facility and rebuild at Catskill would not be a significant hardship for SLC. In addition, according to FOH, the Catskill alternative's visual impact would be much less than that of the proposed project. Finally, FOH contended that the Catskill site could be redeveloped in conjunction with the redevelopment of the Lehigh/Glens Falls cement facility, an alternative that the applicant failed to explore in the DEIS. FOH argued that the Department is obliged to consider a comprehensive redevelopment plan for the cement industry in this part of the State, to both meet reasonable marketplace needs and preserve the Hudson Valley's unique character.

TOP's petition contended that SLC did not fully explore all reasonable alternatives to avoid or mitigate the Project's adverse impacts to the maximum extent practicable. TOP's petition set forth a number of additional mitigation measures, including excavating beneath the plant site to reduce the height of the structures, thus lessening visual impacts; removing additional obsolete facilities at Catskill and at Greenport; repainting structures at Catskill and at Greenport to better blend into the background; amending the MLUP to require, as a permit condition, that the Becraft Mountain remain in place; and exploring alternate technologies to eliminate the vapor plume. In addition, TOP argued that SLC should have considered a smaller-sized plant, and design alternatives that would reduce the height of the preheater, the stack, and the cement and blending silos.

The Preservation League's petition raised as an issue whether a "no action" alternative must

be selected, in order to protect the Hudson Valley's scenic and historic resources. NRDC's petition asserted that the applicant and staff should be required to come forward with witnesses who could testify as to the applicant's evaluation of alternatives, and be subject to cross-examination with respect to that evaluation. In addition, NRDC asked for an opportunity to brief the applicant's failure to evaluate alternatives, stating that this deficiency mandated denial of the permit under SEQR. According to NRDC, the alternatives analysis is critical to this project, because many of the project's most significant impacts are not regulated under specific permit programs.

The Town of Greenport also raised issues concerning alternatives (e.g., moving the facility's location in the quarry further south). As noted previously, the Town is in the process of finalizing an agreement with the applicant, and therefore these issues will not be addressed in this ruling.

At the issues conference, Phillip Lochbrunner of SLC elaborated upon the alternatives analysis in the DEIS, noting that "while the DEIS provides a good summary of the results of the alternatives considered, it is not the intention of that document, in my understanding, to contain all of the detail of all of the investigations that were performed." TR 1580. Mr. Lochbrunner discussed the distinction between the wet process production of cement in use at the Catskill facility, and the proposed project's dry process preheater/precalciner system. TR 1560-63. According to Mr. Lochbrunner, the difference in design resulted in considerable reduction in heat consumption and NO_X emissions; the proposed facility would consume only sixty percent as much energy as Catskill, where NO_X emissions are three times higher than those for the proposed plant at Greenport. TR 1563.

Mr. Lochbrunner went on to discuss the market for cement in the Northeast, the preference for raw materials from a single source, and transportation concerns with respect to importing cement. TR 1564-66. According to Mr. Lochbrunner, the Greenport location is "rather unique," in that the limestone needed for cement production is present in close proximity to access to waterborne transportation. TR 1567.

With respect to Catskill, Mr. Lochbrunner stated that reserves at that site would be exhausted in approximately 25 years; if a larger plant were constructed at Catskill, that period would be reduced to approximately eight years. TR 1568. Mr. Lochbrunner went on to state that, because load bearing soils were limited at the Catskill site, it would be necessary to dismantle the existing plant in order to construct the new facility. TR 1568-69. According to Mr. Lochbrunner, transporting material by truck from Greenport to Catskill is not an acceptable alternative; thus, water transport is the only feasible option. TR 1569-70. Mr. Lochbrunner stated that if this option were selected, it would require a significant expansion of the dock facilities at Catskill. Id.

Mr. Lochbrunner stated that the applicant had approached Lehigh Cement about the possibility of acquiring that company's unused quarry, dependent upon SLC's ability to evaluate Lehigh's remaining reserves. TR 1568. Lehigh was not interested in SLC's proposal. Id. Counsel for The applicant stated that SLC had no option or ownership interest in the quarries. TR 1590, 1593.

With respect to plant size, Mr. Lochbrunner stated that, due to economies of scale, the fixed

costs of operating a large plant do not differ significantly from the costs of operating a smaller facility. TR 1571. Similarly, capital construction costs are reduced when viewed in terms of dollars per annual ton of capacity. Id. Nevertheless, Mr. Lochbrunner noted that the applicant considered a smaller sized facility. TR 1572. According to Mr. Lochbrunner, a smaller capacity plant would not result in a reduction in the preheater tower height, although it would have a smaller footprint. Id.; TR 1574. Mr. Lochbrunner stated that the only way to reduce the height of the preheater tower would be to reduce the number of stages in the process, which would result in a proportionate increase in NO_X and CO emissions. TR 1575-76. More water would also be required, which would increase occurrences of a visible vapor plume. TR 1576-77.

Finally, Mr. Lochbrunner elaborated upon the plant layout alternatives, including the decision to move the facility into the quarry, rather than construct the plant at the old Universal Atlas plant. TR 1577-78. Mr. Lochbrunner also discussed other efforts to reduce visual impacts, including the reconfiguration of the plant layout, painting schemes, and the conveyor design. TR 1579-80.

Staff stated that the applicant had been required to explore variations in the design and layout of the plant, material handling, and location. TR p. 1582. According to staff, a reduced-capacity alternative would not reduce environmental impacts, nor would it meet the applicant's needs. TR 1583.

FOH's post-issues conference brief argued that SLC's alternatives analysis was conclusory, and that a far more extensive evaluation was necessary. FOH pointed out that, with respect to the Catskill alternative, the applicant had not done a visual analysis, nor had SLC compared the costs associated with various alternatives. TOP's post-issues conference brief asserted that SLC had not proven that its selected alternative would minimize environmental impacts. TOP contended that the lack of cost data and SLC's failure to discuss alternatives in sufficient detail rendered this portion of the DEIS facially inadequate. The Preservation League's post-issues conference brief echoed the concerns of other proposed intervenors, and maintained that the DEIS did not consider the environmental impacts of choosing the Catskill alternative, and instead focused only on profit-making concerns.

In its post-issues conference brief, the applicant argued that SLC had analyzed all reasonable alternatives to the proposed project that were consistent with SLC's objectives and capabilities. The applicant contended that its alternatives analysis was not defective merely because the DEIS did not discuss alternatives that would not yield a net environmental benefit, or because the analysis failed to consider or select alternatives that were not economically feasible.

Staff's post-issues conference brief stated that the analysis of alternatives in the DEIS was adequate, noting that the rule of reason governs consideration of alternatives. Staff argued that the discussion in the DEIS, as well as the information provided at the issues conference, were sufficient for the Department to conclude that the applicant had identified and addressed reasonable alternatives to the proposed project.

TOP's post-issues conference reply brief asserted that the applicant had provided little or no

cost information or other hard data with respect to alternatives rejected in the DEIS, including a reduced capacity plant, or a plant with no preheater (thus eliminating the need for the preheater tower). Moreover, according to TOP, while the DEIS discusses the possibility of removing structures at the Catskill facility, the DEIS does not present any rationale for not removing structures such as the Catskill kiln building. TOP argued further that the additional technical and financial information provided at the issues conference was insufficient to meet the applicant's burden on this issue.

Similarly, FOH's post-issues conference reply brief argued that the applicant had failed to provide sufficient detail to permit an evaluation of all reasonable alternatives. Specifically, FOH argued that the unsworn issues conference testimony of an SLC representative was not sufficient to cure the deficiencies in the applicant's alternatives analysis in the DEIS. First, FOH asserted that no geologic report or other objective proof was provided to substantiate the claim that Catskill's reserves would be exhausted in twenty-five years. Second, FOH argued that SLC had offered no documentary proof to support its assertion that reserves from the inactive Lehigh mine would not be available, because that mine is not part of the Lehigh/Glens Falls joint venture, in which SLC has an ownership interest.

Staff's post-issues conference reply brief reiterated the arguments in its initial brief, citing to *The SEQR Handbook* in asserting that the size of the project does not warrant an exhaustive analysis of alternatives. Page 64 of the *Handbook*, in pertinent part, contains the following question and answer:

> 27. Is there a way to limit the amount of detail and still permit an adequate comparative assessment of alternatives?
>
> Yes. For most actions, it is sufficient to use existing information to make a reasonably comparable assessment. This information may consist of a reference to existing documents or other studies; projections based on supportable contentions; and/or evidence that clearly excludes the alternative from consideration.
>
> For projects with many significant impacts or projects likely to significantly affect public health and safety, it may be reasonable to explore a full discussion for 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.
>
> However, the test of acceptability is to ask if the information provided is sufficient for a decision-maker to identify the alternative that minimizes or avoids adverse environmental effects to the maximum extent practicable.

The applicant's reply brief asserts that the proposed intervenors failed to meet their burden on this issue, noting that NRDC's reply brief acknowledged that no specific offer of proof concerning alternatives was made during the issues conference. The applicant argued that, in the event the level of detail in the alternatives analysis was deemed inadequate, the proper remedy would be to require

additional information, rather than adjudicate the issue.

RULING: The proposed intervenors have not raised an adjudicable issue with respect to the applicant's analysis of a reduced-capacity alternative. The DEIS and the discussion at the issues conference is sufficient to support the applicant's contention that a smaller-sized plant would result in no net environmental benefit. Moreover, the information provided with respect to alternative material transport methods, and the exploration of the "no-action" alternative, are adequate to permit a comparative assessment.

In addition, the SEQRA regulations provide that "[s]ite alternatives may be limited to parcels owned by, or under option to, a private project sponsor." Thus, in the context of evaluating alternatives, the applicant is not required to investigate sites that it neither owns, nor has under option. See 6 NYCRR § 617.9(b)(5)(v) (agencies may limit their consideration of alternative sites to "parcels owned by, or under option to, a private applicant"); Horn v. Int'l Business Machines Corp., 110 AD2d 87, 95 (2d Dep't 1985), app. denied, 67 NY2d 602 (1986) ("[i]t would be an illogical and unwarranted extension of SEQRA to require every private developer to address in its EIS the possible development of other sites over which it has no control, which might not be for sale, or which are not economically feasible"). Therefore, SLC has no obligation to investigate the Lehigh site further.

The only issue potentially remaining for adjudication concerns the adequacy of the discussion in the DEIS concerning the Catskill location as an alternative to the proposed project. The petitioners contend that the lack of detailed information, such as cost figures, with respect to that alternative raises an adjudicable issue. The section of the *SEQR Handbook*, quoted above and cited in staff's briefs, supports petitioners' contentions. The SLC DEIS consists largely of unsupported narrative, and does not refer to "existing documents or other studies, projections based on supportable contentions; and/or evidence that clearly excludes the alternative from consideration" with respect to the Catskill alternative. See, Bronfman v. Flacke, 127 AD2d 833, 835 (2d Dep't 1987), app. denied, 70 NY2d 601 (1987) (EIS treatment of alternatives was adequate where EIS contained discussion of alternative proposals for flood control, including "detailed comparative numerical and descriptive data in chart form"). Given the significant environmental impacts associated with the Greenport location, the DEIS would benefit from a more expansive treatment of this alternative to provide the requisite level of detail. This is particularly true given the applicant's expertise in the area of hard rock mining and cement manufacturing. Matter of Dalrymple Gravel & Contracting Co., Inc., 2001 WL 1172598, *10 (Issues Ruling, Sept. 25, 2001) (sand and gravel mine applicant failed to provide a description and evaluation of alternative site it had under option for proposed mine to a level of detail sufficient to allow a comparative assessment; given applicant's "objectives and capabilities," deficiency raised adjudicable issue).

Nevertheless, given the information already provided concerning the Catskill site in the DEIS, as well as the additional detail supplied at the issues conference, adjudication on this point is not warranted. Instead, the applicant is directed to furnish additional information within sixty days of this ruling to staff, the ALJs, and to the other parties in this proceeding. The information submitted should include documentation concerning the reserves at Catskill, and cost comparison data. The parties will have an opportunity to comment on the applicant's submission, and based upon those

comments, the ALJs will determine whether there is an issue for adjudication with respect to alternatives.

Record of Compliance/Fitness

FOH raised the applicant's compliance record as a proposed issue for adjudication. The petition references the Department's Record of Compliance Enforcement Guidance Memorandum ("ROC/EGM") (issued August 8, 1991; revised March, 1993), which provides that the Department must evaluate an applicant's compliance history before a permit is issued or renewed.

The ROC/EGM establishes the policies and procedures by which the Department "is to ensure that persons who are unsuitable to carry out responsibilities under Department permits, certificates, licenses or grants, are not authorized to do so. Compliance with the ECL and enforcement against those who violate the ECL can be advanced by ensuring that the permit review procedures incorporate such consideration at the earliest possible stage in the review process." ROC/EGM at ¶ I. The ROC/EGM requires an assessment of an applicant's compliance record, on a case-by-case basis, to determine what, if any, actions the Department should take to safeguard the State's environment (for example, the imposition of permit conditions, or requiring an environmental monitor for the project). The record of compliance policy applies to every permit applicant, but the use of the form itself is not mandated in every case. ROC/EGM at ¶ VII(3). A compliance evaluation pursuant to the ROC/EGM policy reviews violations which have occurred within ten years of the date of the ROC form submitted by an applicant. ROC/EGM at ¶ IV.

According to the policy, "[t]he compliance history of fixed, longstanding local permittees within a region is generally known. Exclusively local companies (i.e., located in only one region) which fall within this description may be exempted by DEC from the ROC requirement or these permit applicants could be subject to a combination of central data system review and annual report review." ROC/EGM at ¶ VII(3). Consideration is given not only to the applicant's record, but also to the compliance history of

> any other corporation, partnership, association or organization in which the permittee or applicant holds or has held a substantial interest or in which it has acted as a high managerial agent or director or any other individual, corporation, partnership or organization which holds a substantial interest or the position of high managerial agent or director in the permittee or applicant.

Id. Thus, the ROC/EGM provides two potential avenues for the Department to assess the compliance history of an entity related to an applicant: commonality of management, or whether there is a "substantial interest" by the applicant in the related entity, or by the related entity in The applicant.

The Commissioner's Interim Decision in Matter of Waste Mgmt. of New York, 2000 WL 33354685 (May 15, 2000), provides a framework to analyze a permit applicant's fitness in light of the ROC/EGM. "The threshold focus should be on the applicant, with the principal inquiry being whether the actual compliance history of the permittee or applicant warrants permit denial or

imposition of special conditions." Waste Mgmt., at *6. The Interim Decision goes on to note that "[i]n the case of large publicly held corporations, particularly those with offices, affiliates or related entities across the nation, the analysis . . . should focus initially and chiefly on The applicant's compliance record within New York." Id.

If a problematic compliance history concerns an entity related to the applicant (e.g., a parent company or affiliate), the next step is to determine whether the entity in question has held a "substantial interest" in the applicant, or has acted as a "high managerial agent or director" with respect to the applicant (e.g., the two entities share the same board of directors or corporate officers). Id. If a substantial interest is found, or the related entity maintained a "high managerial relationship" with the applicant, it becomes necessary to inquire "whether the interest or relationship amounts to a 'substantial influence' over the management of the applicant's site." Id. at 6 (citing Matter of CECOS Int'l., 1990 WL 98269 (Decision, Mar. 12, 1990) (finding that local management was responsible for day-to-day operations; compliance problems at other sites owned by parent corporation were not sufficient to warrant permit denial, but might be relevant to future applications if recent management changes were insufficient to address environmental concerns).

In its petition, FOH argues that the applicant's Catskill facility's compliance record is such that SLC should be ineligible for a permit, or, at the very least, operating conditions should be imposed to assure compliance with any permit granted. In addition, FOH contends that the compliance record of SLC's parent (Holcim, formerly Holderbank) and SLC's affiliate, Holnam, should be taken into consideration.

At the issues conference, FOH introduced a set of exhibits (IC Ex.s IC 117a through 117m), containing information about SLC's Catskill plant, as well as other SLC and Holnam facilities in the United States and Canada. The information provided in these exhibits amplified the narrative discussion in FOH's petition. The exhibits include:

1. Documents concerning the compliance history of the applicant's Catskill facility, formerly operated by Independent Cement, including Orders on Consent from May, 1993 ($8000 penalty imposed for violations of air regulations (including dust emissions, equipment malfunctions, and failure to operate air pollution control devices) as well as petroleum bulk storage regulations, specifically, a failure to install secondary containment); February, 1997 ($11,000 penalty imposed for failure to submit quality assurance and performance test documentation for continuous opacity monitor); June, 1997 ($12,000 penalty imposed for failure to install RACT at the cement kiln by the May, 1995 deadline); April, 1998 ($8000 penalty assessed for failure to install a continuous opacity monitor on the clinker cooler); and December, 1998 ($3000 penalty assessed for failure to maintain baghouses) (IC Ex. 117A);
2. Documentation concerning Holnam's Dundee, Michigan facility, where, pursuant to a consent decree entered into with the Michigan Department of Environmental Quality in 1999, the company paid a $576,000 fine for violating emissions limits for particulate matter. A December 15, 1999 letter from Francis X. Lyons, Regional Administrator for EPA Region 5 to Congressman John D. Dingell indicated that EPA felt that the penalty imposed by the State was inadequate to reflect the severity and duration of the violations (IC Ex. 117B);

3. Newspaper articles concerning Holnam's La Porte facility, Fort Collins, Colorado, where the company was allegedly required to pay a $16,000 fine for air emission exceedances (IC Ex. 117C);

4. A newspaper article reporting that Holnam's Clarksville, Missouri facility had allegedly agreed to pay a fine of $100,874 to resolve a six-count complaint filed by the EPA in connection with violations of hazardous waste regulations (IC Ex. 117D);

5. Documents, including complaint forms filed with the Texas Natural Resources Conservation Commission concerning the applicant's Midlothian, Texas facility. In each instance, the complaint was investigated but no violation was found. This exhibit also contains a newspaper article reporting that the Texas Air Control Board had approved a $135,000 fine against the plant for violations of sulfur dioxide limits (IC Ex. 117E);

6. Documentation concerning Holnam's Saratoga, Arkansas, facility, which ceased operations in the early 1990's. According to the material provided, the facility allegedly operated an unpermitted landfill, and was also cited for other violations of hazardous waste record-keeping, manifesting, and notification requirements (IC Ex. 117F);

7. Newspaper articles concerning Holnam's Mason City, Iowa facility, that allegedly failed to monitor emissions sources and to report exceedances, and an incomplete copy of an administrative consent order issued to Holnam, Inc. (IC Ex. 117G);

8. A newspaper article concerning a Holnam facility in West Seattle, Washington, reporting alleged discharges of stormwater containing kiln dust and other pollutants, and another article reporting on the reclamation of a wetland filled in the 1970s with cement kiln dust from the plant (IC Ex. 117H);

9. A newspaper article discussing a Holnam facility in Holly Hill, South Carolina, which was reportedly fined $838,850 by the United States Environmental Protection Agency for failure to comply with air emission standards, failure to submit an adequate certification of compliance, and failure to make a hazardous waste determination on its cement kiln dust and refractory brick (IC Ex. 117I);

10. Minutes of the Utah Air Quality Board, discussing a Holnam facility in Devil's Slide, Utah's application for variances for NO_X emissions due to exceedances of approval order limitations (IC Ex. 117J);

11. A newspaper article reporting an explosion at a Holnam facility in Ada, Oklahoma (IC Ex. 117K);

12. Newspaper articles reporting on an investigation of allegations of price-fixing with respect to SLC in Canada, and, as a result of the investigation, a fine of $1.88 million levied against SLC, and $300,000 against Beton Orleans Inc., SLC's subsidiary (IC Ex. 117L); and

13. Newspaper articles concerning the St. Lawrence Cement Plant in Mississauga, Ontario, Canada. According to the articles, opacity standards at the plant were regularly exceeded. (IC Ex. 117M).

At the issues conference, the applicant maintained that Holnam has no substantial influence over SLC, and no role in the company's day-to-day operations. TR 2247-48, 2266. The applicant relied upon the test articulated in Waste Management, as well as the Commissioner's decision in Matter of Athens Generating Co., 2000 WL 33341184 (Interim Decision, June 2, 2000) in asserting that only the Catskill facility's compliance history was relevant to this proceeding. TR 2248.

RULING: The violations and fines attributed to Holnam facilities in other states are more significant than those associated with the Catskill facility, but FOH's offer of proof founders because it does not address whether the personnel of Holnam or Holcim will have a substantial interest in the proposed project. At the issues conference, counsel for FOH stated without contradiction by SLC that Phillip Lochbrunner, SLC's representative, is listed as an officer of St. Lawrence, Inc., in the Canadian entity's annual report (TR 2268), but this alone is not sufficient to raise an issue as to whether that entity substantially influences the applicant's operations or compliance determinations. In addition, in many cases the documentation in the exhibits proffered by FOH with respect to a number of the Holnam facilities and the St. Lawrence operations in Canada consists of newspaper articles, which are not sufficient by themselves to raise an adjudicable issue. See, Matter of Athens Generating, 2000 WL 33341184, at * 16. The offers of proof do not demonstrate that the proposed project's daily operations or the applicant's compliance decisions would be substantially influenced by Holnam or St. Lawrence Cement of Canada.

At the issues conference, counsel for staff stated that staff had not investigated the relationship between the applicant and Holnam, or the applicant and Holcim. TR 2263. Counsel for staff indicated that the Department had determined that the applicant's compliance history at the Catskill facility was unremarkable, and that submission of the record of compliance form was not warranted. TR 2254. Staff also cited to the standards articulated in the decisions in Matter of Waste Management and Athens Generating in support of its position that the applicant's record of compliance did not merit further inquiry. TR 2255.

In Waste Management, the Commissioner concluded that the compliance incidents under consideration were not of such "serious and persistent nature" as to justify permit denial. 2000 WL 33354685, at *7. However, the Commissioner went on to clarify that such denial was not warranted, "particularly where the draft permit includes express permit conditions agreed to by The applicant and designed to address any compliance concerns . . . [requiring] an on-site environmental monitor, a hydrogeologist monitor position, a financial assurance mechanism and monthly reporting of volume intakes." Id. In Athens Generating, the Commissioner upheld the ALJ's determination that the applicant's record of compliance was not adjudicable. 2000 WL 33341184, at *16-17. Nevertheless, a review of the ALJ's rulings in that case reveals that the ALJ directed staff to review comments received at the legislative hearing concerning the applicant's record of compliance for its out-of-state facilities. ALJ Issues Ruling, at 52-53 (April 26, 2000). Therefore, the decisions in both of those cases were informed by a more complete record and more extensive permit conditions than are present in this instance.

Here, staff has indicated that the Department has not undertaken any investigation into the relationship between the applicant and the applicant's affiliates outside of the state or in Canada. While the issue of the applicant's record of compliance does not merit adjudication based upon the intervenors' offer of proof, the applicant must complete a record of compliance form and submit that form to staff, including an analysis of the relationship of Holnam to the proposed facility. Staff should review that submission (which should also be provided by the applicant to the other parties in this proceeding) and present staff's conclusions to the ALJs and parties within sixty days of the date

of this ruling. This is consistent with our recommendation that staff reconsider the request for an on-site environmental monitor, and determine whether such a request is warranted based upon the result of the hearing on air emissions issues.

We reach this conclusion not only because staff has admittedly not delved into this matter but also because the nature of the violations revealed by FOH with respect to the Catskill facility, as well as several of the Holnam plants, directly relate to the nature of the activities in question in this proceeding. While the penalties recovered by DEC at Catskill may not appear very large, several relate to operation and maintenance of air pollution control technology that is at issue here. See, ROC/EGM at ¶ 4 ("Department Staff may use different [penalty] thresholds [in evaluating an applicant's compliance record] because of lesser statutory sanctions in specific areas of concern"). Specifically, these are the 1993 Order on Consent concerning failure to operate air pollution control devices, the February 1997 and April 1998 Orders on Consent regarding the opacity monitor, the June 1997 penalty for failure to install RACT at the cement kiln and the December 1998 penalty for failure to maintain the baghouses.

In addition, given the scale of this facility, the complex air pollution control system contemplated, and the concerns of the community, more consideration of the out-of-state allegations regarding Holnam's compliance record and its relationship to SLC is warranted in light of evidence of a number of significant air pollution compliance violations. This information should provide the Department with a documented record upon which to determine if there is a need to adjudicate fitness in this proceeding and/or to determine what, if any, additional monitoring requirements are needed.

CONCLUSION

The ALJs have found the following issues for adjudication:

- Air dispersion modeling
- Short term limits for NO_X
    - LAER with respect to VOCs and RTO
    - $PM_{2.5}$
    - Noise
    - Riverine Habitat Mitigation Plan
- Visual Impacts
- Economic Impacts

With respect to all other matters raised by the petitioners, the ALJs have determined based upon the above rulings that these are not appropriate for adjudication. As noted, there are a large number of items that we found should be incorporated into revised draft permits, and/or require supplementation of the record. These are set forth below. In addition to the specific items listed below, staff had noted at the issues conference that it was discussing aspects of the air permits with EPA. We have not been informed of the results of these discussions, and whether further changes to the air permits have been made based upon these discussions. Therefore, in addition to the revised draft air permit, staff is to submit a status report that reflects what, if any, determination it has made regarding EPA's comments on the NO_X, CO, PM and PM_{10}

limits.

Supplementation of Record

1. Identification of ERCs
2. Compliance certification
3. Air pollution impacts on Olana
4. Controls for fugitive dust, particularly with respect to dock activities
5. Design for dock impoundment
6. Village of Athens LWRP/impacts to Athens waterfront
7. Pied-billed grebe
8. Alternatives analysis on Catskill site
9. Record of compliance

Stipulations/Conditions to Incorporate into Draft Permits

1. Broken bag detectors/visolite test
2. Scrubbers required to operate whenever kiln is on
3. Clarify that any PSD-related permit condition is subject to federal enforcement
4. Clarify what pollutants are subject to PSD and Part 231 programs (LAER and BACT) and what pollution controls apply to the facility
5. Staff clarification of PM_{10} emission rates
6. Clarify that Catskill facility will be shut down prior to first clinker production at Greenport
7. Insert condition requiring that CEMS for NO_X is to be operational at first clinker production and that it will be NO_X-certified within six months following.
8. Clarify that any limits and conditions that are to commence at the start-up of production specifically indicate same by providing language “at first clinker”
9. Incorporate SLC’s revised emission rates - IC Ex. 60a
10. Clarifiy COMS required for kiln and clinker cooler pursuant to EPA Determination Detail (IC Ex. 70)
11. Clarify calculations re: SO_2 emissions and how applicant will comply with sulfur limits in fuel
12. Clarify NSPS and NESHAP requirements in draft air permit
13. Based on application, provide limitation on transfer of clinker in draft permit
14. Insert condition requiring that entire bottom of the spray condition tower will be enclosed
15. Clarify in draft air permit that barges are required to have on-board baghouse filters to control fugitive dust
16. Clarify management of the collected dust from the baghouse collection points in conformity with issues conference record
17. Specify/describe in draft air permit the controls that govern reintroduction of collected contaminants - identify specific air regulation that governs
18. Provide more specification in draft permit regarding implementation of dust control measures including agreements SLC made with respect to unloading procedures

19. Outfall 001 - revise SPDES permit to clarify that after six months of discharge staff will revise monitor-only parameters if needed to sustain water quality
20. Include copy of SLC's Catskill landfill SPDES permit with draft SPDES permit; clarify sampling regime at Catskill facility to ensure that should mercury or any other constituent of the Greenport facility CKD cause water quality exceedances, the monitoring will reflect that condition and address it
21. Include detailed permit condition reflecting SLC's stipulation to protect City's back-up water supply
22. Devise permit condition to restrict truck usage in the event that product cannot be transported via conveyor/barge
23. City/SLC to devise permit condition to reflect agreement regarding notice of HudsonMax arrival at dock
24. Permit condition re: significant bird strike recordkeeping
25. Permit condition to prohibit demolition of Catskill structures during eagle breeding season; survey of structures prior to demolition
26. Include permit condition requiring Article 24 application prior to mining of HS-100
27. Permit condition to require pre-blast survey
28. Include permit condition requiring that blasting records be available to public

Party Status

The staff and the applicant are automatically full parties to this process. 6 NYCRR § 624.5(a). To secure full party status, a prospective intervenor must:

(1) file an acceptable petition pursuant to 6 NYCRR §§ 624.5(b)(1) and (2);
(2) raise a substantive and significant issue or be able to make a meaningful contribution to the record regarding a substantive and significant issue raised by another party; and
(3) demonstrate adequate environmental interest. 6 NYCRR § 624.5(d)(1).

To obtain *amicus* status, a petitioner must file an acceptable petition pursuant to 6 NYCRR §§ 624.5(b)(1) and (3); identify a legal or policy issue which needs to be resolved by the hearing; and have sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective contribute materially to the record on such issue. 6 NYCRR § 624.5(d)(2).

Based upon these standards, Friends of Hudson, the Hudson Valley Preservation Coalition (which includes Riverkeeper), The Olana Partnership and the City of Hudson are granted full party status. Staff did not contest the environmental interest of any intervenor. SLC did contest the standing of HVPC to raise community character issues. TR 1177. Based upon the petitions filed, we find adequate environmental interest to support these intervenors' party status. These participants have provided sufficient information on all or some of the identified issues for adjudication to warrant their participation as full parties.

We grant the joint *amicus* petition of the Preservation League and National Trust for Historic Preservation based upon their submissions thus far with respect to issues concerning Olana. We also grant the *amicus* petition of the Village of Athens based upon its particular interest and knowledge with respect to its LWRP and the Athens Waterfront. We deny the petitions of BRPC and MDEP as explained on pp. 36-37. We also deny the petitions of Columbia County, Columbia Hudson Partnership, Natural Resources

Defense Council, and the Town of Greenport for *amicus* status. The County has played virtually no role in these proceedings. It has made two submissions that state its support for the project generally and its view that the County encompasses diverse land uses IC Exs. 42, 141. We do not find that the County has shown expertise or a special perspective through these submissions that would warrant its further participation as an *amicus*.

After the close of the issues conference, the Town submitted a letter explaining that it had decided to support the project and withdraw its petition. IC Ex. 132. It then submitted an *amicus* brief that provides general support for the project. IC Ex. 154. The Town's submission comes late in these proceedings, and the Town has not provided information in these submissions that would meet the standards set forth in Part 624. Therefore, the Town's petition for *amicus* status is denied. CHP has indicated that it maintains one outstanding objection to the project regarding the exit strategy. IC Ex. 125. However, this concern is addressed in the draft permit. In any case, CHP has not demonstrated what particular knowledge it will bring to these proceedings that will assist in reaching a determination. Finally, while NRDC may participate as a member of the Coalition, 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.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis. 6 NYCRR § 624.8(d)(2). Ordinarily, expedited appeals must be filed to the Commissioner in writing within five days of the disputed ruling. 6 NYCRR § 624.6(e)(1).

Allowing extra time due to the number and length of these rulings and the very large record upon which these rulings are based, as well as the upcoming holidays, two copies of any appeals must be sent to the attention of Commissioner Erin Crotty and received at the Office of the Commissioner (NYSDEC, 625 Broadway, Albany, New York 12233-1010) before 5 p.m. on January 18, 2002. Any responses to any appeals must be received by 5 p.m. on February 1, 2002. The parties shall ensure that transmittal of all papers is made to the ALJs and all others on the service list at the same time and in the same manner as transmittal is made to the Commissioner. No submissions by telecopier will be allowed or accepted. Appeals should address the ALJs' rulings directly, rather than merely restate a party's contentions. To the extent practicable, appeals should also include citations to transcript pages and exhibit numbers.

Albany, New York
December 7, 2002

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Helene G. Goldberger
Administrative Law Judge

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Maria E. Villa
Administrative Law Judge

To: Service List

Attachments

Attachment A: Greenport Project Site Plan

Attachment B: Catskill Site Plan

Attachment C: IC Ex. List

Attachment D: Summary of Petitions

Attachment E: E-Mail from Robert Leslie, Esq.

Attachment F: September 19, 2000 letter from the U.S. Environmental Protection Agency

Attachment G: Agreement between SLC and Columbia County [IC Exhibit 59]

Attachment H: Major Wetland Map

Attachment I: Wetlands located on the western portion of the Greenport Facility