

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,

**Ruling on Issues and
Party Status**

by

RED WING PROPERTIES, INC.

DEC #3-1336-00049/00001

Applicant.

February 29, 2008

SUMMARY

Red Wing Properties, Inc. (applicant) has applied for a mined land reclamation permit for a proposed mine in the Town of Milan, Dutchess County and prepared a Draft Environmental Impact Statement (DEIS). Staff of the Departmental Conservation (DEC Staff) has reviewed the application materials and determined that the proposed project meets permit issuance standards and prepared a draft permit (Issues Conference, Exhibit 19) which the applicant accepts. At the request of DEC Staff, an issues conference was held and two petitions for party status were received: the first from the Town of Milan (Town) and the second from a group called Milan Concerns. Of the numerous issues and sub-issues proposed for adjudication by the petitioners, sub-issues related to noise impacts and traffic impacts from the proposed mine are adjudicable. As discussed, the applicant's traffic impact analysis is insufficient for the DEC Commissioner to make the required findings, pursuant to the State Environmental Quality Review Act (SEQRA). Accordingly, the applicant shall compile the missing traffic information, share it with the service list, before the adjudicatory hearing on this issue can commence. Milan Concerns has filed an acceptable petition, raised substantive and significant issues, and demonstrated an adequate environmental interest. Accordingly, it is entitled to full party status. The Town has failed to proposed a substantive and significant issue and therefore, its request for full party status is denied.

PROJECT DESCRIPTION

The applicant, the largest supplier of sand and gravel in the Hudson Valley, proposes to operate a bank run sand and gravel mine with no on-site processing on an approximately 196 acre parcel (the site) it owns in the Town of Milan, Dutchess County. The proposed mine would be located north of Turkey Hill Road, west of the intersection with Odak Farm Road. The site has been

used for mining in the past, both before the applicant purchased the property and in the late 1970's and early 1980's by the applicant (DEIS, p. 14).

The proposed mine would have a total life of mine area of 69 acres and mining and concurrent reclamation (initially as grassland) would be done in 7 phases of 10-12 acre increments. Native top soil will be removed, stored in berms and then reapplied after the sand and gravel is removed. Areas of the property not actively used for mining will continue to be farmed. Life of the operation is dependent on market demand but is expected to be approximately 10 to 12 years.

No material processing or weekend operations would take place. Weekday operations will be limited to 7:00 a.m. to 4:00 p.m. There will be no operations on Saturday or Sunday or six major holidays (DEIS p. 2).

All materials removed from this proposed mine will be trucked to the applicant's Billings plant along a single truck route. Truck traffic will be limited to 50 trips in and out per day and all trucks will either be owned or hired by the applicant (DEIS, p.37).

PROCEEDINGS

By email dated November 3, 2006, DEC Staff requested the appointment of an Administrative Law Judge (ALJ) to conduct a public hearing (pursuant to 6 NYCRR 621). By letter dated November 7, 2006, I was assigned this matter.

A Notice of Complete Application, Notice of Draft Environmental Impact Statement Acceptance and Notice of Public Hearing for this project were published on March 28, 2007 in DEC's electronic *Environmental Notice Bulletin* (ENB) and the *Poughkeepsie Journal* on April 6, 2006.

A public hearing was held on May 10, 2007 in the Milan Town Hall, 20 Wilcox Circle, Red Hook.

By letter dated May 24, 2007, DEC Staff informed the applicant that it was seeking an adjudicatory hearing on the application.

By memorandum dated May 29, 2007, DEC Staff requested a legislative hearing, issues conference and, if needed, an adjudicatory hearing (pursuant to 6 NYCRR 624), based on the

letters received and public comments at the May 10, 2007 public hearing.

By letter dated June 4, 2007, I was assigned to this matter.

By letter dated June 5, 2007, DEC Staff advised members of the public who had expressed an interest in this application that there would be an adjudicatory hearing on the application in the near future.

A Notice of Legislative Public Hearing and Issues Conference was published in the *ENB* on July 18, 2007 and in the *Poughkeepsie Journal* on July 20, 2007.

By letter dated June 22, 2007, DEC Staff advised members of the public who had expressed an interest in this application that there would be a Legislative Hearing on August 14, 2007 and that the Issues Conference would begin the next day.

On July 16, 2007, DEC Staff produced a proposed draft permit.

On August 3, 2007, two Petitions for full party status were timely received, the first from the Town of Milan and the second, from Milan Concerns.

On August 14, 2007, a legislative hearing was held in the Milan Town Hall, 20 Wilcox Circle, Red Hook.

On August 15 and 16, 2007 an issues conference was held in the Milan Town Hall, 20 Wilcox Circle, Red Hook.

The transcripts of both the legislative hearing and issues conference were received on September 6, 2007.

By e-mail dated September 21, 2007, I shared the final Issues Conference Exhibit List with the service list and asked for continuing updates regarding several issues, including: (1) the status of litigation between the applicant and the Town of Milan; (2) whether the Town had received a response to a June 1, 2007 letter to the Commissioner; and (3) the status of litigation between the applicant involving a logging road easement it owns that allows travel from the proposed mine site and across adjoining property.

By e-mail dated September 27, 2007, counsel for the Town provided an update, and indicated that the litigation between the Town and the applicant was still pending, and that no response to

the Town's letter had been received nor had requests for meetings with the DEC Commissioner or the Governor's office been arranged.

By e-mail dated October 10, 2007, DEC Staff informed the service list that DEC Staff attorney Steven Goverman was ill and by e-mail dated November 11, 2007 DEC Staff informed the service list that Mr. Goverman would be replaced by Carol Krebs, Esq.

By e-mail dated October 30, 2007, counsel for the Town provided another update, which disclosed that the applicant had filed another lawsuit against the Town, challenging the re-adoption of the 2007 Comprehensive Plan and local laws involving zoning and wetlands.

By e-mail dated November 1, 2007, counsel for the applicant provided an update on the litigation involving the status of the logging road easement. According to counsel, depositions and discovery were proceeding and that the matter would not likely go to trial until the end of 2008.

Closing briefs were received on November 2, 2007.

By letter dated November 16, 2007, the Assistant Commissioner for Hearings recused himself from this matter.

Reply briefs were received on November 28, 2007.

By letter dated January 2, 2008, the Town Supervisor wrote to me informing me of his election and continuing interest in the proceeding. By e-mail dated January 15, 2008, the Town's attorney provided copies of this letter to the service list.

By e-mail dated February 4, 2008, I asked for any final updates from the service list.

THE FIRST PUBLIC HEARING

The first public hearing was convened on May 10, 2007 in the Milan Town Hall. DEC Staff asked for this hearing to receive public comments on the permit application and DEIS pursuant to 6 NYCRR part 621. The hearing began at 7:00 p.m. and concluded at 10:30 p.m. Approximately 120 people attended. After a brief explanation of the proposed project by the applicant and an explanation by DEC Staff of the purpose of the hearing, three elected town officials spoke on the Town's behalf. The Town Supervisor, Van Talmadge, the Chair of the Town Planning Board, Lauren Kingman, and Town Board Member, Ross Williams, all spoke

in opposition. The Supervisor of the neighboring Town of Red Hook, Marirose Blum Bump, next spoke, also in opposition. Next over thirty members of the public spoke, all in opposition. Those speaking included local elected and appointed officials as private citizens, petitioners, petitioner's expert witnesses, adjacent landowners, and other members of the public. Ten written comments were also accepted into the record at this hearing.

THE SECOND PUBLIC HEARING

Following review of the public comments, DEC Staff decided that the application was approvable and provided a draft permit. DEC Staff then referred the matter for a full adjudicatory hearing pursuant to 6 NYCRR part 624. The first part of this process, the legislative hearing occurred on October 14, 2007 at the Milan Town Hall. This hearing began at 7:00 p.m. and concluded at 10:15 p.m. Approximately 125 people attended. After a brief explanation of the proposed project by the applicant and an explanation by DEC Staff of the purpose of the hearing, two elected town officials spoke on behalf of the Town. The Town Supervisor, Van Talmadge, and Town Board Member, Ross Williams, spoke in opposition. The Supervisor of the neighboring Town of Red Hook, Marirose Blum Bump, next spoke, also in opposition. Next over thirty members of the public spoke, all but one in opposition. Those speaking included local elected and appointed officials as well as private citizens, petitioners, petitioner's potential witnesses, and adjacent landowners, as well as other members of the public. Eight written comments were also accepted into the record at this hearing.

WRITTEN COMMENTS

The hearing file contains more than 40 public comments responding to information in the application and DEIS. Some of these written comments were submitted directly to DEC Staff and others were received at the hearings and shared with the service list.

LEGISLATIVE HEARING RECORD

At the request of members of the audience at the second public hearing, I incorporated the transcript of the first public hearing and written comments into the legislative hearing record.

ISSUES CONFERENCE

Two petitions for full party status were timely received, the first from a group of local residents called "Milan Concerns" and the second from the Town of Milan. These petitioners as well as the two parties to the proceeding (the applicant and DEC Staff) participated at the issues conference, which began on August 15, 2007 and concluded the next day.

DEC Staff was represented by Steven Goverman, Esq. Also attending were DEC Staff members Michael Merriman, Halina Duda, Margaret Duke and Lawrence Biegel. The applicant was represented by Kevin Bernstein, Esq. of Bond, Schoeneck & King, PLLC. Also attending were Frank Doherty of Red Wing Properties, Inc. and Paul Griggs of Griggs-Lang Consulting Geologists, the applicant's consultant. Milan Concerns was represented by Todd Mathes, Esq. of Whiteman, Osterman & Hanna, LLP. Also present for Milan Concerns were William Jeffway, president of the group, as well as their proposed expert witnesses: Ken Kaliski, Janet Choi, James Cowan, John Hinckley, Steve Revell, Erik Kiviat, Richard Smardon, and Christopher Linder. The Town of Milan was represented by Janis Gomez Anderson of Van DeWater and Van DeWater, LLP. Also present for the Town were Van Talmadge, Town Supervisor, Ross Williams, a Town Board member, and Ted Fink of Greenplan, Inc., the Town's consultant.

On the morning of August 16, 2007, representatives of the parties and petitioners accompanied me on a site visit. This visit included both a tour of the site and a drive along several of the roads mentioned at the issues conference.

DISCUSSION

Two petitions for full party status were received, one from the Town of Milan and the other from a group called Milan Concerns. In its petition, the Town raised only one issue, community character. Milan Concerns proposed ten issues with numerous sub-issues for adjudication and offered the testimony of a number of expert witnesses. Each issue and sub-issue is discussed below. As a threshold matter, the applicant challenged the environmental interest of Milan Concerns.

Before the issues conference was noticed, DEC Staff prepared a draft permit dated July 13, 2007 that it proposed to issue to the applicant (I.C. Exh. 1). At the opening of the issues conference, DEC Staff disclosed that, as a result of ongoing discussions, it was contemplating making certain changes to the draft permit, but no formal language had yet been developed. The

areas of proposed change included groundwater protection and the hours during which maintenance activities would be permitted. The applicant did not object to either the text of the July 13, 2007 draft permit or the changes being discussed with DEC Staff. Accordingly, no issues are raised by the applicant with respect to this draft permit, and the only potential issues are those raised by the petitioners.

Section 624.4(c) of 6 NYCRR specifies the standards for adjudicable issues in a DEC permit hearing. An issue is adjudicable if it relates to a dispute between the DEC Staff and an applicant over a substantial term or condition of the draft permit (6 NYCRR 624.4(c)(1)(i)). Where DEC Staff has determined that a permit application as conditioned by a draft permit will meet all statutory and regulatory requirements, the potential party proposing an issue has the burden of persuasion to demonstrate that the proposed issue is substantive and significant (6 NYCRR 624.4(c)(4)). In the present case, DEC Staff prepared a draft permit and the Applicant does not dispute the conditions in the draft permit.

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)). 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)).

Section 624.4(c)(6)(i)(b) states when DEC, as lead agency, has required the preparation of a DEIS, as in the present case, "the determination to adjudicate issues concerning the sufficiency of the DEIS or the ability of the department to make the findings required pursuant to section 617.9 of this Title will be made according to the standards set forth in paragraph 624.4(c)(1) of this Part" (quoted directly above).

In order to establish that adjudicable issues exist, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through

cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues." (Matter of Halfmoon Water Improvement Area, Decision of the Commissioner, April 2, 1982).

Issue #1: Milan Concerns' Environmental Interest

The first issue discussed at the issues conference was whether or not Milan Concerns possessed an environmental interest in the proposed issuance of DEC's mining permit. DEC's administrative permit hearing regulations state that a petition for party status must identify the "petitioner's environmental interest in the proceeding" (6 NYCRR 624.5(b)(1)(ii)). The regulations do not define the phrase "environmental interest."

Milan Concerns argues it possesses a broad environmental interest with respect to the impact of the proposed mine on the community but also is working on behalf of the groups members who will be individually impacted (t. 150). Milan Concerns is an unincorporated citizen group composed of citizens of the Towns of Milan, Rhinebeck and Red Hook, most of whom live, work and recreate in close proximity to the proposed mine (136). The group works to promote and foster the area's rural character. Attached to its petition are the affidavits of seventeen of its members (MC petition, Exh. A). These affidavits set forth the members' individual circumstances and concerns. Some members own property immediately adjacent to the site, others further away, and each expresses individual environmental concerns about the proposed mine.

At the issues conference, the applicant challenged the environmental interest of Milan Concerns and argued that the affidavits were insufficient, because all of the groups' members would not be impacted by the proposed mine. To support this claim, the applicant provided eleven aerial photos from GoogleEarth with the locations of the homes of the members of Milan Concerns (I.C. Exh. 2). Applicant argued that the mine would be a low intensity operation and that Milan Concerns had failed to demonstrate that the affiants would be impacted by the mine. The applicant concluded that because none of the members of Milan Concerns individually has an environmental interest, the group as a whole could not possess an environmental interest. Applicant's counsel stated he was not able to provide any administrative precedent for his argument because applicants

generally stipulate to a petitioner's environmental interest. Applicant's counsel argued that in the absence of administrative case law on point, it would be appropriate to apply the standards to determine whether a potential party has standing in environmental cases from the judicial branch (t. 148), which has adopted a narrow view of standing in cases involving SEQRA.

DEC Staff argued that Milan Concerns did have an environmental interest, and thus standing to bring a petition in this administrative forum. DEC Staff noted that members of the group included the proposed mine's neighbors and other people who would use the roads impacted by mine traffic (149).

Ruling #1: Milan Concerns possesses an environmental interest and thus has standing to be a petitioner in this matter. As noted by Applicant's counsel, there is a the lack of administrative case law on this point and most applicant's concede environmental interest. This is a result of the fact that the standard for environmental interest is quite low. While the courts have narrowly interpreted of standing in environmental cases, the Commissioner has not similarly narrowed the definition of environmental interest. The Commissioner has the responsibility to minimize environmental impacts. therefore, it is responsible to judge claims of unaddressed impacts on the merits and not by limiting the number of people who can raise an issue. In this case, by the applicant's own count, sixteen of the seventeen members of Milan Concerns who filed affidavits live within 1.5 miles of the site and the petition claims six of them own property less than 100 feet from the boundary of land owned by the applicant. Even without the affidavits, this petition would be sufficient to establish environmental interest because it includes a description of the group and its representative was available to further explain at the issues conference.

ISSUE #2: Supplemental DEIS

The first issue identified in Milan Concerns' petition involves the need for the applicant to prepare a Supplemental DEIS due to deficiencies alleged in three areas: (1) the DEIS contains numerous erroneous statements, including the statement that mining is not prohibited at the site; (2) the Town's population growth warrants revised studies, particularly with respect to traffic impacts; and (3) additional information is required with respect to fine particulate matter, consistent with Commissioner's Policy 33 (CP-33). At the issues conference, Milan Concerns stated that information in the DEIS regarding the applicant's request for a curb cut (for the new proposed

driveway) from the Dutchess County public works department was also in error (154).

DEC's SEQRA regulations set forth the circumstances when a DEIS needs to be supplemented (6 NYCRR 617.9(a)(7)(i)).

"(i) The lead agency may require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or adequately addressed in the EIS that arise from:

- (a) changes to the proposed project; or
- (b) newly discovered information; or
- (c) a change in circumstances related to the project"

Milan Concerns argues that the DEIS was largely compiled with data from 2002, and that circumstances have changed since then warranting updating the information in the DEIS. Milan Concerns seeks a ruling that the administrative hearing process should be suspended while the DEIS is supplemented (155).

At the issues conference, the Town asserted that its SEQRA comment letter (Town petition, Appendix A) identified areas where additional information was necessary in order for the DEC Commissioner to accept the FEIS (157). This comment letter contains 27 comments divided into: general comments (12), Noise (1), Visual (6), Air (2), Truck Traffic (5), and Alternatives (1). Some of these comments are referenced in the Town's petition.

Both the applicant and DEC Staff argued that no SDEIS was necessary. Applicant argued that the proposed project had not changed, that no new information had been discovered, and that there had been no change in circumstances (158). In addition, the applicant argued that none of the alleged deficiencies were substantive and significant issues requiring adjudication (163). DEC Staff noted that at the time of the issues conference, the DEIS was only eight months old and that no new and unexamined information existed to warrant the preparation of an SDEIS.

It is not clear from either the SEQRA regulations (6 NYCRR part 617) or the DEC administrative permit regulations (6 NYCRR part 624), that an ALJ has the authority to direct the preparation of an SEIS or whether this power rests with DEC staff and the Commissioner. However, issues raised by Milan Concerns are discussed below as are the twelve general comments of the Town. The remaining fifteen issues specific comments raised by the Town are addressed later in this ruling, where appropriate.

DEIS's failure to discuss new local law

The first ground for requiring an SDEIS cited by Milan Concerns is because of numerous deficiencies and erroneous statements. The only example cited in the petition is the failure to appropriately recognize that mining is prohibited at the site under the Town's zoning law (MC petition, p. 10).

At the issues conference, the applicant responded that an SDEIS is not required (159). In its closing brief, the applicant argues that whether mining is prohibited is irrelevant to DEC's mining permit issuance process because DEC Staff will not consider a local prohibition in deciding whether to issue a permit.

Ruling #2.1: The information in the DEIS regarding the status of local zoning is several years old during which time a new law has been enacted, struck down by the courts and re-enacted (two days before the issues conference). While the DEIS does not contain this information, the issues conference record does. No SDEIS is required nor is an adjudicable issue raised.

Town of Milan's Population Growth

The second ground for requiring an SDEIS cited by Milan Concerns is that the Town has experienced significant population growth since information in the DEIS was compiled. This population growth has increased the population density in the Town, and according to the petitioner, the traffic impacts of truck traffic to and from the proposed mine (154) are not accurately described in the DEIS.

At the issues conference, both the applicant and the Town provided summaries of U.S. Census Bureau population estimates which show that the Town's population was 2,356 at the April 1, 2000 census, estimated at 2,472 on July 1, 2002 and estimated at 2,649 on July 1, 2006 (I.C. Exhs. 3 & 4). From these numbers, it can be determined that the Town's population has grown 12.4% from 2000 and 7.4% since 2002.

In its closing brief, DEC Staff argued that this growth is typical of growth in Dutchess County and not so substantial as to require supplementation (DEC brief, p. 5). The applicant stated there were no new residences along the proposed truck route since the traffic study had been completed (applicant's brief, p. 16).

Ruling #2.2: In this case, the increase in population is not a change in circumstances that warrants preparation of an SDEIS. As discussed below, the applicant's traffic analysis is flawed and needs to be revised. This will address Milan Concerns' desire for an updated traffic study.

Fine Particulates

The third ground cited by Milan Concerns for requiring an SDEIS is that the DEIS does not include an air quality impact analysis pursuant to CP-33, which was adopted in 2003. As discussed more fully in Rulings 4.1 and 4.2, the emissions from this type of facility are considered *de minimis* by DEC Staff because the emissions are under 15 tons per year (tpy). At the issues conference, the applicant's expert provided a calculation of the facility's emissions that estimated 7.9 tpy (I.C. Exh 11) and that the facility is *de minimus* under CP 33.

Ruling #2.3: No supplementation is regarding the proposed mine's emissions of fine particulate matter and the record is sufficient for the DEC Commissioner to make findings on this point.

Curb Cut

At the issues conference, Milan Concerns argued that the DEIS is not accurate with respect to the proposed curb cut and its review and approval by the Dutchess County Public Works Department (DPW). The group claims that no written approval for the curb cut has been received by the applicant, contrary to statements in the DEIS (154).

The DEIS states that the DPW has reviewed the applicant's traffic study and curb cut permit application and that the "DPW has indicated the application fulfills their requirements and they will issue their approval upon completion of the environmental review" (DEIS p. 39).

At the issues conference, the applicant stated that a permit from the County (DPW) would be necessary to construct the new driveway but that the applicant had not yet formally applied for the necessary permit (251). The applicant's consultant has shared the driveway sight line analysis in the application with representatives of the County DPW. Based on conversations with County DPW, the applicant believes that it will meet the requirements for the highway work permit necessary to construct the new driveway. The statement in the DEIS does not indicate that a written approval has already been received (252).

Ruling #2.4: The applicant has clarified the information in the DEIS. No SDEIS is required nor is an adjudicable issue raised.

Definition of "low intensity"

The first of the Town's general comments is that the DEIS is deficient because the term "low intensity" is used to describe the proposed mine, but the term is not defined (Town petition, Appendix A, p.4).

At the issues conference, the applicant responded that in this case, "low intensity" means no blasting or processing at the site, limited hours of operation, no drive-up sales, limited equipment use at site, concurrent reclamation, and mining in phases (164).

Ruling #2.5: The definition provided by the applicant is now in the SEQRA record and no SDEIS is required.

DEIS lacks a quantification of "scattered homes"

The second of the Town's general comments is that the DEIS uses the phrase "scattered homes" near the proposed project, but does not quantify how many homes are within a quarter mile or half mile of the proposed site.

At the issues conference the applicant responded that the number of homes impacted along the proposed truck route were counted (total of 56) and this information is in the record (164).

Ruling #2.6: The information in the record regarding the number and proximity of homes near the proposed mine site is adequate. No SDEIS is required nor is an adjudicable issue raised.

Permit renewal

The third of the Town's general comments is that since the expected life of mine is 10-12 years, the DEIS should address possible permit renewal and any future changes that might occur, such as on-site processing.

At the issues conference, the Town's counsel stated that the DEIS examined the impacts from the entire project, not just for the first five years (which is the length of the permit) (165).

Ruling #2.7: There is no need to discuss possible permit renewal or unplanned changes in the mines future operations. No SDEIS is required nor is an adjudicable issue raised.

Participation in the agricultural exemption program

The fourth of the Town's general comments is that the proposed mine site is receiving an agricultural exemption from the Dutchess County Real Property Tax Service Agency, and that the DEIS fails to address whether the unused or reclaimed sections of the mine would continue to receive this exemption.

At the issues conference the applicant argued that this information was not relevant to the DEIS or the DEC permitting process. The applicant argued that whether it remained in the agricultural exemption program was a financial issue and a real property tax issue, between the applicant and the Town (165).

Ruling #2.8: The failure of the applicant to indicate in the DEIS whether it will continue to participate in a property tax program is not an adjudicable issue nor does it require the preparation of an SDEIS.

Failure to provide market data regarding demand for aggregate

The fifth of the Town's general comments is that the DEIS does not include market data, such as information about the number of mines in the area, the size of these mines and where their products are distributed.

At the issues conference, the applicant asserted that while it had this type of information, it was not relevant to any DEC permitting standard and not relevant to the DEIS (166).

Ruling #2.9: The failure to include market data in the DEIS is not an adjudicable issue and does not require the preparation of an SDEIS.

A more extensive habitat survey is needed

The sixth of the Town's general comments is that the DEIS is insufficient because it does not contain an on-site survey for Indiana Bats, Bog Turtles or the New England Cottontail.

The impacts of the proposed project on the Indiana Bat is discussed below and found not to be adjudicable in ruling #10.3. The impacts of the proposed mine on the Bog Turtle or the New England Cottontail were not raised as potential issues by Milan Concerns' wildlife expert and the Town has not made an offer of proof regarding this issue.

Ruling #2.10: No additional habitat survey is needed for Bog Turtles or the New England Cottontail. No SDEIS is required nor is an adjudicable issue raised.

The DEIS fails to identify alternative sources of aggregate

The seventh of the Town's general comments is that the DEIS fails to discuss alternative sources, including recycled materials.

The applicant responds that this was not identified as an issue in the scoping document and is not substantive or significant (167).

Ruling #2.11: This information is not required for the DEIS. No SDEIS is required nor is an adjudicable issue raised.

DEIS fails to disclose other mining operations in the Town

The eighth of the Town's general comments is it would be helpful if the Natural Resource Assessment disclosed the location of past and present mining in the Town.

At the issues conference the applicant responded that the Natural Resource Assessment was meant to demonstrate the limited availability of sand and gravel resources within the Town and the requested information was not relevant to the DEC's permitting process (168).

Ruling #2.12: There is no requirement that past and present areas of mining in the Town be included in the DEIS. No SDEIS is required nor is an adjudicable issue raised.

The DEIS should disclose that wetland mapping is incomplete

The ninth of the Town's general comments is that the DEIS fails to note that the mapping of freshwater wetlands under the jurisdiction of the US Army Corps of Engineers is incomplete in the Town.

At the issues conference, the applicant responded that the freshwater wetlands issues are addressed in the DEIS in section 3.2.3 (169). The DEIS notes that there are no federal wetlands in the life of mine area, and that there is a small, linear federal wetland at the site which will not be impacted by the proposed mine (DEIS, p.11)

Ruling #2.13: The information in the DEIS is sufficient. No SDEIS is required nor is an adjudicable issue raised.

Appendix J to the DEIS is misleading

The tenth of the Town's general comments is that a person might misinterpret the applicant's Natural Resource Assessment (DEIS, Appendix J) and it should be updated and clarified to include all developed areas.

The applicant argues this is not relevant (169).

Ruling #2.14: The Town's concern is noted. No SDEIS is required nor is an adjudicable issue raised.

The Natural Resource Assessment is misleading

The eleventh of the Town's general comment is that the applicant has failed to disclose the extent to which deposits extend into the neighboring Town of Red Hook and that possible mining in Red Hook should be discussed in the DEIS.

The applicant argues this is not relevant (169).

Ruling #2.15: There is no requirement for the applicant to discuss mining at other sites. No SDEIS is required nor is an adjudicable issue raised.

The Town has banned mining and DEC must respect local law

The Town's last general comment is that DEC should respect the Town's land use regulation and not issue a permit to the applicant.

Ruling #2.16: This is a policy dispute. Current DEC guidance requires the issuance of a mining permit, even in circumstances where local law prohibits mining, if the application meets permit issuance standards (92-2). The appropriate way to change DEC policy is to petition the Commissioner requesting a policy change, which Milan Concerns has

done (MC petition, appendix B). No SDEIS is required nor is an adjudicable issue raised.

ISSUE #3: Community Character

Both Milan Concerns and the Town propose community character as an adjudicable issue. Both petitions note that local zoning prohibits mining and that mining is incompatible with the Town's Comprehensive Plan. Because local zoning and planning are important indicators of a community's character, the proposed mine would create a material conflict with the community's plans as officially adopted. The intervenors argue that these conflicts create both an adjudicable issue and grounds for permit denial.

Community character - background

The DEIS examines potential community character impacts and concludes that no significant impacts to community character will occur as a result of the project (DEIS, p. 51). The DEIS acknowledges that the project has the potential to be incompatible with the surrounding community and lists over 45 aspects of the project that will mitigate these impacts (DEIS, p. 49-50). The DEIS also contains the statement: "[a]t the time of the application, mining was allowed in this district via the floating zone provisions of the Town of Milan Zoning Code" (DEIS, p. 2).

The question of whether mining is allowed at the site under local law has been and continues to be under review by the courts. While a final decision has not been made on this point, the issues conference record includes the following information.

In January 2006, the Town adopted a new Comprehensive Plan (Local Law #1) and a local law to eliminate the Floating Light Industrial (FLI) Zone (Local Law #2). The applicant timely challenged these laws. The Town then repealed Local Law #2, because of improper public notice, and enacted Local Law #12, which again eliminated the FLI zone. The elimination of the FLI zone eliminated potential mines from being established anywhere in the Town (Town petition, appendix A, p.2). In February 2007, a court declared local law #1 invalid. In March 2007, the Town reintroduced the Comprehensive Plan and re-enacted it on August 13, 2007 (192), a few days before the issues conference.

At the issues conference, the applicant argued that the Town was improperly trying to adjudicate the issue of the validity of the local law in the DEC administrative forum, a dispute properly heard in state Supreme Court. The applicant also argued that since the Town's first attempt at revising its comprehensive plan

was invalidated by the courts, it is not settled that mining is not permitted at the site (191).

At the issues conference, the Town responded that the 2006 Comprehensive Plan was invalidated on procedural grounds and that the same plan was readopted in 2007, without the procedural defects (194). In addition, the Town has repealed and reenacted the local law eliminating the floating light industrial zone. It was anticipated at the issues conference by all parties, that the applicant would again challenge the Town's adoption of the 2007 Comprehensive Plan and the reenacted local law (195). This is the case. On October 25, 2007, the applicant again sued the Town seeking to invalidate the 2007 Comprehensive Plan, Local Law No. 6 (which eliminated a Floating Light Industrial Zone) and Local Law No. 7 (local wetland regulation) (applicant's brief, p. 27).

Positions of the Parties

Community character is the sole issue proposed by the Town. The Town identified two potential witnesses on this issue: Town Board Member Ross Williams and the Town Planner, J. Theodore Fink. At the issues conference, Mr. Williams stated he would testify about: (1) his opinion that the proposed mine was prohibited by local law and created a conflict with the community's plans, (2) the background of the Town's comprehensive plan and the town's local law prohibiting mining, as well as (3) the goals and vision of the comprehensive plan (183). The petition identifies Mr. Fink as the witness who would testify regarding the alleged deficiencies in the DEIS and his opinion regarding the true impact of the proposed mine on the community's character. At the issues conference, the Town entered its Comprehensive Plan into the record (I.C. Exh. 6) and asserted that the proposed mine would contradict the community's duly adopted plan. The Town also provided supporting documents (I.C. Exh. 7) and a copy of the reenacted local law that eliminated the Floating Industrial Zone in the Town, effectively banning mining (I.C. Exh. 8).

Milan Concerns also proposed to adjudicate the issue of community character, but offered no expert on community character as a witness. Rather it argued that its other experts would testify for the dual purpose of informing the record on both their specific issues and the general issue of community character (176).

At the issues conference, the applicant argued that community character is not a stand-alone adjudicable issue (190) and it should not be an issue with respect to DEC's permit,

because the issue would be considered by the local government before issuing any local approvals (197). The applicant argued that DEC administrative precedent demonstrated that community character was not an issue readily susceptible to adjudication as a separate issue (198).

At the issues conference, DEC Staff took no position as to whether or not community character was a stand-alone issue for adjudication because it argued that it was precluded from doing so (212). Section E of subparagraph D of 92-2 states:

"D. If the project has received a positive declaration requiring an EIS or a hearing is required, Departmental staff will not propose or recommend that the question of local jurisdiction or prohibition of the mining activity be an issue for adjudication."

While it is not an issue for adjudication, DEC Staff's reading of "local jurisdiction or prohibition of the mining activity" as "community character" seems overly broad. Local laws prohibiting mining may be part of a community's character, but there are many other aspects of community character.

Community Character - Discussion

In its reply brief, the Town states that other issues conference participants did not understand the Town's position with respect to community character. "The Town's position is this: DEC must consider the impacts on community character in its role as lead agency; and according to its own precedent, it must defer to the Town's Comprehensive Plan and its prohibition of mining since January of 2006 as evidence of the Town's Community Character" (Town's reply brief, p.1). The Town cites no dispute requiring adjudication, rather it makes a legal argument that community character impacts must be considered before a final decision is made on permit issuance, and this consideration must result in permit denial. There is no requirement that an issue be adjudicated before it is cited as the grounds for permit denial by the Commissioner.

In its brief, Milan Concerns argues that adjudication of community character is necessary to develop the record on the interplay between physical environmental impacts attributable to the project and community character impacts. Without considering community character as a separate issue, the nexus between the Town's officially adopted land use policies and goals and the physical impacts of the project to the existing environment will not be adequately considered (MC brief, p. 12).

The Town has included in the record the Comprehensive Plan (I.C. Exh. 6), supporting documents (I.C. Exh. 7) and a copy of the reenacted local law that eliminated the Floating Industrial Zone in the Town, effectively banning mining (I.C. Exh. 8). In response, the applicant introduced five letters from the Dutchess County Department of Planning regarding the Comprehensive Plan (I.C. Exh. 5). The applicant argued that the newly adopted Comprehensive Plan should not be afforded any deference by DEC because: (1) the plan is not based on sound planning, but is rather based on the feelings of local opponents of the project who are a minority of the local population; (2) the plan contradicts the view of the County Planning Department; (3) the plan contradicts the natural resource assessment prepared by the applicant's consultant (DEIS, appendix J) (203). This assessment shows that there are only two areas in the Town that could be practically mined for sand and gravel with an area of about 1.1% of the Town (applicant's brief, p.20).

RULING #3.1: Neither petitioner has shown that a significant or substantive issue exists regarding community character and the record is sufficient for the Commissioner to make SEQRA findings. The record contains both the Comprehensive Plan and the local zoning law and both must be reviewed before SEQRA findings on community character can be made and a final decision on permit issuance is reached. The documents in the record speak for themselves and provide an adequate basis, with other information in the record, for the Commissioner to make SEQRA findings and decide either to issue or deny the permit. If the Comprehensive Plan is valid at the time of DEC's final decision, the Commissioner can consider it with respect to community character impacts.

Qualifications of Town's proposed witnesses

The applicant also challenges the qualifications of Mr. Fink (206) and Mr. Williams (applicant's brief, p.2) to testify as experts on community character.

The Town responds that Mr. Fink is an experienced planner and qualified to testify about community character. The Town also argues that Mr. William's experience in local government qualify him to testify as well (Town's reply brief, p. 6).

Ruling #3.2: In the event that the Commissioner finds community character adjudicable, both Mr. Fink and Mr. Williams are qualified to testify regarding the matters proposed.

Should DEC Staff have declared the application complete?

The Town also raises the policy question whether DEC Staff should have declared the application incomplete because mining is banned at the site. DEC's Technical Guidance Memorandum MLR 92-2 states "a complete application for a new mining permit shall contain a statement by the applicant that mining is not prohibited at that location. For the purposes of application completeness, the Department will rely exclusively on the applicant's statement concerning prohibition and will not involve itself in matters of dispute between local government and the applicant" (p. 1).

The Town argues that DEC Staff's reliance on 92-2 which required DEC Staff to continue to process this mining application, even after the Town had informed DEC Staff that mining at the site is banned by local law, was improper. This continued processing, leads to both a waste of taxpayer resources by DEC Staff and the host community (181). Milan Concerns expressed these same concerns to the DEC Commissioner in a letter dated June 1, 2007 (petition, Exh. B). In this letter, Milan Concerns asks that this policy be reconsidered. As of February 3, 2008, no response had been received and this policy remains in effect.

The applicant argues that a DEC adjudicatory hearing is not the appropriate forum to create a new policy to replace 92-2 (199). Applicant states that it complied with 92-2 when it stated "[a]t the time of the application, mining was allowed in this district via the floating zone provisions of the Town of Milan Zoning Code" (DEIS, p. 2). The applicant argues that mining was allowed at the site in October 2002, because the now repealed floating light industrial zone was in effect and the 1986 Comprehensive Plan was supportive of mining (200).

Milan Concerns responds that the applicant did not comply with 92-2 because at the time of the original application mining was prohibited (217). The Town agreed and stated that mining was not allowed under the floating light industrial zone and the site was and is in an A3A zone that does not permit mining (219). According to the Town, the applicant sought to have the site rezoned and it was denied. This denial was not challenged (219). The law repealing floating light industrial zones was passed on January 29, 2006 and has been in effect in different forms since and DEC Staff was informed of the applicant's alleged misstatement of the now superceded law (219).

In its reply brief, the Town continues its disagreement with 92-2, but acknowledges that the issue is not adjudicable.

Ruling #3.3: While a dispute exists between the applicant and the Town regarding whether or not mining was allowed at the time of the application, this dispute is not adjudicable (6 NYCRR 624.4(c)(7)).

ISSUE #4: Traffic Impacts

The fourth issue, traffic impacts, was raised by Milan Concerns. Milan Concerns asserts that the proposed truck route has numerous geometric and sight distance deficiencies and is unsafe. While DEC has no specific traffic standards, the intervenor has shown that the application in its current form is insufficient for the Commissioner to make the required SEQRA findings (6 NYCRR 617.11). The applicant must provide traffic studies that include information required by the SEQRA scoping document and requested by DEC Staff. In addition, the applicant should include some information requested by the intervenor, to more fully develop the record. No further information is required regarding sight line distances from the applicant's driveway or the alternative truck route along an old logging road for which the applicant does not have an uncontested easement. Other points raised by the intervenors are essentially arguments as to why the permit should ultimately be denied, and require no additional action.

Traffic - Background

According to the DEIS, a new driveway will be constructed for truck traffic, approximately 60 feet to the west of the existing driveway at the site. Since this mine is proposed to supply the applicant's Billings facility, all trucks will travel along the same truck route. Trucks will exit by turning right onto Turkey Hill Road (County Route 56, CR 56) and travel for 0.7 miles to the intersection of CR 55, then continue on CR 56 for another 1.6 miles west to the intersection of CR 56 and US 9 where the trucks will take a left (DEIS, Appendix A, Location Map). Trucks will pass 56 residences on the 2.3 mile proposed truck route and will proceed through several intersections with other local roads.

Trucks arriving at the site will take the opposite path. They will take a right from US 9 onto CR 56 and then left at the project's driveway. All material from the proposed mine will be hauled to the applicant's existing Billings Plant. Currently,

the applicant's nearby Roe-Jan mine supplies Billings. If the project were approved, the fifty truck trips per day to the proposed mine would replace trucks currently on the road operating from Roe-Jan (DEIS, p. 2). The proposed route from the proposed mine is several miles shorter than that from Roe-Jan. Trucks from Roe-Jan did use a portion of the proposed truck route but were redirected to other roads by the applicant at the request of residents along the route (246).

The DEIS includes information about the conditions of the proposed truck route, including: the portion of CR 56 to be used by the trucks is a two-lane highway with travel lanes up to 11 feet wide and there are no weight restrictions; the shoulders, where present, are unpaved and generally less than three feet wide; CR 56 is somewhat winding, following the topography; the condition of the road is good for a road of its age; about 725 vehicles use the road a day (2002), or about one a minute during peak travel time and one every two minutes at off-peak times; the posted speed limit is 55 mph; the average vehicle speed on the road observed was 44 mph; the neighboring Town of Red Hook has prohibited school buses from using the intersection of CR 56 and US 9 because it is dangerous; and sight distances at this intersection to the south are limited by vegetation along the east side of US 9 (DEIS, 35-37).

Special condition 12 of the draft permit limits the proposed mine to fifty truck trips in and fifty truck trips out per day (100 trips total). It also requires that a log of truck traffic be maintained and bans sales to drive-up customers (I.C. Exh. 19). All trucks will either be owned or hired by the applicant. The trucks will primarily be dump trucks capable of carrying about 40 tons per load (DEIS, p. 37).

Attached to Milan Concerns' petition is a three page letter from the intervenor's expert (Janet Choi, Senior Associate, Research Systems Group, Inc.) setting forth thirteen comments with respect to traffic impacts. These comments were elaborated on at the issues conference by a colleague of Ms. Choi, Kenneth Kaliski. The Town agreed that traffic impacts should be adjudicated (242) and also made five comments on traffic (Town petition, appendix A, comment 22-26). The applicant opposed adjudication and argued that the DEIS was complete and no significant traffic impacts will occur as a result of the project (DEIS, p.39). DEC Staff agreed with the applicant.

Compliance with the SEQRA Scoping Document

Milan Concerns contends that the scope of the applicant's traffic analysis was inadequate because the applicant failed to provide information identified by the DEIS scoping document (236). Specifically, the DEIS fails to discuss traffic impacts on the intersections along the proposed truck route of CR 56 with either Hapeman Road and Spring Lake Road (petition, comment 9) or with US 9 (236).

The Final Scoping Document, revised July 30, 2004, (DEIS, Appendix C) states in relevant part (p. 5-6):

"The DEIS will discuss the existing traffic counts on the roads to be used by project truck traffic, the amount and type of truck traffic to be generated by this operation, the planned truck schedule and route, ***the potential impact of project truck traffic on the intersections of Turkey Hill Road (County Route 56) with Hapeman Road, Spring Lakes Road (County Route 55) and U.S. Route 9***" (emphasis added).

There is no discussion of the intersections of CR 56 and Hapeman Road and Spring Lakes Road in the DEIS or the applicant's other submissions. No explanation of this deficiency was provided at the issues conference or in their briefs by either the applicant or DEC Staff. The applicant does state that it examined the two intersections where trucks would turn (the driveway/CR 56 and CR 56/US 9) because these are the critical intersections (260).

Ruling #4.1: Milan Concerns correctly argues that an evaluation of the intersections identified in the scoping document is necessary for the Commissioner to determine that off-site traffic impacts have been mitigated to the maximum extent practicable as required by SEQRA. The applicant must submit additional information regarding the potential impact of project truck traffic on the intersections of Turkey Hill Road (County Route 56) with Hapeman Road, Spring Lakes Road (County Route 55) and U.S. Route 9. This information should include a written narrative describing the proposed truck route, including road conditions, warning signs, intersections, grade and other relevant data (this will address the concern in petition, comment 5). In addition the applicant should clarify how many one-way trips there will be from the mine (petition, comment 8). The applicant should also discuss any possible alternative routes along existing roads (petition, comment 11). After this

information is compiled and distributed to the service list, this issue will be the subject of adjudication.

Compliance with DEC Staff's Information Request

Milan Concerns also contends that the applicant failed to respond to DEC Staff's request for the traffic counts to be subdivided into truck traffic and car traffic (petition, comment 10, 236). By letter dated September 28, 2004, DEC Staff member Lawrence Biegel wrote "[w]e have reviewed the revised scoping document dated July 30, 2004 for your proposed project referenced above and find it to be acceptable. One minor request however - please ensure the existing traffic counts - bottom of page 5 [of the scoping document] - includes a breakdown of trucks vs. cars" (DEIS, appendix C).

The 2002 traffic counts in the DEIS do not contain traffic counts with breakdowns of trucks vs. cars. At the issues conference, the applicant explained that an automatic traffic recorder was used that could not differentiate between cars and trucks (260). DEC Staff did not explain why this information was not now sought or relevant.

Ruling #4.2: Milan Concerns is correct when it argues that this information is necessary for the Commissioner to determine that traffic impacts have been mitigated to the maximum extent practicable as required by SEQRA. Because the 2002 traffic counts cannot be divided between truck and car traffic, the applicant should undertake new traffic counts, which should provide breakdowns of car and truck traffic. The applicant should also do a full day weekday count under typical conditions (petition, comment 13). This new data will also address concerns about the staleness of the traffic data. In addition, the applicant may wish to examine the intervenor's claim that there have been 22 car crashes in a five year period on the truck route (239). After this information is compiled and distributed to the service list, this issue will be the subject of adjudication.

Driveway Corner Sight Distances

Milan Concerns asserts that the corner sight distances (CSD) in the DEIS which measure from the applicant's proposed new driveway along CR 56 are not accurate (petition, comment 2) and that the applicant's consultant used the wrong standard in calculating the required CSDs (petition, comment 1). The applicant responds that Milan Concerns is referring to the current CSD and not to the estimated CSD after the removal of vegetation and regrading part of the embankment on the site, as

discussed in the DEIS (p.38). The applicant argues that no adjudicable issue exists because after the mitigation measures are undertaken, the CSD will exceed both the standard advanced by Milan Concerns and the applicant (248).

The important CSD for the driveway are the turns that trucks to and from the mine will take. Trucks exiting the mine will turn right onto CR 56, trucks arriving will make a left turn from CR 56 into the site.

The DEIS contains the applicant's consultant site distance evaluation for the driveway dated November 20, 2002 (DEIS Exh. H). The table below summarizes its findings:

Turn	11/20/02 observed CSD	CSD Standard for 51 mph	Improved CSD with mitigation
Left onto CR 56	570 feet	865 feet	730 feet ¹
Right onto CR 56	520 feet	790 feet	1,010 feet
Left from CR 56 to site	1025 feet	565 feet	no improvement necessary

The mitigation consists of the removal of vegetation and regrading of the embankment. During the site visit, the applicant pointed out a large red maple that would have to be moved as part of the mitigation. This work would not be undertaken unless the permit is granted.

The applicant also had its traffic expert return to the site before the issues conference to confirm his findings. He reported that the CSDs were shorter than in 2002 (I.C. Exh. 10).

Milan Concerns' expert stated that he had measured the CSD at the project's proposed driveway and found them to be 80 to 120 feet shorter than those stated in the DEIS (petition, comment 2), probably because vegetation had grown up since 2002 (237). The expert did not challenge the improved CSD after the mitigation measures were complete.

¹ None of the trucks from the site will make this turn.

In his evaluation, the applicant's expert used 51 mph (the 85th percentile speed) to calculate the CSD standard in the table above. In its petition, Milan Concerns asserts that the correct CSD standard was the 55 mph posted speed limit, which would increase the minimum CSD by about 60 feet (petition, comment 1). At the issues conference, the applicant correctly asserted that it didn't matter which standard was used because the improved sight distances would be 1,010 feet, a figure not challenged by the intervenor (248).

Ruling #4.3: No adudicable issue is raised nor is additional information needed regarding the sight distances from the applicant's driveway. The information in the record is sufficient for the Commissioner to conclude that a hard look has been taken at this issue and that after mitigation, the applicant will meet applicable standards.

Intersection of CR 56 and US 9

Milan Concerns asserts that the conditions at the intersection of CR 56 and US 9 are not accurately or adequately described in the DEIS (petition, comment 6) and that the DEIS's statement that school buses have been forbidden from using this intersection is proof that the proposed truck route is unsafe.

Unlike the intersection of CR 56 and the project's proposed driveway which was evaluated for numerical sight distances, no such analysis was included in the DEIS for the intersection of CR 56 and US 9, where trucks going to the site turn left off US 9 to CR 56 and trucks leaving the site turn right from CR 56 to US 9. The DEIS does contain a narrative describing this intersection that states that sight distances looking to the south at this intersection are limited by vegetation along the east side of US 9 and that school buses are prohibited from using the intersection (DEIS, p. 37). To mitigate this, the DEIS states that the applicant will request that NYS DOT remove the vegetation in the right-of-way (DEIS, p. 38).

At the issues conference, the intervenor's expert asserted that the limited sight distance at this intersection is not caused by vegetation, but rather a hump in the curve of the road that limits sight distances (237).

In his memorandum prepared prior to the issues conference (I.C. Exh. 10), the applicant's expert again reported that sight distances were restricted by vegetation. He stated that at the intersection, US 9 has a posted speed limit of 45, the sight distance looking south is approximately 400 feet. The standard

calls for 430 feet for a right turn exiting CR 56 and 500 feet for a left turn exiting CR 56 (at 50 mph, the standard calls for 480 and 555 feet, respectively). The applicant's expert concludes that because the intersection does not meet current standards, an "intersection ahead" warning sign was installed on the northbound approach to US 9 to warn drivers of potential turning traffic ahead (I.C. Exh. 10). This signage, the applicant argues, already mitigates the problem of restricted sight distances (250). Issues Conference Exhibit 10 was not shared with the parties prior to the issues conference.

Ruling #4.4: The applicant should include the information in I.C. Exh. 10 in its new traffic study, as well as other relevant data regarding this intersection. The applicant should also expand upon the statement in the DEIS that "the Town of Red Hook reports that school buses are prohibited from using the intersection of CR 56 and US 9 because it is dangerous." The applicant should include information regarding which authority issued the prohibition, when was it implemented, and its form. This information will assist the Commissioner in his final decision whether to issue the permit. After this information is compiled and distributed to the service list, this issue will be the subject of adjudication.

Grade of the Hill

Milan Concerns asserts that the grade of CR 56 between Parker State Training Center and Hapeman Hill Road is 12%, which exceeds design standards, and that this potentially dangerous condition is not discussed in the DEIS (petition, comment 3). The applicant's expert returned to the proposed truck route before the issues conference and measured the grade at the point and reported an average grade of 7.5% with a maximum of 8.9% over a distance of 50 feet (I.C. Exh. 10). The New York State design standard is 9% (238).

Ruling #4.5: The intervenor is directed to promptly communicate to the service list, exactly where this steep grade occurs and what data and standards were used to calculate the grade. The applicant will evaluate the intervenor's information in the new traffic study.

Alternative Truck Route

Milan Concerns argues that an alternative truck route exists that will mitigate nearly all the traffic impacts of the proposed mine (239). This alternative is described in the DEIS (p.1) as a

right-of-way through the woods that connects the Archer property (site) with the applicant's Roe-Jan property.

In response to public comments on traffic, the applicant evaluated this alternative in the DEIS (section 9.9, p. 60). As explained in the DEIS, this alternative would involve trucks leaving the Archer site and traveling north along an old logging road across neighboring properties until reaching the southern end of the Roe-Jan facility. This route would require the trucks to cross, at grade, Spring Lake Road (CR 55). As part of the applicant's evaluation of this route, the applicant's consultant noted that this route would involve crossing wetlands under the jurisdiction of the U.S. Army Corps. The applicant concluded that this alternative would likely have no impact on archeological resources, have no significant noise impact, and reduce traffic impacts. Other impacts considered in the DEIS include questions of the safety of crossing CR 55 and possible dust from the use of the road (p.62).

At the issues conference, the applicant explained that the logging road was part of an easement created in the late 1800s that was now the subject of litigation (256). The applicant and its title insurance company have brought an action to quiet title on the easement and the dispute involves whether the easement still exists (257). The applicant's counsel stated that he was not the attorney handling this matter for the applicant and further claimed that it is doubtful that the roadway could be improved satisfactorily (257).

At the issues conference DEC Staff stated it had considered the alternative truck route along the old logging road and rejected it for several reasons. First, in order to use the road, clear cutting would be necessary along the length of the roadway (266). In addition, the road would have to pass over intermittent streams and create other disturbances to the wooded areas, which in DEC Staff's view are unnecessary because a highway exists for trucks to travel along (267). DEC Staff noted that this proposed alternative would also involve amending the existing DEC mining permit for the applicant's Roe-Jan facility.

Following the issues conference on September 21, 2007, I requested the parties to provide updates on several issues via email, including the continuing litigation involving this easement. By e-mail dated November 1, 2007, the applicant's counsel stated that depositions had been taken in this case and documents produced. Further discovery was expected and the case was not likely to go to trial until the end of 2008.

Ruling #4.6: SEQRA requires private applicants to evaluate alternatives under their control. In this case, the applicant does not control the easement and it is the subject of litigation. However, at the request of DEC Staff, the applicant has done an additional study on the alternative truck route and described the environmental impacts. DEC Staff has evaluated the study and concluded that even if it was available to the applicant, it is not a preferred alternative because of its environmental impacts, including clear cutting, filling federal wetlands and crossing intermittent streams. The applicant will continue to provide updates to the service list about this litigation. If the applicant is successful in confirming its easement, the record is sufficient for the Commissioner to determine whether this alternative truck route should be required. No further information is necessary.

Other Comments

The remainder of the comments in Milan Concerns' petition are undisputed facts, which it asserts should lead to the Commissioner denying the permit. Specifically, Milan Concerns asserts that since the DEIS data demonstrates that the average speed of traffic on Turkey Hill Road in 2002 was 44 mph in a 55 mph zone, the road is unsafe at the posted speed limit (MC petition, Appendix C, comment 12). In addition, many drivers on this road may be unfamiliar with it because it is part of a Scenic Drive Tour set forth on the county website promoting tourism (petition, comment 7). Milan Concerns also notes that shoulder widths along CR 56 are deficient (comment 4), as noted in the DEIS.

Ruling #4.7: Because they do not raise contested factual questions no further action is required at the issues conference phase. These comments are arguments for the Commissioner to consider when making a final decision on whether to issue the permit.

Traffic -- Conclusion

The applicant argues that because the two roads in question, CR 56 and US 9 are under the jurisdiction of the county DPW and NYS DOT, respectively, that the conditions of the road and the mitigation of unsafe conditions (with the use of warning signs, etc.) is outside the control of the applicant and DEC (265). However, all the drivers are within the control of the applicant (DEIS, p.37), and once the traffic information in the record is sufficient for a hard look to be taken, additional mitigation,

such as additional driver training regarding the features along the route that do not meet specifications could be imposed as permit condition. However, this can only be evaluated after the information is assembled for the Commissioner to take a hard look at the traffic impacts.

ISSUE #5: Noise Impacts

The next issue raised by Milan Concerns involves the noise impacts from the proposed mine. Specifically, the intervenor proposes five sub-issues regarding the noise analysis in the DEIS: (1) applicant overestimated the existing ambient noise level; (2) applicant overestimated the amount of attenuation possible from the use of earthen berms; (3) applicant failed to properly estimate the noise from trucks traveling along the proposed truck route; (4) applicant used the wrong measure for noise, L_{eq} instead of L_{90} , in its calculations; and (5) applicant failed to use the correct model to assess noise impacts. According to the intervenor's expert, these errors could result in a difference of more than 30 dBA between the noise predicted by the applicant's noise study and the noise from the mine, if permitted (petition, Exh. D). The Town also is concerned about noise (Town petition, appendix A, comment 13), however, this comment is essentially argument and raises no factual questions.

At the issues conference, the applicant argued that Milan Concerns had failed to raise an adjudicable issue with respect to noise impacts (327). DEC Staff agreed with the applicant and asserted that the noise impacts of the proposed activity had been exhaustively investigated and that no issue for adjudication was presented (329).

Background - Noise

The DEIS concludes that the project will have no significant noise impact (p. 13). This conclusion is supported by a noise study conducted by the applicant's expert (DEIS, Appendix D). This report includes a description of the mining operation and area surrounding the mine, including adjoining landowners. The study itself begins with an assessment of ambient sound levels around the mine site. At the issues conference, the applicant's expert explained that it was his practice to take noise sample in a community to approximate the ambient noise readings and determine the location of noise receptors for a study (314). Measurements would be taken once the L_{eq} level stabilized (315)

and that all measurements were done in accordance with equipment manufacturer's recommendations and conducted properly (316).

The applicant's noise expert selected five locations surrounding the proposed mine to measure the ambient noise (Mining Plan Map, DEIS appendix B). These locations were selected to be those most likely to be impacted, usually at the nearest property line to be conservative, by noise at the site. At the issues conference, the applicant's expert stated that ambient noise readings were taken on a single day (probably in 2002). The expert arrived at the noise receptor location, waited until the Leq level measured on his meter stabilized and then took the measurement. Each measurement took about 30 minutes and morning and afternoon measurements were taken and the lower ambient noise level was used for the applicant's study. (315). The ambient noise at the receptors ranged from 46.3 - 51.8 dBA (DEIS, appendix D, p.3).

The applicant's noise study next calculated the expected noise generated from the loader, bulldozer and trucks at the site. It then examines the noise attenuation expected due to distance, barriers, and wooded land. Three noise control techniques were incorporated into the mining plan: directional mining, perimeter berms and hours of operation.

The applicant's noise study concludes that the proposed mine would not have a significant noise impact because the worst-case impacts typically resulted in increases of 1 dBA or less. The largest increase, about 8 dBA, occurs on unoccupied State-owned land and the nearest structure would experience less than a 1 dBA. The report did conclude that stripping operations at the mine could result in an increase of more than 6 dBA for a day during the life of mine at each receptor, but this was not viewed as significant.

The study concludes by citing noise mitigation, including the construction of berms, including a 10 foot berm between Warackamac Lake and the mine, mufflers on equipment, compliance with the Mining Plan Map, minimizing truck back-ups and noise from backing loaders (p. 12)(321).

Ambient Noise Level in DEIS unverifiable

The first sub-issue asserted by Milan Concerns is that the ambient noise levels reported in the DEIS (Appendix D) are too high, and do not accurately reflect the conditions at the site (petition, p. 14). At the issues conference, Milan Concerns'

noise expert stated that the numbers reported in the DEIS, ranging from 46.3 - 51.8 dBA, were too high for the area and that underestimating ambient noise by 10 to 15 dBA would significantly affect an analysis of the project's noise impacts (307).

The intervenor's expert monitored ambient sound levels at 660 Turkey Hill Road for a 24 hour period on May 7-8, 2007. At this location, the intervenor's expert measured a range of 35 - 43 dBA for the hours the mine would be in operation (7 a.m. until 4 p.m.). This site was not a receptor chosen by the applicant and is approximately 400 feet south of the site's boundary. The intervenor offered a memorandum from its noise expert (I.C. Exh. 16) which states that a subsequent sound measurement at 660 Turkey Hill Road and at 5 Odak Hill Road (on July 30-31, 2007) had recorded the same 35-46 dBA range for ambient sound levels. The intervenor's expert stated that these measurements were taken in accordance with DEC policy (332). Milan Concerns stated that it had been continuing to monitor sound levels at 660 Turkey Hill Road and would offer this additional data at a possible adjudicatory hearing (305). The two noise receptors chosen by Milan Concerns are residences of members of the organization and 660 Turkey Hill Road is directly across the street from the proposed mine's driveway (339).

At the issues conference, the applicant's expert responded that he had used receptors closer to the mine than those used by the intervenor and that he did not know what the ambient levels were at the intervenor's noise receptors without measuring (338). He continued road noise was the predominant source of noise in the area and the further a receptor from the road, the lower the ambient sound level tended to be (338). He concluded that he had been working on this project of years and that the readings of ambient noise were representative of what his firm had measured in the community over the last five to seven years (316).

At the issues conference, DEC Staff questioned whether the ambient noise level measured at the intervenor's only receptor was typical of the area and a good receptor (328). However, while arguing that noise impacts should not be adjudicated, DEC Staff concede that it is not expert in noise assessment (DEC brief, p. 13).

Ruling #5.1: Milan Concerns has raised an adjudicable issue with respect to whether the DEIS accurately characterized the ambient sound level in the area surrounding the mine. The intervenor has offered a qualified expert who has undertaken independent ambient sound measurements which differ significantly from the applicant's. DEC's Noise Policy states "appropriate

receptor locations may be either at the property line of the parcel on which the facility is located or at the location of use or inhabitation on adjacent property" (p.12) so both the applicant's and intervenor's sound receptor choices appear valid. The difference in ambient sound levels, approximately 5-10 dBA, could affect the conclusions of the DEIS with respect to noise. It may be that the applicant is correct and the lower ambient noise readings measured by the intervenor are caused by the intervenor's receptors being further from the road, and thus quieter. It may be that the intervenor is correct that the applicant erred when it measured higher ambient noise levels. At this point, it is impossible to settle this factual question without additional information, which will be produced at the adjudicatory hearing.

Barrier Attenuation

The second sub-issue Milan Concerns' raises is that the applicant has overestimated the noise attenuation from barriers by a factor of 10 dBA or more. The applicant's expert cites the international ISO standard 9613-2 for determining sound levels due to propagation outdoors to support his claim (petition, Exh. D). At the issues conference, the intervenor's expert explained his position that the applicant's claim of a barrier attenuation in excess of 20 dBA was not appropriate for distances up to 500 feet and that barriers become less effective up to 1,000 feet when they become ineffective (308). Atmospheric conditions can bend sound waves which limit the effectiveness of barriers at distances beyond 500 feet (334).

At the issues conference, the applicant responded that the large amount of attenuation claimed in its noise study was due to the size of the proposed barrier (2.5 meters wide and earthen). The applicant cited as authority for this attenuation an excerpt from "Noise and Vibration Control Engineering: Principles and Applications" by Beranek and Vier (I.C. Exh. 13). This is the source for chart 7 in the applicant's noise study (DEIS, Appendix D). The applicant's expert stated that assuming a noise attenuation greater than 20 dBA from the berms was appropriate in this case. He stated that he had actually measured the effectiveness of berms such as those proposed and measured an attenuation of 24 dBA (319). The intervenor's expert responded that this attenuation could only be achieved close to the barrier and assuming that level of attenuation at greater distances was unrealistic, based on his 25 years of experience (334). The applicant's expert responded that attenuation levels were adjusted so that undue credit was claimed as the sound traveled over distances of 500 feet (326).

Ruling #5.2: Milan Concerns has raised an adjudicable issue with respect to the effectiveness of the berms to mitigate noise. Both the applicant's expert and Milan Concerns' expert cite different authorities for their respective contentions regarding barrier attenuation and it is not possible at this point to settle this factual question without additional information, which will be produced at the adjudicatory hearing.

DEIS fails to consider noise from trucks

Milan Concerns asserts that the applicant's noise study (DEIS, Appendix D) fails to analyze the noise impacts from the truck traffic as required by DEC's noise policy. Specifically, that the largest source of noise from the proposed mine would be truck traffic and it is not considered, of particular concern to Milan Concerns is the use of "jake breaks" by the dump trucks as they wind their way along the truck route to US 9 (329).

At the issues conference, the applicant argued that truck noise is addressed in federal regulation, state law (Vehicle and Traffic Law, section 386), and DEC regulations (6 NYCRR 450) and all the trucks will meet these standards with respect to truck noise (322). The applicant also pointed to special condition of the draft permit (I.C. Exh 19) which requires equipment at the site not to employ backup beepers (I.C. Exh 14). At the issues conference, the applicant provided information about "jake breaks" (I.C. Exh. 15), including the fact that noise limits from trucks traveling over 35 mph is limited to 90 dB(A) (NYS V&T 386). The DEIS states that the use of jake breaks will be discouraged (p. 17), but the applicant conceded their use may be necessary for safety reasons (325). The intervenor's expert responded that 90 dBA is incredibly loud and would startle people in a residential community (335).

Ruling #5.3: Milan Concerns has failed to show that this issue is adjudicable. Noise from mobile sources is regulated by existing state and federal law.

Applicant used wrong sound measurement

Milan Concerns argues in its petition that the applicant did not accurately measure the noise impacts from the proposed mine because the applicant used L_{eq} instead of L_{90} in its calculations. At the issues conference, Milan Concerns' counsel argued that the DEC noise policy supports the use of L_{90} (309). The intervenor's expert seems to contradict the intervenor's position when he said

the "ambient levels in the area ... are referenced in terms of L_{eq} , which is an equivalent level, which is fine" (306).

At the issues conference, the applicant responded that the Commissioner had accepted L_{eq} in past administrative decisions (312). DEC Staff argued that this was not an adjudicable issue.

Ruling #5.4: No adjudicable issue is raised by the applicant's use of L_{eq} instead of L_{90} . DEC's Noise Policy discusses L_{eq} and authorizes the use of this measurement, as well as others.

Applicant failed to properly model noise impacts

Milan Concerns argues that the applicant should have undertaken a Cadna/A modeling of noise impacts. In its brief, Milan Concerns argues that this modeling is necessary if the applicant is going to take a large credit for barrier attenuation (MC brief, p. 22). Milan Concerns did not raise this sub-issue at the issues conference and the record is not developed on this point. Milan Concerns makes no offer of proof nor does it explain its position adequately.

Ruling #5.5: Milan Concerns has not raised an adjudicable issue.

ISSUE #6: Air Quality Impacts

The sixth issue involves potential air quality impacts from the proposed mine. In its petition, Milan Concerns argues that the DEIS fails to quantify the fugitive dust and diesel emissions from the mine, in contradiction to DEC Policy CP-33. The Town also comments on this (Town petition, appendix A, comment 20) and its concerns are addressed in the discussion, below.

Background

The DEIS discusses the air quality impacts of the proposed mine and concludes that the mine will be a *de minimis* source of dust that by definition, can have no significant impact on air quality (DEIS, p.32). The DEIS discusses DEC policy CP-33, Assessing and Mitigating Impacts of Fine Particulate Matter Emissions. Under this policy, if fine particulate emissions from a point source are below 15 tons per year (tpy) then the source is considered insignificant and no further assessment shall be required (p.9). The DEIS states that because no processing will occur on-site, no point source exists, so by definition the

proposed facility is a *de minimis* source (DEIS, p. 33). The DEIS also discusses the requirement of CP-33 that best management practices (BMPs) be used for non-point sources, such as trucks and loaders. The DEIS lists 19 BMPs to be used at the site.

Milan Concerns attaches to its petition (Exh. E) a three page letter from the intervenor's air expert John Hinckley of Resource Systems Group, Inc. This letter raises four sub-issues with the DEIS: (1) the absence of an emissions inventory; (2) whether the applicant correctly characterized the fine particulate emissions as *de minimis*; (3) the failure to quantify road sweeping measures; and (4) the failure of the permit to require the installation of a sign stating all loaded trucks must be covered. Each sub-issue is discussed below.

The Town supported Milan Concerns and DEC Staff agreed with the applicant that this proposed issue did not warrant adjudication (299).

Lack of Emissions Inventory

The first air quality sub-issue identified by Milan Concerns is that CP-33 required the production of an emissions inventory for fine particulates ($PM_{2.5}$). This was necessary to understand the air quality impacts from the proposed project (282).

The applicant responded that it did not believe that CP-33 applied to sand and gravel operations because they produce very low emissions (288). Rather, the appropriate regulatory standard was found in 6 NYCRR 422 which requires best management practices for the control of dust at mines (301). Nonetheless, the applicant did commission its expert to produce an inventory based on EPA guidance (AP-42) which it introduced at the issues conference (I.C. Exh. 11). This inventory estimates the emissions from the site at 7.9 tons per year (tpy). The applicant's expert stated that the methodology of the inventory included conservative assumptions. He concluded that the mine's emissions would be well below the 15 tpy threshold in CP-33 (296).

Milan Concerns responded to the applicant's emissions inventory by stating it was incomplete because it did not include an estimate of emissions from stripping activities, wind erosion of stock piles, loading activity and diesel emissions (300). The applicant responded that stock piles were not allowed under its permit (302) and that diesel emissions from mobile sources are regulated under 6 NYCRR 217-5 (299). The applicant's expert also stated that emissions from truck loading would not materially

change his 7.9 ton emissions estimate (302). The applicant's expert also stated that on the over five hundred mining applications he had personally worked on, none had been required to compile an emissions inventory (303).

Milan Concerns also took issue with the method by which the applicant's emissions inventory was compiled. The intervenor asserts that the applicant did not follow the procedure set forth in CP-33 which requires an assessment of emissions before mitigation and then again afterwards, which allows an evaluation of the effectiveness of the mitigation (304).

Ruling #6.1: CP-33 does not require the production of an emissions inventory in this case. This issue is not adjudicable.

De Minimis

The second air-quality sub-issue identified by Milan Concerns involves whether or not the proposed mine is a *de minimis* source of fine particulates. As discussed above, CP-33 sets a *de minimis* cap of 15 tpy and the information in the record indicates emissions from the facility of less than 8 tpy.

Ruling 6.2: The proposed project is properly characterized as a *de minimis* source of fine particulates. This issue is not adjudicable.

Street Sweeping and Wheel Washing

The third air-quality sub-issue identified by Milan Concerns involves street sweeping. The Town also raises this issue in its comments (Town petition, appendix A, comment 21). In the DEIS, one of the BMPs identified by the applicant is sweeping the paved entrance road on an as needed basis to control dust (DEIS, p. 35). At the issues conference, Milan Concerns' air expert argued that the efficiency of road sweeping can be highly variable and that additional specifics regarding road sweeping should be included in the permit (284). He concluded that the installation of a wheel washing station at the site to wash the wheels and undercarriages of trucks leaving the site would be more effective (285).

The applicant responded that a pre-determined schedule of road sweeping was not desirable because it did not take into account weather conditions (298). The applicant included a photo of the road sweeping truck in the issues conference record (I.C. Exh 12). The applicant concluded that street sweeping would be

effective and a wheel washing station was not needed (298). DEC Staff agreed with the applicant.

Ruling #6.3: Milan Concerns has failed to show that an adjudicable issue exists with respect to street sweeping and wheel washing. The intervenor has failed to show that a predetermined road sweeping schedule or a wheel washing station is warranted.

Signage

The fourth air quality sub-issue identified by Milan Concerns was that a sign should be installed stating all loaded trucks must be covered on the site. The applicant agreed to install such a sign (293).

Ruling #6.4: The applicant has agreed to install a sign, so no issue remains.

ISSUE #7: Cultural and Archeological Resources

The seventh issue involves impacts from the proposed project on cultural and archeological resources. In its petition, Milan Concerns argues that the DEIS fails to consider the impacts of the mine on cultural resources and archeological remains of Native Americans that once lived in the area. The DEIS includes Phase 1 and Phase 2 surveys prepared by the applicant's consultant, that were required by the Office of Parks, Recreation and Historic Preservation (OPRHP). These studies conclude that the proposed mine would have no effect on potentially significant cultural resources and that no further investigation is recommended (DEIS, appendix F, p. 6).

As an offer of proof, Milan Concerns offers its archeological consultant, Dr. Christopher Lindner, who argued that the DEIS fails to include a careful background study of the area, particularly of the knowledge held by people living near the proposed mine. Dr. Lindner urged further study regarding the nearby Indian Hill (which is off-site to the East), an area where numerous projectile points had been found perhaps dating back three or four thousand years. Dr. Lindner also argued that the DEIS is insufficient with respect to the cultural importance of the area. He stated he has seen two eighteenth century maps of the area that include the word "Waraghamack" in the area of the proposed mine. Dr. Lindner is informed that this is an important Mohican word for "pine swamp" or "bowl place." Waraghamack, Dr. Lindner concluded, is close to both the name of an important

nineteenth century Mohican chief as well as "Warackamac", the name of the lake at the site. The failure to conduct interviews with local residents and inquiry into local knowledge contravenes the Standards for Cultural Research Investigations and Curation of Archeological Collections in New York State (349). His discussions with local residents indicate that Native Americans inhabited the area around Indian Hill into the 1700s.

The applicant argues that this issue should not be adjudicated and that Milan Concerns failed make a sufficient offer of proof (351). The applicant points to the studies conducted by its consultant, Steve Oberon (DEIS, Appendix F) completed in 2003 and 2004 which conclude that there would not be any significant impact on cultural resources (353). These studies were reviewed by the New York State Office of Parks, Recreation, and Historic Preservation who accepted the studies' conclusions (DEIS, Appendix C). The applicant argues that it would be unprecedented in a DEC administrative case to adjudicate this issue when OPRHP had written a no impact letter (353). According to the applicant, DEC has in the past deferred to OPRHP's judgment on these issues and should do so here.

DEC Staff agrees with the applicant that this proposed issue does not meet the standard for adjudication. DEC Staff explained that does not have in-house expertise in these issues and that it does rely on OPRHP's experts. Milan Concerns responded that DEC still had to make findings with respect to impacts on archeological and cultural resources, so it could not defer entirely to OPRHP (354).

Ruling #7: Milan Concerns has failed to raise an adjudicable issue. Its claim that significant archaeological resources are likely present at the mine site (MC brief, p. 16) is not supported by the record.

ISSUE #8: Visual Impacts

The eighth issue involves the visual impacts from the proposed mine. The DEIS discusses potential visual impacts (section 4.2) and concludes that if the proposed mitigation measures are implemented, visual impacts will be mitigated to the maximum extent practicable and that there will be no significant visual impact (DEIS, p. 24). Attached to the DEIS, is a visual study dated September 20, 2002 (DEIS, Appendix E).

DEC's policy entitled "Assessing and Mitigating Visual Impacts", issued on July 31, 2000, provides direction to DEC Staff for evaluating visual impacts from proposed facilities.

Milan Concerns raises four sub-issues with respect to the applicant's visual study.

Positions of the Parties

Milan Concerns asserts that the applicant's visual analysis is deficient and that the DEIS fails to include the visual models necessary to assess how the proposed berms would mitigate visual impacts. This has resulted in an insufficient record for permit issuance (374). Milan Concerns offers the testimony of Dr. Richard C. Smardon, who prepared a four page critique of the applicant's visual analysis (MC petition, Exh. F). At the issues conference, Dr. Smardon explained that his comments involved four sub-issues: (1) the failure to include a narrative in the visual study; (2) the applicant's failure to model each mine phase; (3) the DEIS's failure to discuss visual impacts before they are mitigated; and (4) the DEIS's failure to mention the newly adopted comprehensive plan (356-60). The Town supports Milan Concerns (360).

The applicant argued that the issue of visual impacts from the proposed mine is not adjudicable and that Milan Concerns failed to make an adequate offer of proof. The applicant characterized Dr. Smardon's critique as comments and noted that the intervenor had not conducted its own visual impacts study. The applicant explained that it followed the four step process set forth in DEC's Visual Policy (361) and that the visual analysis in the DEIS exceeds what was required by DEC policy. According to the applicant, the record demonstrates that any visual impacts have been minimized to the maximum extent possible (367) and that the record is adequate for the permit to be issued (374). The applicant pointed to several permit conditions requiring visual mitigation, including the requirement for screening berms, buffer areas, and tree plantings (375).

DEC Staff believes that the applicant's visual study complied with DEC's visual policy (370) and that the applicant took a hard look at this issue and that the visual impacts from the project would be small and have been appropriately mitigated (371). The Town makes six comments regarding visual impacts (Town petition, appendix A, comments 14-19) which it did not raise at the issues conference.

Lack of narrative in visual study

The first sub-issue raised by Milan Concerns involves the applicant's failure to detail the existing landscape. According to Dr. Smardon, the applicant's narrative is too short and

photographs of the visual receptors were not included in the applicant's analysis (357).

In response, the applicant noted that narrative describing the mine site and its surrounding exists elsewhere in the DEIS (368) and that it complied with DEC policy.

Ruling #8.1: Milan Concerns has failed to raise an adjudicable issue. There is no requirement in DEC's visual policy that a lengthy narrative be provided or that there be photographs of the visual receptors.

Visual analyses for all mine phases

The second sub-issue proposed by Milan Concerns involves the applicant's failure to do a separate visual analysis for each phase of the mine. The intervenor's expert, Dr. Smardon, stated his opinion that especially during phases five and six, the mine will be visible from Turkey Hill Road when traveling from west to east and from Odak Farm Road (358).

The applicant responded that the line of sight cross sections do show the basics of the mine (369) and that its analysis studied visual impacts to the surrounding residences (applicant's reply brief, 28).

Ruling #8.2: Milan Concerns has failed to raise an adjudicable issue. The analysis sought by Milan Concerns is not required under DEC's visual policy.

Failure to evaluate visual impacts before mitigation

The third sub-issue raised by Milan Concerns involves the failure of the DEIS to first estimate the visual impact and second, estimate the visual impact with mitigation. Without this information, the intervenor's expert argues, the success of the mitigation measures cannot be accurately assessed (358).

Ruling #8.3: Milan Concerns has failed to raise an adjudicable issue. The analysis sought by Milan Concerns is not required under DEC's visual policy.

DEIS fails to discuss comprehensive plan

The final sub-issue involves the lack of a discussion in the DEIS of the Town's Comprehensive Plan's specific provisions regarding aesthetic impacts (358). At the issues conference, the

applicant responded that the comprehensive plan had only been adopted the week of the issues conference (369).

Ruling #8.4: The reasoning applied in ruling 2.1 stands. No issue for adjudication is raised.

ISSUE #9: Groundwater Impacts

The ninth issue involved adverse impacts to groundwater. Milan Concerns subsequently withdrew this issue based on an amendment to the draft permit.

In its petition, Milan Concerns asserted that the DEIS did not accurately characterize the groundwater level at the site and that the mine is to be located over an aquifer, which supplies water for residents of Milan and the neighboring Town of Red Hook. At the issues conference, DEC Staff announced it had reached agreement with the applicant to clarify special condition 9 (I.C. Exh 19) of the draft permit by requiring a five-foot separation distance between mining and the groundwater table. Continuous groundwater monitoring would also be required to ensure that the five foot distance was maintained (382). Because groundwater levels vary across the site and by season, this new condition prohibits mining within five feet from the highest groundwater level measurement, usually in the Spring (396).

Ruling #9: Since all issues regarding groundwater have been resolved and the proposed issue withdrawn, this issue is not adjudicable.

ISSUE #10: Terrestrial and Aquatic Ecology

Milan Concerns has expanded this issue since it was first raised in its petition. In its petition, it raised the issue of impacts on the Blandings turtles, then at the issues conference (without notice to the other participants) it proposed issues with respect to Indiana bats, False hop sedge and the potential rare environment in and around Lake Warackamac. Finally, in its brief, Milan Concerns raises issues with respect to Rattlebox. The Town also includes a discussion of the Indiana bat in its reply brief. Because of Milan Concerns' failure to include the Indiana bat in its petition or provide a reason why it was raising it without notice to the other issues conference participants, the Applicant moved to strike the discussion of the Indiana bat from the record (applicant's brief, p. 48).

Ruling #10.1: While it is poor practice to surprise issues conference participants, including the ALJ, with undisclosed issues, in this case the actions of Milan Concerns do not warrant striking the discussion of the Indiana Bat from the record.

Blandings Turtles

In its petition, Milan Concerns asserts that Blandings turtles, a NYS Threatened Species, are likely present at the site and that the proposed mine would pose a significant threat to the local population. Because of the probability that Blandings turtles are using the site, the applicant should be required to undertake live-trapping surveys for several weeks each spring (May and early June) for multiple years around the site to further investigate this impact. Based on these contentions, Milan Concerns argues that it has raised a substantive and significant issue regarding the impacts on Blandings turtles.

Milan Concerns' offer of proof includes the opinion of Dr. Erik Kiviat, the Executive Director and Co-founder of Hudsonia, Ltd. In his undated letter to DEC Staff member Lawrence Biegel, Dr. Kiviat describes himself as the foremost expert on ecology and conservation of the Blandings turtle in Dutchess County, and his *curriculum vitae* confirms nearly a quarter-century of writings on wetland ecology, including the Blandings turtle. Dr. Kiviat has been concerned about the impact of this proposed mine since at least February 2004, when he first submitted his comments to DEC Staff. Dr. Kiviat bases his belief that mine would have significant negative impacts on Blandings turtles on two facts: first, a young Blandings turtle was found, marked and released near the site on May 6, 1989; and second, that there is a potential habitat complex of good quality for Blandings turtles exists at the mine site. Dr. Kiviat states that glaring errors in the applicant's habitat assessment should lead to it being disregarded.

At the issues conference, Dr. Kiviat described the lifecycle of the Blandings turtle, the habitat it needs at different stages of its development and recent research in Dutchess County. He explained that they are not conspicuous and often go unobserved (455). The conditions at the site after mining commences would create areas of recently disturbed soil, where Blandings turtles lay their eggs (460). Dr. Kiviat then went through the applicant's Blandings turtle habitat assessment and offered his criticisms. First, he questioned the qualifications of the applicant's expert (454). Second, he criticized as superficial the literature search that had been done as part of the report (455). Third, he argued that because Blandings turtle nests are

so hard to find, the applicant's consultant's conclusion that no nests were on the site is unreliable (457). Fourth, he asserted that while no state or federally regulated wetlands exist at the site, wetland habitat does exist in the northeastern portion of the site (458) and could be used by Blandings turtles. He noted that he had shared these criticisms with DEC Staff in early 2004 (426) in comments on the scope of the DEIS (I.C. Exh. 18). Among the impacts the mine would have on Blandings turtles is the greater likelihood of turtles being killed on the roads by the additional truck traffic (428).

The applicant responded to Dr. Kiviat at the issues conference by noting that the proper procedures for investigating the presence of Blandings turtles had been followed in this case. DEC's Natural Heritage Program had been contacted and responded by letter dated April 23, 2002 which reported no sightings of a Blandings turtle since May 6, 1989 (the one noted above) and requested further investigation of the site. In response, the applicant's expert (Cathie A. Baumgartner of Terrestrial Environmental Specialists, Inc.) visited the site and prepared a letter report dated June 10, 2002 (DEIS, Appendix A). This report states Ms. Baumgartner's opinion, based on a background information search and field reconnaissance, that the site and vicinity were not potential habitat for Blandings turtles. By letter dated May 28, 2004, DEC Staff notified the applicant that it had re-reviewed the Blandings Turtle Habitat Assessment and stated it was satisfied with the study results and that no further studies would be required (Issues Conference Exh. 18, p. 2). The applicant argues that because no wetlands, either under the jurisdiction of DEC or the U.S. Army Corps, exist at the site, no core habitat for Blandings turtles exists (439). The applicant concludes that it complied with SEQRA and that Milan Concerns' proposed issue does not meet the standard for an adjudicable issue because of an inadequate offer of proof (443).

DEC Staff takes the position that the applicant's review is adequate and no issue regarding Blandings turtles has been raised (449). In its brief, DEC Staff states that while it is possible that Blandings turtles are using the site, available data indicate that the nearest population of Blandings turtles is over ten miles away and it has been eighteen years since one was seen in the area (DEC brief, p. 17).

Ruling #10.2: The information in the record supports DEC Staff's position that no additional information is required and that no adjudicable issue has been raised regarding the Blandings turtle.

Indiana Bats

While not raised in its petition, at the issues conference Dr. Kiviat also commented that the applicant had failed to conduct an Indiana bat assessment (431). Dr. Kiviat noted that the reason an assessment had not been done early in the process was because it was only recently that the summer behavior of this endangered species had become understood. He went on to describe known caves used by the Indiana bat in the mid-Hudson region. The reason an assessment was necessary was because Indiana bats need naturally exfoliating bark, like shag bark hickory, to raise their young in the summer. Although Dr. Kiviat stated he had not seen much of the site, he thought that there might be trees suitable for Indiana bats at the site.

The applicant responded at the issues conference, stating that Dr. Kiviat was merely speculating that the Indiana bat might be impacted by the proposed mine. The applicant noted that DEC's Natural Heritage Program had not asked for an investigation and none was included as part of the SEQRA scoping process. The applicant argued that an inadequate offer of proof has been made on this proposed issue because, among other things, Milan Concerns had failed to offer any proof that shag bark hickory existed at the site (444).

DEC Staff noted that the mining plan would result in the taking down of only a few, if any, trees at the site (448). In its brief, DEC Staff describes the informal screen protocol that DEC's Endangered Species unit Mammal Specials uses with respect to Indiana bats. If a proposed project is within two miles of summer roost habitat or three miles away from winter habitat, then an assessment is needed. Since the proposed mine is not within ten miles of known Indiana bat habitat, DEC Staff argues no additional assessment is needed (DEC Staff brief, p. 17).

Ruling #10.3: No additional assessment is required nor has an adjudicable issue been raised with respect to Indiana bats.

False Hop Sedge

Another issue raised by Dr. Kiviat at the issues conference, but not disclosed in Milan Concerns' petition, involves a plant called False hop sedge (*Carex lupulifornis*) (434). According to Dr. Kiviat, False hop sedge is a rare plant that is tracked by DEC's Natural Heritage Program. He states it is very rare in the Hudson Valley, with only three or four known sites. Dr. Kiviat asserts that the failure to look for this plant as part of a generalized rare plant survey is a flaw in the application.

The applicant responded at the issues conference that Dr. Kiviat was speculating about the presence of False hop sedge. The applicant argued that DEC's Natural Heritage Program had not identified this as a species to be investigated (445). DEC did request further investigation for the endangered plant Rattlebox, discussed below, and this was done. The applicant concludes that the intervenor has failed to meet its burden of proof to raise an adjudicable issue regarding false hop sedge.

DEC Staff acknowledged that no generalized rare plant survey was done, but argued that the rare plant review was adequate because the existing process was followed and species identified as potentially at the site were adequately studied (449).

Ruling #10.4: Milan Concerns has failed to raise an adjudicable issue with respect to False hop sedge and no additional information is needed.

Lake Warackamac

The final issue raised by Dr. Kiviat at the issues conference, but not disclosed in Milan Concerns' petition involves Dr. Kiviat's assertion that Lake Warackamac is an unusual body of water for the Hudson Valley (436). Dr. Kiviat bases his claim on what he believes to be marl at the bottom of lake. Since marl is composed of calcium carbonate, the pH of the lake water and soils would be basic, this could create an unusual waterbody with rare plants. Dr. Kiviat suggests a rare plant survey be done by an experienced expert.

The applicant expressed surprise at Dr. Kiviat's assertion that the Lake was an unusual body of water (439) and argued that it was merely speculation (applicant's brief, p. 46).

The DEIS describes Warackamac Lake as located to the southwest of the planned life of mine area. The lake covers about 11.5 acres and is located on property owned by the applicant and the State of New York (DEIS, Appendix A, p. 6). The lake appears to have been created by past mining activity and has no inlet or outlet. It is very steep-sided with a cobble substrate near the shore. The submerged aquatic vegetation is primarily spatter-dock (*Nuphar variegatum*) (DEIS, Appendix A, Appendix p.1).

Ruling #10.5: Milan Concerns has failed to raise an adjudicable issue regarding Lake Warackamac because it has failed to make an adequate offer of proof. Dr. Kiviat's statements that he had not seen much of the site (434) and "we" think it is an

unusual lake (436) without some factual support are insufficient to raise an adjudicable issue.

Rattlebox

In its closing brief, Milan Concerns raises impacts to Rattlebox (*Crotalaria sagittalis*), a state endangered plant and criticizes the applicant for only searching the site for two days in 2003 looking for the plant (MC brief, p. 35). DEC did request further investigation for the endangered plant Rattlebox (*Crotalaria sagittalis*) by letter dated April 11, 2003. The applicant supplied the letter report of Joseph M. McMullen of Terrestrial Environmental Specialists, Inc. who did both a literature and field survey and concluded that rattlebox was not found in the area (DEIS, Appendix G).

Ruling #10.6: Milan Concerns has failed to raise an adjudicable issue with respect to Rattlebox and no additional information is needed.

ISSUE #11: Cumulative Impacts

The eleventh issue involves the cumulative impact of this proposed mine and the applicant's nearby existing Roe-Jan facility. Specifically, the cumulative impacts that would result because the two mines are approximately a mile apart and the permitting of this new mine would extend the life of the Roe-Jan mine because material from the new mine would be taken to Roe-Jan for processing. Milan Concerns asserts that this combined impact was not meaningfully analyzed in the DEIS and should be adjudicated (petition 18). Milan Concerns did not identify any witnesses regarding this issue (466).

The applicant responded that the appropriate procedures were complied with in analyzing cumulative impacts and that section 4.9 of the DEIS adequately and extensively describes the cumulative impacts of the two mines (467). According to the applicant no substantive or significant issue has been raised and that insufficient offer of proof has been made (469).

At the issues conference, DEC Staff stated that the two facilities were not proximate enough to require air or traffic issues to be analyzed cumulatively (467) and that due to the geographic and functional separation of the facilities, there would be no cumulative dust, noise or visual impacts (DEC brief, p. 18).

Ruling #11: Milan Concerns has failed to show that the issue of cumulative impacts should be adjudicated. It has failed to identify a witness or make other offer of proof on this issue.

ISSUE #12: Milan Concerns' Comments on the Draft Permit

In addition to the issues proposed for adjudication, discussed above, Milan Concerns also included in its petition seven comments on the draft permit (I.C. Exh. 19), which were discussed at the issues conference. Milan Concerns also raised an eighth comment at the issues conference. Each is discussed below.

Screening Berms

First, Milan Concerns states that screening berms should be placed along between Turkey Hill Road and the proposed mine site to mitigate dust and noise impacts. At the issues conference, the intervenor stated that the offer of proof from its visual impacts expert, Dr. Richard Smardon, showed that mine site could be seen from along Odak Farm Road (471) and that a longer berm would mitigate this impact.

The Town agreed that if the permit were to be issued, longer berms would be desirable. DEC Staff noted that the construction of the proposed additional berms would be outside of the life of mine area and potentially within the 100 foot buffer area from the intermittent stream that exists at the south end of the site (473). The applicant responds that a longer berm would not provide any addition mitigation of impacts and that no change is necessary to the permit condition (474).

Ruling #12.1: Milan Concerns has not raised an adjudicable issue with respect to screening berms and no change is necessary to the draft permit.

Mine Entrance

Second, Milan Concerns seeks changes in conditions 8 and 12 of the proposed permit (I.C. Exh. 19) relating to the location of the mine entrance. Specifically, the intervenor seeks to have trucks traveling between the Roe-Jan facility and the proposed Archer mine travel along the internal route.

Ruling #12.2: This issue is discussed in ruling 4.6. It is not adjudicable and no change to the draft permit is necessary.

Mining Below the Water Table

Third, Milan Concerns sought to include a provision requiring continuous groundwater level monitoring and a prohibition on mining within five feet of the water table. At the issues conference, DEC Staff and the applicant agreed to a prohibition on mining within five feet of the seasonal high groundwater table and a monitoring requirements (477). These revisions are incorporated in the revised draft permit (I.C. Exh. 19). Milan Concerns withdrew this issue in its closing brief.

Ruling #12.3: The issue is withdrawn, and no issue remains.

Storage of Fuel

Fourth, Milan Concerns suggests changing special condition 10 to include an absolute prohibition on on-site fuel storage at the proposed mine, to protect groundwater. At the issues conference, DEC Staff stated that allowing on-site fueling is fairly common in mining operations and that the proposed permit conditions including secondary containment would adequately protect the environment (478). The applicant opposed the proposed change (479).

Ruling #12.4: Milan Concerns has failed to raise an adjudicable issue and the permit's requirement of secondary containment is protective of the environment.

Infra-Red Backup Alarms

Fifth, Milan Concerns seeks to modify the draft permit so as to require all trucks accessing the mine site to be equipped with infra-red backup alarms, to mitigate noise impacts from audible backup alarms. At the issues conference, the applicant opposed this requirement as unnecessary because the trucks accessing the site will be loaded and depart without having to be put in reverse (481). All on-site equipment will be equipped with infra-red alarms.

Ruling #12.5: Milan Concerns has failed to raise an adjudicable issue and no change is necessary in the draft permit.

Concurrent Reclamation

Sixth, Milan Concerns seeks an amendment to condition 16 to require the applicant to consult with NYS Department of Agriculture and Markets to ensure that the reclamation would

allow the reuse of the site for agricultural purposes. At the issues conference, DEC Staff member Helena Duda stated that the final use of the property as agricultural had been considered and that in Condition 14, the applicant had agreed to replace a minimum of six inches of topsoil originating from the uppermost 12 inches of the soil horizon in final reclamation (484) and that the compacted floor of the mine would have to be ripped up prior to top soil being placed on it (485). It is also unclear from the record if NYS Department of Agriculture and Markets actually performs the kind of consultation that Milan Concerns seeks.

Ruling #12.6: Milan Concerns has failed to raise an adjudicable issue and no change is necessary in the draft permit.

Dust Control

Seventh, Milan Concerns argues that condition 17 should be amended to require all haulage roads on the site to be paved, to reduce fugitive dust impacts. Milan Concerns also seeks to require that water or other dust palliative be applied on a predetermined schedule, that records of these application should be made and submitted to both DEC Staff and the Town, and mine employees be trained to mitigate dust impacts. These impacts are more fully discussed in the air quality discussion, above. The applicant opposed these proposed changes and stated that paving the first 400 feet of the driveway would be unnecessary because dust impacts had already been mitigated (490).

Ruling #12.7: Milan Concerns has failed to raise an adjudicable issue and no change is necessary in the draft permit.

At the issues conference the Town raised an eighth comment on the draft permit. Specifically, the Town sought to have a new permit condition included in the draft stating that the DEC permit did not become effective until all local approvals had been obtained (490) and that if conditions change due to the passage of time before local approval is obtained, that SEQRA be redone (491).

DEC Staff argued against making the DEC permits conditional on obtaining local approval and that the DEC process should be separate from the local one (492). DEC Staff also argued that the second change sought by the Town was speculative and that if conditions had materially changed regarding the proposed mine before local approval was obtained, DEC Staff would decide whether to require supplemental information from the applicant (493).

The applicant pointed to the draft permit that already stated the permittee is responsible for obtaining all local permits (495) and that permit already allows DEC Staff to modify the permit based on new material information (I.C. Exh. 1, general condition five).

Ruling #12.8: Milan Concerns has failed to raise an adjudicable issue and no change is necessary in the draft permit.

APPEALS

Pursuant to 6 NYCRR 624.6(e) and 624.8(d)(2)(i), this issues ruling may be appealed in writing to the Commissioner. Appeals must be received on or before Monday, March 31, 2008. Any replies to appeals must be received on or before Tuesday, April 14, 2008. Any appeals and replies must be addressed to the office of the Commissioner, NYSDEC, 625 Broadway, Albany, New York 12233-5500 (to the attention of Chief Administrative Law Judge James T. McClymonds), and must be received by that office by 4:00 p.m. on the dates indicated herein. Two copies of all such appeals, briefs and related filings must be sent to the Chief ALJ, and one copy sent to the ALJ at the Department's Office of Hearings and Mediation Services, and one copy to each person listed on the service list below. Transmittal of documents shall be made at the same time and in the same manner to all persons.

February 29, 2008
Albany, NY

_____/s/_____
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Administrative Law Judge

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