

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

In the Matter

- of -

the Application for a Mined Land Reclamation  
Permit pursuant to Article 23 of the  
Environmental Conservation Law for a Proposed  
Mine in the Town of Milan, Dutchess County,

-by-

**RED WING PROPERTIES, INC.,**

Applicant.

DEC Application No. 3-1336-00049/00001

INTERIM DECISION OF THE COMMISSIONER

May 19, 2010

## INTERIM DECISION OF THE COMMISSIONER

Red Wing Properties, Inc. (applicant) submitted an application to the New York State Department of Environmental Conservation (Department or DEC) for a mining permit for a new sand and gravel mine located in the Town of Milan, Dutchess County, New York. The proposed mine is referred to as the Archer Mine.

### I. Background

#### A. Procedural Background

Department staff reviewed the application, determined that the proposed mine met the requirements for a permit under the Mined Land Reclamation Law (MLRL), issued a draft permit that included a number of conditions, and referred this matter for adjudicatory proceedings under 6 NYCRR Part 624. Applicant also prepared a Draft Environmental Impact Statement (DEIS). The matter was assigned to Administrative Law Judge (ALJ) Nicholas Garlick, who presided over a legislative hearing and issues conference.

At the issues conference, two parties presented petitions for party status: the Town of Milan and a local citizens group called Milan Concerns. The Town of Milan claimed that the DEIS was deficient in a number of ways and that the proposed mine would have a significant impact on the Town's community character. Milan Concerns raised ten issues, with additional sub-issues. Some of the issues raised by the Town of Milan and Milan Concerns overlap.

The ALJ ruled that the Town of Milan raised no substantive and significant issues requiring adjudication, and that Milan Concerns raised substantive and significant issues on two potential impacts - traffic and noise - requiring adjudication. Attachment A to this interim decision sets forth the proposed issues for adjudication raised by the Town of Milan and Milan Concerns, the ALJ's ruling on each of those issues, which party appealed from those rulings, if at all, and my decision on the issues appealed.<sup>1</sup>

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<sup>1</sup> In reviewing the ALJ rulings not challenged on appeal, I see no reason to go beyond the ALJ rulings challenged by the parties. Thus, I am confining my decision to the issues raised on the appeal.

B. Description of the Proposed Mining Operation

The entire site is comprised of 196 acres, and the proposed mine would encompass approximately 69 acres over the total life of mine area. Mining would progress in seven phases of 10-12 acre increments over a projected 10-12 year period. The site had been mined previously in the late 1970s to early 1980s.

The mined sand and gravel would be hauled and processed off-site at applicant's central processing facility known as the Billings Plant. Material currently processed at the Billings Plant comes from, in part, the Roe-Jan Mine. The Roe-Jan Mine also is located in the Town of Milan, just north of the proposed Archer Mine. If the Archer Mine is permitted, applicant will stop hauling material from the Roe-Jan Mine to the Billings Plant for processing. The Roe-Jan Mine, however, will continue to supply the local market. Trucks from Roe-Jan and Archer travel to the Billings plant via Route 9.

The number of anticipated truck trips per day (100) to and from the Archer Mine is fairly comparable to the current 80-100 daily truck trips to and from the Roe-Jan Mine. The local truck route to U.S. Route 9, however, changes. The truck route from Roe-Jan and the proposed Archer Mine run along different, though roughly parallel, east-west roads to reach U.S. Route 9, which runs north-south. (These truck routes are depicted in the Location Map for the Archer Mine, DEIS, Appendix A.)

Prior to 2005, the trucks from Roe-Jan traveled largely along the route now proposed for the Archer Mine. The Roe-Jan trucks traveled south on County Route 55 to Turkey Hill Road (County Route 56) and then west to U.S. Route 9. Since 2005, however, and "in response to public comment,"<sup>2</sup> trucks from Roe-Jan travel from the mine north along County Route 19, west on County Route 2, to U.S. Route 9.

Unlike the trucks that currently travel the more northern Roe-Jan truck route to U.S. Route 9, trucks entering and exiting the proposed Archer Mine would travel a more southern east-west road to the intersection of County Route 56 and U.S. Route 9 - roughly the former truck route used by Roe-Jan trucks once they reached the intersection of Turkey Hill Road (County Route 56).

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<sup>2</sup> Although applicant states in the DEIS (at 37) that it requested approval to use the new truck route for the Roe-Jan facility "in response to public comment," it does not explain what the public comment was.

The DEIS expressly states that the neighboring Town of Red Hook has prohibited school buses from traveling through the intersection of County Route 56 and U.S. Route 9 because the sight distances render that intersection dangerous. DEIS, at 37.

C. Completeness Determination / Local Zoning

Both the Town of Milan and Milan Concerns have claimed throughout this matter that Department staff should not have deemed the mining application complete because mining at the site of the proposed Archer Mine was not and is not allowed under local law. Whether the Town and Milan Concerns are correct as a matter of fact, I note that completeness determinations cannot become issues for adjudication. 6 NYCRR 624.4(c)(7).<sup>3</sup>

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<sup>3</sup> The MLRL requires that a completed application for a mining permit must include "a statement by the applicant that mining is not prohibited at that location." ECL 23-2711(2)(c). Conversely, if the applicant does not provide that statement, the application cannot be deemed complete and it will not be processed further. In the DEIS, applicant expressly stated that

"The proposed site is located in an A3A (Agricultural) district. At the time the application was submitted, mining was allowed in this district via the floating zone provisions of the Town of Milan zoning code. The Town of Milan had established the floating zone designation as a mechanism for review and approval of manufacturing and industrial uses, including mining, in the town (Section 200-13 and 200-43 of the Town zoning). Mining was a principal permitted use under the Light Industrial floating zone. Red Wing Properties, Inc. submitted an application to the Town of Milan Town Board for a Floating Zone LI District Designation for this property. The town recently eliminated the Floating Zone LI District (Local Law #2 of 2006) in what *Red Wing views as an illegal action*. On May 26, 2006, Red Wing commenced an Article 78 Proceeding/Declaratory Judgment action in State Supreme Court challenging the Town's action in court. *Therefore, Red Wing's view is that this action is still permitted with Town approval.*"

DEIS, at 2 (revised Dec. 8, 2006) (emphasis added).

Notwithstanding Red Wing's views about the propriety of the Town's action in abolishing the floating light industrial zone, as stated above, the Appellate Division, Second Department, has recently ruled that the Town's abolition of the floating light industrial zone was legal. Red Wing Props., Inc. v Town of Milan, 2010 NY Slip Op 02765 (2d Dept 2010)[2010 NY App Div LEXIS 2691].

Nonetheless, the issue of whether mining is in fact allowed in the area of the proposed Archer Mine has now received a determination from the New York State Appellate Division, Second Department. Red Wing Props., Inc. v Town of Milan, 2010 NY Slip Op 02765 (2d Dept 2010) [2010 NY App Div LEXIS 2691] (holding that the Town of Milan took the requisite hard look under SEQRA and otherwise complied with General Municipal Law requirements in adopting a comprehensive plan and abolishing a floating light industrial zone). This means that new mines, including the proposed Archer Mine, cannot be sited in the Town of Milan.

Thus, this issue has proceeded beyond a dispute over the mining application's completeness to a judicial determination upholding the Town's action in adopting a comprehensive plan and abolishing the floating light industrial zone.

In light of this legal development, applicant is directed to inform the ALJ whether it will continue to pursue its application for a MLRL permit. If applicant does choose to pursue its application, as set forth in more detail below, not only do I agree with the ALJ's ruling on the issues that he determined would be adjudicated, I also determine that additional issues should proceed to adjudication.

## **II. Standards for Party Status and Adjudicable Issues**

A party wishing to participate as a full party in an administrative proceeding on a permit matter must submit a petition that includes the following information:

- the name of the party and its representative;
- the party's environmental interest in the proceeding;
- the party's interest "relating to statutes administered by the department relative to the project";
- the grounds for opposition or support;
- identification of "issues for adjudication"; and
- an appropriate offer of proof on each claimed issue.

6 NYCRR 624.5(b)(1), (2).

Issues proposed for adjudication by a potential party must meet additional standards, i.e., they must be both "substantive" and "significant." According to the regulations, an issue is "substantive" if

"there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria

applicable to the project, such that a reasonable person would require further inquiry."

6 NYCRR 624.4(c)(2). To determine whether a potential party has raised a "substantive" issue,

"the ALJ must consider the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ."

Id.

According to the regulations, an issue is "significant" if

"it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit."

6 NYCRR 624.4(c)(3).

When the Department is lead agency and has required the preparation of a DEIS, proposed issues for adjudication regarding the sufficiency of the DEIS are subject to the same standards - they must be both substantive and significant. 6 NYCRR 624.4(c)(6)(i)(b).

### **III. Rulings on Party Status**

#### **A. Party Status - Milan Concerns**

In his rulings on issues and party status, the ALJ determined that the petition filed by Milan Concerns established the group's environmental interest in this matter. The Town of Milan supported Milan Concerns's petition, and Department staff did not object to the stated environmental interest of Milan Concerns. Applicant, however, argued that the "environmental interest" standard in 6 NYCRR 624.5(b)(1)(ii) was equivalent to the standard for standing to sue in a State Environmental Quality Review Act (SEQRA) claim established by the courts in New York State and that Milan Concerns did not meet that standard.

The ALJ correctly pointed out that establishing standing in a judicial proceeding (in the courts) is not the same as demonstrating environmental interest in a DEC administrative proceeding - the standards for environmental interest are not as

restrictive. Stated simply and clearly: the environmental interest of petitioners seeking to participate as full parties in DEC administrative proceedings does not have to be satisfied through the test for standing under SEQRA in a judicial proceeding, which includes the restrictive "special harm" test.<sup>4</sup>

Rather, to establish environmental interest, a petitioner would need to demonstrate what its interests are and how they are tied to subjects addressed by SEQRA or other applicable provisions of the ECL or other statutes at issue in the proceeding. SEQRA itself provides much guidance because it defines the term "environment" very broadly:

"'Environment' means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic interest, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character."

ECL 8-0105(6). Therefore, so long as a petitioner identifies interests that are tied to any of the myriad subjects that SEQRA or other applicable environmental statutes address, that petitioner will be deemed to have stated an environmental interest under 6 NYCRR 624.5(b)(1)(ii). In contrast, if a proposed intervenor identifies interests that are unrelated to

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<sup>4</sup> I would further note that the New York Court of Appeals recently clarified the showing that an environmental organization would have to present to establish standing to litigate a matter under SEQRA in the courts.

In 1991, the Court of Appeals held that petitioners raising a claim under SEQRA must demonstrate that they have suffered "special harm," i.e., harm that is different from the harm experienced by the general public. Society of Plastics Indus., Inc. v County of Suffolk, 77 NY2d 761, 764 (1991). The special harm requirement can be met presumptively by persons living adjacent to or in close proximity to a project. Id. Nearly two decades after it decided Society of Plastics, the Court clarified how the special harm requirement can be met by an environmental organization, noting that "the adjacent to or in close proximity" construct is not necessarily appropriate for such an entity. In Matter of Save the Pine Bush, Inc. v Common Council of the City of Albany, 13 NY3d 297 (2009), the Court held that a member's residence close to a challenged project is not an indispensable element of standing for environmental organizations, and that the environmental organization in that case satisfied the special harm requirement because its members repeatedly studied and enjoyed the unique habitat of the local preserve. Id. at 304-305.

the determinations that the Department is required to make in a proceeding, that intervenor will not have demonstrated an environmental interest. See, e.g., Matter of Sullivan County Division of Solid Waste (Phase I Expansion), (Deputy Commissioner's Interim Decision, Feb. 15, 2005, at 23-25 [2005 NY Env LEXIS 8, \*25-27])(upholding ALJ's ruling that an association of Town Supervisors, which raised issues in its petition about limiting waste imports to preserve space for waste generated by county residents had not established any environmental interest over issues that the Department had jurisdiction to adjudicate).

Here, Milan Concerns has more than established its environmental interest concerning issues that the Department has jurisdiction to adjudicate. As the ALJ points out, over more than a dozen members of Milan Concerns submitted affidavits detailing the impacts that are of concern to them, as well as their close proximity to the proposed Archer Mine (some reside adjacent to the proposed mine) and their travel over the roads to be used by the trucks entering and leaving the Archer Mine. Among the impacts of concern that they cite are traffic, noise, dust, and community character, all of which would potentially directly affect the members. One member is the co-founder of Milan Concerns and explained why the group was created - a banding of residents concerned about the development of the Town of Milan and other nearby communities, and the "effective preservation and enhancement of the area's natural environment, economic vitality, public health and quality of life." Affidavit of William Jeffway, sworn to on May 19, 2007, ¶ 2. Without question, these affidavits demonstrate Milan Concerns's environmental interest.<sup>5</sup>

Therefore, I agree with the ALJ that Milan Concerns has established a sufficient environmental interest to satisfy 6 NYCRR 624.5(b)(1)(ii).

B. Party Status - Town of Milan

The ALJ did not expressly rule that the Town demonstrated its environmental interest, and I now determine that the Town has done so.

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<sup>5</sup> Although Milan Concerns submitted twelve affidavits, this is not to suggest that it needed to, or that environmental organizations in general need to make such a showing. The bar for establishing environmental interest under 6 NYCRR 624.5(b)(1)(ii) is not set so high.



In its petition, the Town of Milan stated that its environmental interest was based on a number of factors: (1) the proposed Archer Mine is located within the Town of Milan; (2) the Town seeks to "promote protection of the environment" and to "protect and promote the health, safety and welfare of the Town's residents"; and (3) SEQRA's definition of environment is broad, encompassing the issues of concern to the Town that are presented by this proposed mine, including "noise, visual, air and traffic impacts" that it believes will occur if the project is approved. Petition of Town of Milan for Party Status (Aug. 3, 2007), ¶¶ 2-4. The Town also states that its issues of concern are directly related to the purposes of SEQRA and the MLRL.

At the Issues Conference, Department Staff had no objection to the Town of Milan's environmental interest. Issues Conf. Tr., at 153. While applicant stated that it did not believe that either the Town's petition or the explanation provided by its counsel established the Town's environmental interest, it nonetheless had no objection to the Town's environmental interest. Id.

Based on a review of the Town of Milan's Petition, the Town has demonstrated that it has a sufficient environmental interest as required by 6 NYCRR 624.5(b)(1)(ii). The proposed mine would be located within the Town, the residents of the Town would be affected by the mine's impacts, and the Town has raised environmental concerns that are directly related to the subject matter of SEQRA and the MLRL.

The Town's primary issue is community character. As discussed below, that issue remains in the case and will also be further developed through other issues for adjudication - e.g., visual, noise, and traffic impacts. The Town can make a meaningful contribution to the record on these issues. 6 NYCRR 624.5(d)(1)(ii). Therefore, I determine that the Town has full party status in this proceeding.

#### **IV. Proposed Issues for Adjudication**

##### **A. Community Character Impacts**

Both Milan Concerns and the Town of Milan raised community character as a proposed issue requiring adjudication. They based their claim on two principle arguments: (1) that the Town of Milan has banned mining through the adoption of a local law, and (2) that mining is not compatible with the Town's comprehensive plan.

In Ruling 3.1, the ALJ ruled that while community character may well be an issue for me to consider as I make my SEQRA findings toward the end of the administrative process in this matter, it is not appropriately developed as an independent issue for adjudication. He determined that the record contained the necessary information for me to consider the issue of community character, and thus a hearing on this issue was not necessary. I agree with the ALJ's ruling on community character - up to a point, discussed below.

Community character falls expressly within the definition of "environment" under SEQRA. ECL 8-0105(6); 6 NYCRR 617.2(1). The character of a community can be determined mainly by local land use plans and local zoning ordinances. See Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006, at 71 ([2006 NY Env LEXIS 88, \*77] "[a]dopted local plans are afforded deference in ascertaining whether a project is consistent with community character"); Matter of Lane Construction Co., Interim Issues Rulings of the ALJs, Feb. 22, 1996, at 16 (local zoning ordinance as "the expression of the community's vision of itself"); Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, June 20, 1995, at 8 [1995 NY Env LEXIS 14, \*18] ("[i]f a zoning ordinance or other local land use plan exists, it would be evidence of the community's desires for the area and should be consulted when evaluating the issue of community character as impacted by a project"); Matter of Miracle Mile Assocs., Decision of the Commissioner, Dec. 6, 1979, at 3 [1979 NY Env LEXIS 28, \*5] ("[t]he Department will not intrude its judgment . . . in matters which have properly been the subject of definitive local governmental determinations of patterns of land use").

Additionally, where impacts on community character are intertwined with other discrete impacts, the record on community character can be further developed through an adjudicatory hearing on those other impacts. See Matter of Crossroads Ventures, LLC, Interim Decision of the Deputy Commissioner, Dec. 29, 2006, at 72 [2006 NY Env LEXIS 88, \*78 ("community character is not readily susceptible to adjudication as a separate issue but rather is considered after the record is developed on particular environmental issues which are aspects of the overall community character"), citing Matter of Lane Construction Co., Interim Issues Rulings of the ALJs, Feb. 22, 1996, at 16; see also Matter of St. Lawrence Cement Co., LLC, Second Interim Decision of the Commissioner, Sept. 8, 2004, at 117-118 [2004 NY Env LEXIS 58, \*138-139 (focusing adjudication on discrete environmental issues rather than a general issue of community character)].

Here, because impacts to community character are implicated in other issues for adjudication - noise, visual, and traffic impacts - the record on community character can be further developed through those issues.

I also note that the Town of Milan has raised the issue of declining property values in the context of community character. Petition of Town of Milan for Party Status, at 5, Exh A, at 4-5. The Town's expert challenges the basis of the applicant's conclusion in the DEIS that the Archer Mine would have no effect on local property values. Id., Exh A, at 4-5. Specifically, the Town's expert stated that applicant's expert

- relied on a study of a different area of Dutchess County without making any connection to the area of the proposed Archer Mine;
- provided only a summary of the study and not the study itself, and without the data to support the expert's conclusions;
- did not explain in his summary if the study provided a pre-mine versus post mine comparison;
- did not provide the proximity of the homes to the mine in the study; and
- did not identify if any of the homes were owned by the mining company.

Id. This critique constitutes a challenge to the sufficiency of the DEIS, and I determine that the Town's offer of proof through its expert's critique is sufficient. See Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2 [1982 NY Env LEXIS 34, \*4 ("offer[s] of proof can take the form of . . . the identification of some defect or omission in the application" and that the defect is "likely to affect permit issuance in a substantial way.")

The effect on property values from the siting of facilities, including a mine, however, is not properly considered in the context of community character. Rather, the effect on property values is considered when balancing unmitigated environmental impacts against social, economic, and other considerations. See 6 NYCRR 617.11(d); Matter of St. Lawrence Cement Co., Second Interim Decision of the Commissioner, Sept. 8, 2004, at 120-122 [2004 NY Env LEXIS 50, \*142-143]; See Matter of Lane Construction Co., Interim Issues Rulings of the ALJs, Feb. 22, 1996, at 17-18.

As set forth in this interim decision, I have determined that the intervenors have raised a number of issues for adjudication. Any one of them could result in unmitigatable adverse impacts. In that event, the balancing of those impacts against social, economic, and other considerations will occur, and the record should be developed on the issue of effects on property values to assist in this balancing.

B. Traffic Impacts

Milan Concerns raised seven issues on traffic impacts. The ALJ ruled that four of them (4.1, 4.2, 4.4, and 4.5<sup>6</sup>) qualify as issues for adjudication; two others do not qualify as issues for adjudication (4.3 and 4.6); and one does not raise contested factual questions (4.7), which, the ALJ stated, means that I can take the arguments into account in my final decision on the merits of this matter. Applicant challenges the ruling on 4.1, 4.2, 4.4, and 4.5.<sup>7</sup> Milan Concerns challenges the ruling on 4.6.

I agree with the ALJ that Milan Concerns has established that the issues presented in 4.1, 4.2, 4.4, and 4.5 as to traffic impacts are substantive and significant, and thus, are adjudicable. Accordingly, I reject applicant's challenge and affirm those rulings.

I disagree, however, with the ALJ's ruling on 4.6. Milan Concerns argued that the DEIS failed to adequately explore the availability of an alternative, internal route for truck traffic. At the time of the issues conference, the record was not fully established that applicant had control or access to the easement that would arguably provide this alternative route. At that

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<sup>6</sup> As applicant pointed out in its Brief in Support of Applicant's Appeal to the Commissioner (at 25), the ALJ did not expressly state that the issue presented in 4.5 (relating to the grade of a hill) constituted an adjudicable issue. Nonetheless, applicant has treated it as a ruling in favor of an adjudicable issue, and so do I. In the ALJ's ruling on 4.5, he directed applicant to evaluate the grade in the new traffic study that the ALJ ordered on issues 4.1, 4.2, and 4.4. The difference is that in his rulings on 4.1, 4.2, and 4.4, the ALJ expressly stated that they would then become issues for adjudication. I am reading the ALJ's ruling on 4.5 as having the same result.

<sup>7</sup> Applicant's Notice of Appeal in this proceeding lists 4.6 as one of the ALJ's rulings it is challenging on this appeal. From the context of applicant's brief, however, it is clear to me that applicant intended to challenge the ALJ's ruling on 4.5.

time, applicant stated that it had commenced an action to quiet title to the easement governing this potential alternative truck route, and the litigation was pending.

On June 15, 2009, Supreme Court, Dutchess County (Brands, J.), issued a decision holding that applicant was "entitled to use the right of way for purposes of ingress and egress without hindrance or interference." Applicant has appealed that decision, and the appeal is pending.

I determine that the issue of the alternative, internal truck route is an adjudicable issue. In its petition, Milan Concerns posed this issue as a failure to adequately explore and discuss in the DEIS the alternative, internal truck route as a way to mitigate adverse traffic impacts. Pursuant to 6 NYCRR 624.4(c)(6)(i)(b), a determination to adjudicate issues as to the sufficiency of a DEIS hinges on whether (1) it is a dispute between the Department and the applicant over a substantial term or condition of a draft permit; (2) Department staff cites it as a basis to deny a permit; or (3) a potential party raises it and it is both a substantive and significant issue. See 6 NYCRR 624.4(c)(1).

Here, the issue of the alternative, internal truck route is an adjudicable issue because it is substantive and significant. This issue is substantive because the record demonstrates that the project may pose serious traffic impacts to the community, which, under SEQRA, could result in the denial of this permit. The issue is significant because, again, it could result in a denial of the project, or at least a major modification, e.g., that the trucks will be required to travel along the internal truck route, instead of applicant's preferred route, which according to Milan Concerns, presents adverse impacts to the community.

### C. Noise Impacts

Milan Concerns claimed that applicant did not adequately analyze noise impacts in the DEIS in five respects:

- (1) ambient sound levels were overestimated;
- (2) barrier attenuation was overestimated;
- (3) truck noise was not accounted for;
- (4) the wrong sound measurement was used; and
- (5) an incorrect model was used.

The ALJ determined that the first two were adjudicable issues (Rulings 5.1 and 5.2), and applicant challenged those rulings on

appeal. The ALJ also determined that the remaining three were not adjudicable issues (Rulings 5.3, 5.4, and 5.5). Milan Concerns challenged the ruling only as to the proposed issue of not accounting for noise from trucks (Ruling 5.3).

I agree with the ALJ that Milan Concerns raised issues for adjudication on the claimed overestimation of ambient sound levels (Ruling 5.1) and barrier attenuation (Ruling 5.2), and I affirm those rulings of the ALJ.

I disagree, however, with the ALJ's ruling that Milan Concerns raised no issue for adjudication on whether applicant properly accounted for truck noise both on and off-site (along the haulage ways). In support of his ruling, the ALJ stated that "[n]oise from mobile sources is regulated by existing state and federal law." The ALJ's response that noise from mobile sources is regulated by existing state and federal law misses the mark - it does not address the concern raised by the petitioner. Milan Concerns was complaining that the DEIS failed to analyze noise impacts from truck traffic, as required by DEC's noise policy.

In support of its proposed issue for adjudication, Milan Concerns claims that the noise analysis in the DEIS does not account for all of the noise generated from the proposed project - the truck noise - and thus it underestimates the overall noise impacts. Milan Concerns Petition for Full Party Status (Aug. 3, 2007), at 13-15.

I now determine that this proposed issue is both substantive and significant, and thus raises an adjudicable issue. The issue is substantive because without a full assessment of the noise impacts, applicant may not be able to meet statutory or regulatory criteria. Noise is expressly included within the definition of environment under SEQRA (ECL 8-0105(6)), and the Department has adopted guidance to further this assessment (DEC Program Policy Memorandum DEP-00-1, Assessing and Mitigating Noise Impacts, revised February 2, 2001). Noise impacts were also identified as an issue to be addressed in the DEIS. Underestimating or underanalyzing these impacts does not fulfill SEQRA's mandate.

Moreover, this proposed issue is significant because, depending on the final and full analysis of noise impacts, it could result in the denial of the permit, or at least a major modification to it or the imposition of significant conditions. Accordingly, I reverse the ALJ's ruling and determine that the noise from trucks is an issue for adjudication.

D. Air Quality Impacts

The ALJ ruled that three proposed issues on air quality impacts were not adjudicable.<sup>8</sup> The first two rulings relate to the application of a Commissioner's Policy, CP-33, "Assessing and Mitigating Impacts of Fine Particulate Matter Emissions." In Ruling 6.1, the ALJ ruled that CP-33 does not require applicant to produce an emissions inventory for the proposed Archer Mine. In Ruling 6.2, the ALJ ruled that applicant was correct in properly characterizing the proposed mine as a *de minimis* source of fine particulate matter emissions. The ALJ is not correct in either ruling, and I determine that both of these proposed issues are adjudicable.

This proposed project is governed by CP-33. CP-33 sets forth certain steps to evaluate the potential for air quality impacts from emissions of fine particulate matter. Nothing in the policy exempts sand and gravel mines.

The policy establishes a two-step process. The first step is to quantify the source's emissions of fine particulates. If this quantification indicates that the emissions (based on measurements of PM<sub>10</sub>) are below the threshold of 15 tons per year (tpy), that is the end of the analysis under CP-33. If the quantification demonstrates that the emissions of PM<sub>10</sub> will be at or above 15 tpy, then the next step is to assess the impacts in accordance with the policy. But the key first step is to quantify the emissions because that determines how much further an applicant will be required to apply CP-33 - i.e., will it need to then assess the impacts of emissions of fine particulate matter.<sup>9</sup>

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<sup>8</sup> Applicant agreed to install signs that trucks need to be covered on site, which settled a proposed fourth issue for adjudication on air quality impacts. ALJ Ruling on Issues and Party Status (Feb. 29, 2008), Ruling 6.4, at 39.

<sup>9</sup> Milan Concerns and the ALJ appear to have confused the quantification process under the first step of CP-33 with the process for conducting an "emissions inventory." The term "emissions inventory" is a technical term, however, that is not the equivalent to the first step under CP-33. Indeed, CP-33 never uses the term "emissions inventory." An emissions inventory is a far more complicated exercise that a source would undertake to assess the impacts of emissions from nearby sources in order to perform a cumulative modeling analysis of the total concentration in the area in which the source at issue is or will be located. Simply stated, an emissions inventory is a far different exercise than the first step of

Here, the ALJ had no adequate basis to determine that the proposed project is properly characterized as a *de minimis* source of fine particulate matter emissions. At the outset, applicant did not produce the calculations required under step one of CP-33, asserting incorrectly that they were not required. At the issues conference, however, applicant did produce some calculations of emissions of fine particulate matter from its proposed facility. Milan Concerns asserts correctly that these calculations are incomplete.

In the calculations that it produced at the issues conference, applicant only measured emissions from paved and unpaved roads; it did not measure direct emissions from mobile sources or any other sources, such as loading activities or wind erosion. An analysis of fine particulate matter emissions, however, does require a measurement of direct emissions from mobile sources. Matter of Besicorp-Empire Development Co., LLC, Final Issues Ruling, Sept. 27, 2002, at 10 (emissions from mobile sources were among the sources required to be analyzed for impacts from fine particulates). Moreover, if loading activities and wind erosion produce emissions of fine particulate matter, those sources would also have to be included in the calculations.<sup>10</sup>

It may be that once applicant resubmits its calculations under CP-33 to include direct emissions of fine particulate matter from mobile sources and perhaps, too, from loading activities and wind erosion, the total emissions will remain below the 15 tpy threshold, requiring no further analysis under CP-33. But the point is that applicant must provide complete calculations in the first place. Applicant has not done so here.

In the third issue concerning air quality impacts, Milan Concerns claimed that applicant should have committed to a set schedule for road sweeping, or in the alternative, install and use a wheel washing station at the project site. The draft permit contains a condition requiring applicant to use a street sweeper on the paved entrance road of the proposed mine, but it does not set forth any schedule for the sweeping. Applicant claimed that it would assess the condition of any dust on the

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quantification of fine particulate matter emissions required under CP-33.

<sup>10</sup> I agree with staff and applicant that since stockpiles would not be allowed at this site, emissions from stockpiles would not have to be quantified.



road and sweep the road on an as needed basis. The ALJ ruled (Ruling 6.3) that Milan Concerns did not establish that a set schedule for road sweeping or the installation of a wheel washing station was warranted. I agree with the ALJ that Milan Concerns has not met its burden on this proposed issue. Therefore, this issue is not adjudicable.

E. Visual Impacts

Milan Concerns raised four issues on visual impacts:

- (1) the DEIS lacked a substantive narrative on visual impacts;
- (2) applicant did not provide a visual analysis for each phase of the mine;
- (3) the DEIS did not include an assessment of impacts both with and without mitigation; and
- (4) the Town of Milan's comprehensive plan was not accounted for in applicant's visual impacts analysis.

The ALJ held that none of these proposed issues constituted issues for adjudication.

The Department's Program Policy DEP-00-2, "Assessing and Mitigating Visual Impacts" (issued July 31, 2000) (also referred to here as the Visual Impacts Policy) provides flexibility in determining the level of visual assessment required depending on the size of the project, the significance of resources within the project viewshed, and the ability to address potential visual impacts through mitigation measures. The policy concludes that a costly sophisticated visual analysis is not required for every project, and where mitigation measures are available and can be readily determined to be effective, the investment in the mitigation is more important than a complex visual evaluation.

As part of the visual impacts analysis here, applicant relied upon the inventory of aesthetic resources designated by New York State, line of sight profiles, and mitigation measures to conclude that visual impacts from the mining operation will not be significant. Applicant did not reference any aesthetic resources of local importance.

Notwithstanding the perceived brevity of applicant's discussion of visual impacts, applicant's graphic representations say much about the limited visibility of the mine site and the ability to screen views from those few areas in proximity to the mine where it can be viewed. Although a more precise evaluation would be possible, interveners have failed (with two exceptions

discussed below) to specifically identify any potential impacts that may occur due to a lack of specific information or to demonstrate how additional information would lead to differing conclusions or the need to deny or condition the permit.

I agree with the ALJ on three of his four rulings on visual impacts. The ALJ is correct that the Department's Visual Impacts Policy does not dictate a precise length of narrative for the visual impact analysis. See Ruling 8.1. Second, the Policy does not require an assessment of visual impacts without mitigation. See Ruling 8.3. Indeed, the policy encourages mitigation measures to be incorporated into project planning:

"It is usually easier to deal with the visibility of the project than its composition to achieve mitigation. Altering the composition of a project lies within the realm of professional designers. When given the opportunity, however, staff should encourage applicants to design aesthetically compatible projects that incorporate environmentally friendly design principles and components, as may be employed from the mitigation menu below."

Visual Impacts Policy, at 6.

Third, I agree that the visual impacts analysis policy does not require a visual impacts analysis for all phases of the mine. See Ruling 8.2. Here, mining would progress in seven phases of 10-12 acre increments over a projected 10-12 year period, but neither the Town nor Milan Concerns demonstrated how the impacts on any sensitive receptors would change among the different phases.

However, I disagree with the ALJ that applicant need not provide a discussion of the Town of Milan's comprehensive plan. See Ruling 8.4. In support of its petition, Milan Concerns states that the comprehensive plan assigns an aesthetic value to the Turkey Hill Road area and that the Natural Features map that was prepared for the comprehensive plan depicts seven predominant hilltops (one of which is Turkey Hill), which have "exceptional picturesque views of the Town's bucolic setting." Petition for Full Party Status for Milan Concerns, at 16. See also report of Milan Concerns's expert, Dr. Richard Smardon, at 3 (Exhibit F to Milan Concerns's petition). The petition additionally states that Turkey Hill Road / County Road 56 is a "designated County scenic road." Id. I thus determine that applicant should have considered the comprehensive plan, and its supporting documents,

insofar as it reflects these aesthetic resources of local importance.

In sum, I determine that Milan Concerns has raised a substantive and significant issue concerning applicant's failure to assess the visual impacts for areas of local importance - i.e., the areas of Turkey Hill and Turkey Hill Road. The issue is substantive because without a full assessment of visual impacts in accordance with the Department's visual impacts analysis policy, it is impossible to determine if applicant can avoid or minimize adverse visual impacts. The issue is significant because the visual impacts, when fully assessed, could result in additional significant permit conditions, a major modification, or denial of the permit.

#### F. Cumulative Impacts

Milan Concerns claims that applicant failed to sufficiently analyze the cumulative impacts from the concurrent operation of the Roe-Jan mine and the proposed Archer Mine. Specifically, Milan Concerns claims that the addition of the Archer Mine would extend the operation of Roe-Jan from seven to twelve years. In the DEIS, applicant addressed cumulative impacts as to noise, visual, archeological, endangered species, air quality, traffic, groundwater, and community character. Applicant concluded that no cumulative impacts would result from the concurrent operation of the two mines. Staff assert that the two mines are geographically and functionally separate and would result in no cumulative impacts. The ALJ ruled that cumulative impacts are not an issue for adjudication because Milan Concerns failed to identify a witness or make another offer of proof (Ruling 11).

I disagree with the ALJ and determine that cumulative impacts is an issue for adjudication, but will be considered in the context of traffic impacts. The record demonstrates that the Archer Mine would not replace the Roe-Jan Mine. The Roe-Jan Mine would continue operating, which includes mineral processing. The surrounding community is rural, and now two mines with potentially double the truck traffic<sup>11</sup> would be located within only 1.75 miles of each other in this rural community. As discussed above, traffic impacts is an issue for adjudication. As part of the adjudication of traffic impacts, the potential

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<sup>11</sup> Applicant does not state the amount of truck traffic that would be generated by the Roe-Jan Mine once the Archer Mine was in operation.

cumulative impacts of the operation of the Roe-Jan Mine and the Archer Mine are to be considered.

This proposed issue of cumulative impacts is both substantive and significant. The issue is substantive because without a full assessment of the cumulative traffic impacts, applicant may not be able to meet SEQRA statutory or regulatory criteria. This proposed issue is significant because if the cumulative traffic impacts are significant, they could result in the denial of the permit, or at least a major modification to it or the imposition of significant conditions.

Moreover, how two mines would affect community character is an issue for me to consider at the end of the adjudicatory process.

#### G. Terrestrial and Aquatic Ecology Impacts

Of the proposed issues on terrestrial and aquatic ecology impacts, which rulings of the ALJ that Milan Concerns challenges on appeal (Rulings 10.2, 10.3, 10.4, and 10.6), I affirm the rulings of the ALJ. For the reasons stated by the ALJ, Milan Concerns has failed to raise a substantive and significant issue as to impacts on the Blandings Turtle, Indiana Bat, False Hop Sedge, Lake Warackamac, and Rattlebox.

#### H. Miscellaneous Comments on Draft Permit

The final set of proposed issues raised by Milan Concerns concern the draft permit. The ALJ rejected the claims that the draft permit did not include enough screening berms along Turkey Hill Road (Ruling 12.1), the mine entrance should be located to an internal route (Ruling 12.2), and applicant's concurrent reclamation should include a requirement that it consult with the New York State Department of Agriculture and Markets (Ruling 12.6). For the reasons stated by the ALJ, I affirm Ruling 12.6.

However, I disagree with the ALJ on Ruling 12.1. Milan Concerns claims that more screening berms are necessary to mitigate noise and air quality impacts. As I address above, noise and air quality impacts were not accurately measured in the DEIS, and additional berms may be necessary as appropriate mitigation. Applicant should, in adjudicating issues relating to noise and air quality impacts, address whether additional berms would be required to meet applicable legal requirements.

Moreover, as I indicated in the section on traffic impacts above, I disagree with Ruling 12.2, and determine that the issue of the internal truck route is an issue for adjudication.

**CONCLUSION**

Based on my review of the record, and as set forth above, I determine that issues as to traffic, visual, noise, air quality, and cumulative impacts require adjudication in this matter. I remand this matter to ALJ Garlick for further proceedings consistent with this interim decision.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Albany, New York  
May 19, 2010

**Attachment A**  
**ALJ's Ruling on Potential Issues for Adjudication**

**Issues Raised by Town of Milan**

Issue	ALJ Ruling - Issue for Adjudication? Yes/No	Ruling #	Party Appealing	Commissioner's Decision
<b>Deficiencies in DEIS</b>				
- description of "low intensity mining" not defined	No	2.5	--	--
- characterization of "scattered homes" not quantified	No	2.6	--	--
- potential (and scenarios) for permit renewal not discussed	No	2.7	--	--
- continuation in agricultural exemption program, and its fiscal impacts, not discussed	No	2.8	--	--
- market data for local needs, and output from other mines, not explained	No	2.9	--	--
- more extensive habitat survey needed on Indiana Bat, Bog Turtle, New England Cottontail	No	2.10	--	--
- alternative sources of aggregate, including recycled materials, not identified	No	2.11	--	--
- past and present mining in the town should be identified	No	2.12	--	--
- does not mention that wetland mapping by Army Corps of Engineers is incomplete	No	2.13	--	--
- the Natural Resources Assessment (Appendix J) should be updated to include all developed areas	No	2.14	--	--
- the Natural Resources Assessment (Appendix J) should discuss if deposits extend into Town of Red Hook	No	2.15	--	--
<b>Town Ban on Mining</b>				
- DEC should respect the Town's ban & not process this application	No	2.16	--	--
<b>Community Character</b> <i>(also raised by M. Concerns)</i>	No	3.1	Town of Milan & M. Concerns	Agree w/ALJ
(1) local law bans mining				
(2) mining is incompatible with Town's Comprehensive Plan				

**Issues Raised by Milan Concerns  
- Deficiencies in DEIS -**

Issue	ALJ Ruling - Issue for Adjudication? Yes/No	Ruling #	Party Appealing	Commissioner's Decision
<b>New Local Zoning Law</b> DEIS fails to discuss new local zoning law that bans mining at the site	No	2.1	--	--
<b>Population Growth in Town of Milan</b> DEIS includes stale data (2000 Census) - 12.4% population increase not reflected in DEIS	No	2.2	--	--
<b>Fine Particulates</b> DEIS does not provide an air quality impact analysis of fine particulates	No	2.3	--	--
<b>Curb Cut</b> Applicant has not obtained written approval from Dutchess County DPW for curb cut	No	2.4	--	--
<b>Community Character</b> <i>(also raised by Town of Milan)</i> (1) local law bans mining (2) mining is incompatible with Town's Comprehensive Plan	No	3.1	Town of Milan & M. Concerns	Agree w/ALJ
<b>Compliance with 92-2 re: Local Law</b> Application should not have been deemed complete	No	3.3	M. Concerns	Agree w/ALJ
<b>Traffic</b> - information on 2 intersections lacking - traffic counts inadequate - driveway corner sight distances inaccurate - information on intersection of US Rt. 9 & CR 56 lacking - grade (12%) of the hill needs to be evaluated in a new traffic study - alternative (internal) truck route is available - road safety is compromised	<b>Yes</b> <b>Yes</b> No <b>Yes</b> <b>Yes</b> No No	4.1 4.2 4.3 4.4 4.5 4.6 4.7	Applicant Applicant -- Applicant Applicant M. Concerns --	Agree w/ALJ Agree w/ALJ -- Agree w/ALJ Agree w/ALJ <b>Disagree w/ALJ</b> --

<b>Noise</b> - ambient sound levels overestimated - barrier attenuation overestimated - noise from trucks not accounted for - wrong sound measurement used - incorrect model used	<b>Yes</b> <b>Yes</b> No No No	5.1 5.2 5.3 5.4 5.5	Applicant Applicant M. Concerns -- --	Agree w/ALJ Agree w/ALJ <b>Disagree w/ALJ</b> -- --
<b>Air Quality</b> - emissions inventory lacking - source can emit more than de minimis amount of fine particles - street sweeping can be highly variable & should be on a schedule, or use wheel washing as an alternative - applicant should install signage re: trucks need to be covered on site	No No No No	6.1 6.2 6.3 6.4	M. Concerns M. Concerns M. Concerns --	<b>Disagree w/ALJ</b> <b>Disagree w/ALJ</b> Agree w/ALJ --
<b>Cultural &amp; Architectural Resources</b> - significant architectural resources overlooked	No	7	--	--
<b>Visual Impacts</b> - substantive narrative lacking - visual analysis for each phase of mine not provided - impacts are not assessed both without and with mitigation - Comprehensive Plan not accounted for	No No No No	8.1 8.2 8.3 8.4	M. Concerns M. Concerns M. Concerns M. Concerns	Agree w/ALJ Agree w/ALJ Agree w/ALJ <b>Disagree w/ALJ</b>
<b>Groundwater</b> ( <i>withdrawn as an issue</i> )	--	9	--	--
<b>Terrestrial &amp; Aquatic Ecology</b> - Blandings Turtle - Indiana Bat - False Hop Sedge - Lake Warackamac - Rattlebox	No No No No No	10.2 10.3 10.4 10.5 10.6	M. Concerns M. Concerns M. Concerns -- M. Concerns	Agree w/ALJ Agree w/ALJ Agree w/ALJ -- Agree w/ALJ
<b>Cumulative Impacts</b> - would extend life of Roe-Jan facility	No	11	M. Concerns	<b>Disagree w/ALJ</b>



<b>Miscellaneous Comments on Draft Permit</b>				
- not enough screening berms	No	12.1	M. Concerns	<b>Disagree w/ALJ</b>
- mine entrance should be relocated to an internal route	No	12.2	M. Concerns	<b>Disagree w/ALJ</b>
- mining below water table ( <i>withdrawn as an issue</i> )	--	12.3	--	--
- on-site storage of fuel should be banned	No	12.4	--	--
- trucks should have infra-red backup alarms	No	12.5	--	--
- concurrent reclamation should include consultation with Dep't of Agriculture & Markets	No	12.6	M. Concerns	Agree w/ALJ
- dust should be mitigated further	No	12.7	--	--
- permit should not be effective until local approvals obtained	No	12.8	--	--