

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

In the Matter

- of -

the Application for Modifications to a Mined  
Land Reclamation Permit Authorizing the  
Operation of a Sand and Gravel Mine in the  
Town of Fishkill, County of Dutchess,  
pursuant to Title 27 of Article 23 of the  
Environmental Conservation Law

- by -

**SOUTHERN DUTCHESS SAND & GRAVEL, INC.,**

Applicant.

DEC Project No. 3-1330-00047/00006

INTERIM DECISION OF THE DEPUTY COMMISSIONER

March 9, 2006

INTERIM DECISION OF THE DEPUTY COMMISSIONER<sup>1</sup>

Southern Dutchess Sand & Gravel, Inc. ("applicant") submitted applications to the New York State Department of Environmental Conservation ("Department") to modify its existing mined land reclamation permit ("permit") which authorizes the operation of a sand and gravel mine in the Town of Fishkill, Dutchess County, New York ("site").

The matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge ("ALJ") Richard R. Wissler. In his Ruling on Issues and Party Status dated April 20, 1995 ("Ruling"), Judge Wissler identified two issues for adjudication: "(1) potential impacts to the Clove Creek aquifer as a result of mining below the water table [at the site] and (2) potential impacts to unnamed tributaries of Clove Creek as a result of the proposed stormwater diversion plan, as well as the adequacy of the plan's design"<sup>2</sup> (Ruling, at 1).

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<sup>1</sup> By memorandum dated February 25, 2005, Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Deputy Commissioner Carl Johnson. The memorandum was forwarded to the service list for this proceeding by letter dated March 1, 2005.

<sup>2</sup> The Ruling subsequently clarifies that the second issue relates to potential impacts to Clove Creek, as well as to unnamed tributaries, arising from the stormwater diversion plan (see Ruling, at 34-36).

For the reasons discussed in this interim decision, both issues shall be adjudicated, except that the issue relating to potential impacts to the Clove Creek aquifer is hereby modified to reduce the scope of the inquiry.

#### BACKGROUND

Applicant seeks to modify its permit to excavate a twenty-two (22) acre lake within the existing permitted mine area ("project"). The project was classified as a Type I action under the State Environmental Quality Review Act ("SEQRA") (see article 8 of the Environmental Conservation Law ["ECL"]; section 617.4 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ["6 NYCRR"]). On January 9, 2002, Department staff issued a negative declaration for the project.

Applicant has also submitted an application for a variance from the buffer requirements of 6 NYCRR part 422 in order to maintain and use approximately 185 linear feet of existing roadway along the eastern portion of the property and to plant trees for visual screening. Department staff issued a separate negative declaration on the variance application on October 11, 2002.

The ALJ, in the Ruling, presents a comprehensive overview of the proceeding, including the arguments of the participants in the issues conference. As indicated, the ALJ identified two issues for adjudication. Pursuant to 6 NYCRR 624.5(a), Department staff and applicant are mandatory parties in this proceeding. In addition, the ALJ granted party status to the Village of Fishkill, the Town of Fishkill and Fishkill Ridge Caretakers, Inc. ("FRC"). Applicant, Department staff, and FRC appealed from the Ruling, and applicant and FRC filed responses to the appeals.

Applicant, in its appeal dated May 19, 2005 ("Applicant's Appeal"), argued that FRC's application for party status should be denied, and that no adjudication of any issues was necessary. Three exhibits were attached to Applicant's Appeal: a one-page letter dated October 8, 2004 transmitting an assessment of the tributary that runs from the end of the drainage diversion to Clove Creek ("Tributary Assessment Report"); the Tributary Assessment Report; and a one-page cover letter dated May 17, 2005 forwarding two additional copies of the Tributary Assessment Report to Department staff.

Department staff, in its appeal dated May 19, 2005 ("Staff Appeal"), argued that no issue existed with respect to

potential impacts on the Clove Creek aquifer. Nevertheless, Department staff contended that the issue of the potential impacts of the stormwater diversion plan on Clove Creek should proceed to adjudication.

FRC, in its appeal dated April 27, 2005 ("FRC Appeal"), and in its response dated June 1, 2005 ("FRC Response") contended that the SEQRA negative declaration that Department staff issued on the proposed mine expansion should be rescinded, and that an environmental impact statement should be prepared. Applicant, in its response dated June 2, 2005, maintained that no basis existed to vacate the negative declaration and reiterated its position that there were no adjudicable issues with respect to potential impacts to Clove Creek or to the Clove Creek Aquifer.

#### DISCUSSION

The appeals challenge various aspects of the Ruling, including (1) the ALJ's determination that Department staff's issuance of a negative declaration on the proposed mine expansion was not irrational or otherwise affected by an error of law, (2) the ALJ's identification of two issues for adjudication under the New York Mined Land Reclamation Law (ECL article 23, title 27) and its implementing regulations (6 NYCRR part 422), and (3) the

ALJ's grant of party status to FRC.

### Negative Declaration

FRC, in its petition for party status and subsequent submissions, maintained that the potential environmental impacts arising from the proposed expansion of the mine require the preparation of an environmental impact statement pursuant to SEQRA. Accordingly, FRC argued that the negative declaration that Department staff issued should be rescinded.

The Department's regulations governing permit hearings, which are contained at 6 NYCRR Part 624 ("Part 624"), limit the extent to which SEQRA issues may be considered in these proceedings. Where, as here, the Department is the SEQRA lead agency and Department staff have determined that the preparation of an environmental impact statement is not required, inquiry at the issues conference stage is limited to whether Department staff's SEQRA determination was "irrational or otherwise affected by an error of law" (6 NYCRR 624.4[c][6][i][a]). If the ALJ determines that Department staff's decision not to require an environmental impact statement was not irrational or affected by an error of law, the ALJ will not disturb that decision. At that point, the SEQRA inquiry is concluded (see Matter of Metro Recycling & Crushing, Inc., Decision of the Acting Commissioner,

April 21, 2005, at 5-6).

When reviewing the rationality of Department staff's SEQRA determination, the inquiry is directed to whether Department staff identified the relevant areas of environmental concern, took a hard look at each of those areas, and made a reasoned elaboration of the basis for its determination (see, e.g., Matter of Chemical Specialties Mfrs. Assn. v Jorling, 85 NY2d 382, 396-397 [1995]; see also 6 NYCRR 617.7[b] [determination of significance for Type I and unlisted actions]). Where Department staff's determination is reasonable and supported by the record, it will be upheld (see 85 NY2d at 396-97).

In the Ruling, the ALJ evaluated the SEQRA review that Department staff conducted. He determined that the hard look was taken and that no basis existed to conclude that Department staff's negative declaration "was in any way irrational or otherwise affected by an error of law" (Ruling, at 37).

I concur with the ALJ's determination. The record demonstrates that the relevant environmental issues were considered in Department staff's SEQRA review, and Department staff took a "hard look" at the project's potential environmental

impacts. The reasons supporting the issuance of the negative declaration on the project were explained in the negative declaration dated January 9, 2002 which addressed potential impacts including, but not limited to, impacts on land, water resources and air (see Issues Conference Exhibit ["IC Exh"] 6, at 1-3). At the issues conference, Department staff described the hard look that was taken (see IC Transcript dated April 4, 2003 ["April Tr"], at 211-221 [discussing the impacts that were considered by Department staff]; IC Tr dated September 17, 2004 ["September Tr"], at 203-204). Nothing in FRC's offer of proof supports its contention that Department staff's determination to issue a negative declaration was irrational or otherwise affected by an error of law.

However, subsequent to Department staff's issuance of the negative declaration on the proposed mine expansion and the April 4, 2003 session of the issues conference, applicant proposed a stormwater diversion plan that would reroute stormwater runoff to an existing open channel ditch that eventually would discharge into Clove Creek (see, e.g., letter dated August 13, 2003 from applicant's former attorney to ALJ Wissler and issues conference participants). A stormwater diversion plan was later circulated to the issues conference participants for review (see IC Exhs 24, 24A & 25).

Following receipt of the stormwater diversion plan, Department staff indicated that, based on its review, applicant did not submit sufficient information with the plan to assess the potential impacts of increased volumes and velocities to the drainage ditch, the potential for increased erosion, and resulting sedimentation in Clove Creek (see Ruling, at 32-33; see also September Tr, at 204-211; Department Staff's Issues Conference Brief dated October 29, 2004, at 8-9). Department staff also noted that the proposed stormwater diversion plan contained information not available to the Department prior to its issuance of the negative declaration on the proposed mine expansion or the issues conference session of April 4, 2003 (Ruling, at 33).

Department staff characterized the diversion plan information as "new information" within the meaning of the SEQRA regulations, "as provided for under 6 NYCRR Part 617.7" (Department Staff's Issues Conference Brief dated October 29, 2004, at 10). In the Ruling, the ALJ stated that this "new information" may require that the negative declaration on the proposed mine expansion be revisited based on the outcome of the adjudication of the stormwater diversion plan (Ruling, at 37-38).

The SEQRA regulations provide that a negative

declaration may be amended or rescinded when "substantive . . . changes are proposed for the project; or [substantive] new information is discovered; or [substantive] changes in circumstances related to the project arise; that were not previously considered. . ." (6 NYCRR 617.7[e][1], [f][1]). Although nothing in the existing record warrants rescinding or amending the negative declaration, the Department is lead agency and, in this proceeding, has a continuing responsibility under SEQRA to consider significant new environmental impacts up until the time that a final decision is issued (see id.; see also Final Generic Environmental Impact Statement to 6 NYCRR Part 617, Feb. 18, 1987, at 21-22).

Because I am affirming the ALJ's ruling that the diversion plan be adjudicated (see infra), it is conceivable that additional information will be developed on potential environmental impacts. In light of this, I hereby direct that, following the adjudicatory hearing but prior to the closure of the hearing record, Department staff provide to the ALJ and the other parties its determination, based on the then existing information, whether the negative declaration on the proposed mine expansion should be amended or rescinded. Following receipt of Department staff's determination, the ALJ shall provide an opportunity for the other parties to the adjudicatory hearing to

submit a written response to that determination.

In its appeal, FRC sets forth other arguments in support of its contention that the negative declaration should be rescinded. FRC contends that the proposed expansion's location within the boundaries of a critical environmental area ("CEA"), as defined by 6 NYCRR 617.2(i), warrants rescission of the negative declaration.

However, the negative declaration expressly recognized that the site is located within the Clove Creek aquifer which the Town of Fishkill ("Town") has designated as a CEA. During its SEQRA review of the project, Department staff inquired of the Town with respect to the project's impacts on this CEA. The Town, except for its statement that a local special use permit would be required for the project, raised no issues or concerns regarding any impacts on the CEA (see IC Exh 6 [negative declaration dated January 9, 2002 at paragraph 7]; April Tr, at 213-14).

FRC also argued that the ALJ's determination that two issues are "substantive and significant" and subject to adjudication pursuant to Part 624 requires the preparation of an environmental impact statement pursuant to Part 617 (FRC Appeal,

at 1-2). However, FRC's argument inappropriately combines two different regulatory standards which are based on two separate statutory requirements.

The permit hearing regulations in 6 NYCRR Part 624, promulgated pursuant to the Uniform Procedures Act (article 70 of the ECL), establish uniform procedures for the adjudication of permit applications. The Part 624 procedures apply to a permit application only when it is referred for adjudication. In the context of a permit hearing, the "substantive and significant" standard incorporated in Part 624 is the standard used to determine whether a non-SEQRA issue proposed by a potential party requires adjudication (see 6 NYCRR 624.4[c][1][iii]). Pursuant to Part 624, 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]).

In contrast, SEQRA establishes a separate, independent

environmental review obligation for the Department (as well as other State and local agencies). Review of a permit application under SEQRA must be conducted whether or not that application is ultimately referred for an adjudicatory hearing under Part 624.

Pursuant to SEQRA, the standard for determining whether an environmental impact statement will be required is whether an action may have a significant adverse environmental impact (see 6 NYCRR 617.7[a][1]). As previously noted, when Department staff determines that an environmental impact statement is not required and issues a negative declaration, Department staff satisfies its obligations under SEQRA when it identifies the relevant areas of environmental concern, takes a hard look at those areas, and provides a reasonable elaboration of the basis of its determination.

It does not necessarily follow that, where an issue under an ECL provision other than SEQRA is identified for adjudication in a Part 624 proceeding on a permit application, a negative declaration previously issued pursuant to Part 617 for that application must be rescinded or that the SEQRA process must otherwise be reopened.<sup>3</sup> In fact, it is not uncommon for a

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<sup>3</sup> Similarly, it does not necessarily follow that the issuance of a positive declaration (requiring that an environmental impact statement be prepared) will require that

negative declaration to be issued on a permit application for which, once that application is referred for hearings pursuant to Part 624, "substantive and significant issues" are identified which require adjudication (see Matter of Peter Harrison, ALJ's Hearing Report, at 10-11 [reviewing SEQRA determinations and permit standards], adopted by Decision of the Commissioner, February 28, 2000; cf. Matter of Brotherton v New York State Dept. of Env'tl. Conservation, 189 AD2d 814 [2d Dept 1993]; Matter of Goldhirsch v Flacke, 114 AD2d 998 [2d Dept 1985]). The determination that non-SEQRA issues meet the Part 624 "substantive and significant" standard does not mean that the issuance of a negative declaration pursuant to SEQRA was irrational or otherwise affected by an error of law.<sup>4</sup>

Moreover, the circumstance that the ALJ concluded, and I confirm as discussed later in this decision, that further review of the adequacy of the proposed spill prevention and response plan is adjudicable to determine whether applicant has satisfied the requirements of the Mined Land Reclamation Law does not compel a conclusion that staff's negative declaration should

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adjudicable issues be found in a Part 624 permit hearing.

<sup>4</sup> As previously noted, review of a Department staff-issued negative declaration during a Part 624 proceeding is subject to the "rationality/error of law standard," not the "substantive and significant" standard (see 6 NYCRR 624.4[c][6][i][a]).

be invalidated. In the January 9, 2002 negative declaration, Department staff identified the potential impact of mining on groundwater and took a hard look at the issue. Department staff concluded that "[p]roper operating precautions and emergency response, if needed, should avert any significant impacts to groundwater resources during and following the lake excavation" (Negative Declaration, Jan. 9, 2002, at 1-2). The circumstance that the appropriate operating precautions and emergency response measures will be subject to further refinement during an adjudicatory hearing does not undermine the rationality of Department's staff SEQRA determination.

With respect to the adjudication of applicant's stormwater diversion plan, the plan is new and postdates the issuance of the negative declaration and the commencement of the issues conference. Consequently, that it was not considered during the permit application review process cannot be deemed irrational or an error of law. However, as noted, Department staff is under the obligation to consider substantive changes to a project or substantive new information and may, in light of this new plan, revisit its SEQRA determination prior to the issuance of a final decision in this proceeding.

Accordingly, FRC's arguments in support of rescinding the negative declaration on the project are rejected.

### Clove Creek Aquifer

The ALJ found that FRC had raised substantive and significant issues with respect to potential impacts to the Clove Creek aquifer occasioned by applicant's proposal to mine below the water table. The ALJ listed nine sub-issues to be addressed in adjudicating this issue, including:

"(a) the types of the mining equipment to be used in mining below the water table, (b) the organic and inorganic compounds to be used in their operation, (c) the location of that equipment during mining operations in the waters of the 22 acre pond, (d) the type and nature of contaminants that could be introduced into the aquifer as a result of mining below the water table, (e) the adequacy of the proposed spill prevention and response plan, (f) the location and thickness of the layers of the aquifer beneath the [applicant's site, (g) the direction and velocity of groundwater flows through the aquifer, (h) the boundaries of the zone of influence, cones of depression and zone of contribution of the wells in the Village's Clove Creek well field, and whether, if at all, those boundaries intersect with the [applicant's site, and (i) the appropriate design and placement of monitoring wells, and the adequacy of testing and response protocols" (Ruling, at 31-32).

These sub-issues were identified by the ALJ as relevant to applicant's obligation under the Mined Land Reclamation Law to minimize the adverse impacts resulting from its mining operations (see ECL 23-2713[1][a]; 6 NYCRR 422.2[c][4]). This obligation is independent of, and in addition to, the obligations under SEQRA.

Applicant, in its appeal, argued that FRC engaged in "mere speculation" and failed to offer any competent proof with respect to impacts arising from the proposed mining below the water table (Applicant's Appeal, at 6).

Department staff, in its appeal, argued that the nine proposed sub-issues that the ALJ identified were overly broad and would not provide information "directly relevant to the matter before the Department" (Staff Appeal, at 2) and that the issue could be "vacated in its entirety" (id. at 8). Department staff maintained that the record demonstrates that no substantive and significant issue warranting adjudication was raised.

In the alternative, Department staff contended that, if sub-issues (a) through (e) were not excluded from adjudication, "[a]pplicant be permitted to supplement the issues conference record in writing with these particulars, that Staff thereafter be permitted to modify the proposed spill prevention and response measures of the draft permit if appropriate, subject to the remaining participants' rights to submit written comment on these submissions" (Staff Appeal, at 8).

FRC in its response reiterated that the negative declaration should be rescinded and an environmental impact

statement should be prepared but did not specifically address the points raised in the appeals of Department staff and applicant with respect to the adjudicability of the potential impacts to the Clove Creek aquifer from mining below the water table.<sup>5</sup>

The ALJ, in the Ruling, presents a detailed analysis of the concerns relating to the Clove Creek aquifer. For the reasons that follow, I agree with the ALJ that the adequacy of the proposed spill prevention and response plan (sub-issue [e]) should be adjudicated. However, as discussed below, I have determined that three of the sub-issues ([f][location and thickness of layers of the aquifer beneath the site], [g] [direction and velocity of groundwater flows through the aquifer] and [h][well field boundaries]) that would require applicant to conduct a detailed investigation of the aquifer and its

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<sup>5</sup> The Town of Fishkill ("Town") and the Village of Fishkill ("Village"), both of which were granted party status by the ALJ, did not file any appeals. The Town, in its post-issues conference submission dated October 29, 2004, argued that no substantive and significant issues had been raised (see also April Tr, at 199). The Village, in its post-issues conference brief dated October 28, 2004, stated that it did not oppose the permit application to expand the mine, provided that applicant complies with the conditions in the draft permit, the drainage plan to divert stormwater runoff becomes a permit condition, and a spill clean-up contractor is retained by applicant. The Village also noted that it had entered into a written agreement with applicant whereby applicant will provide for "appropriate monitoring wells" (see IC Exh 10 [copy of agreement]; see also April Tr, at 252-253 [Village hydrogeologist discussing monitoring wells as early warning system]).

properties do not require adjudication in this proceeding.

Pursuant to 6 NYCRR 624.4(c)(1), an issue is adjudicable only if it: relates to a dispute between Department staff and applicant over a substantial term or condition of a proposed draft permit; relates to a matter cited by Department staff as a basis to deny the proposed permit and such matter is contested by applicant; or is proposed by a potential party and is both substantive and significant.

Where Department staff has reviewed an application and finds that the project conforms to all applicable requirements of statute and regulation, the burden of persuasion is on an intervenor to demonstrate that the issues it proposes are both substantive and significant (see 6 NYCRR 624.4[c][4]). This burden of persuasion is met by an appropriate offer of proof (see Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2). Generalized concerns without an adequate offer of proof, however, are insufficient to advance an issue to adjudication (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2 ["[a]ssertions made by prospective intervenors cannot be conclusory nor speculative but must be supported by a sound factual and/or scientific foundation"]).

Applicant argues that FRC never requested that the specific issue of impacts to the Clove Creek aquifer be adjudicated, but only requested that the potential impact to the Clove Creek aquifer serve as a basis for vacating the negative declaration issued by Department staff on the proposed mine expansion (Applicant's Appeal, at 8-9). A review of FRC's petition for party status reveals that it simply provides a general list of various hydrogeologic studies that FRC proposes be prepared as part of a draft environmental impact statement. FRC fails to provide any adequate explanation why the studies are necessary or otherwise required.

That a consultant or expert for a potential party takes a position opposite to that of applicant or Department staff does not of itself raise an issue (see, e.g., Matter of Jay Giardina, Interim Decision of the Commissioner, September 21, 1990, at 2 ["[o]ffers of expert testimony contrary to the application are not . . . necessarily adequate in and of themselves to raise an issue for adjudication. This is especially true where the basis for the contrary expert opinion is not identified or where it is apparent that the expert opinion has not taken into account all proposed project mitigation").

In this matter, applicant conducted a hydrogeologic assessment of the excavation of lake on the site, as well as a review of the hydrogeology relating to the site and the Village of Fishkill well field (see IC Exh 6 [Hydrogeologic Assessment for the Southern Dutchess Sand & Gravel Mine dated September 25, 2001; letter dated November 27, 2001 from applicant's consultant to Department on hydrogeologic impacts]). FRC's consultant, in his argument for rescinding the negative declaration, has not identified material deficiencies or errors in applicant's hydrogeologic assessment but merely calls for more studies.

In addition, the draft permit prepared by Department staff contains three special conditions that address spill prevention for the protection of water resources, including the aquifer. The conditions impose restrictions on the storage of petroleum products, fuels or lubricants at the site, require implementation of and compliance with applicant's spill prevention and response plan, including the maintenance of inspection reports, and establish a more restrictive spill notification requirement than what is legally required (see IC Exh 9, special conditions 18, 19, and 20; see also special condition 8).

In areas of Department staff's expertise, its

evaluation of the application and supporting documentation is an important consideration in determining whether an issue is adjudicable (see Matter of Thalle Industries, Inc., Decision of the Deputy Commissioner, November 3, 2004, at 18). Department staff emphasized that, in considering aquifer protection measures for the proposed project, a direct connection of the project to the Clove Creek aquifer was assumed. Department staff maintained that the conditions contained in the draft permit were adequate protection, noting that the draft permit's spill prevention and response measures were developed "with full knowledge of the hydrologic connection and after reviewing the Applicant's past mining practices and the specific conditions of the site" (Staff Appeal, at 3-4).

At the issues conference, Department staff, through William Cooper, a Mined Land Reclamation Specialist 2, reviewed the practice of mining sand and gravel below the water table. Mr. Cooper noted that such mining is occurring at more than 300 active sand and gravel mines across the state "in a similar fashion to this proposed project," and that no known contamination problems have resulted from these operations (April Tr, at 152 & 159; see also IC Exh 18, at 30; IC Exh 19, at 13 [stating that no documentation exists that excavating gravel is

detrimental to an underlying aquifer]).<sup>6</sup>

In reviewing the record, including but not limited to FRC's offer of proof, the submissions of applicant, the draft permit and the evaluations of Department staff, no basis exists to require applicant to conduct a detailed investigation of the aquifer and its properties. Again, as noted, Department staff assumed a direct hydrogeologic connection to the aquifer which was taken into account in its analysis and the development of the draft permit. Department staff evaluated measures designed to

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<sup>6</sup> By its discussion of the soils at the site, the Ruling may be read to suggest that the soil infiltration rate is determinative of the rate of flow in groundwater (see, e.g., Ruling, at 24). However, the soil infiltration rate and groundwater flow rate measure the movement of groundwater in two different conditions.

The infiltration rate is the measurement of unsaturated flow, that is, the measurement of meteoric or surface water through the unsaturated or vadose zone. Infiltration rates, which are appropriate for estimating the downward movement of water into the saturated zone, are primarily affected by soil texture and structure. Groundwater flow (hydraulic conductivity) is the movement of water through the saturated zone and tends to be considerably slower than infiltration rates. Hydraulic conductivity is affected by the permeability and porosity of the soils, sedimentary structures (that is, layering), head differentials (or hydraulic gradient), pressure differentials (whether the groundwater is under confined or unconfined conditions), and transmissivity.

Accordingly, any suggestion that the soil infiltration rate is determinative of the rate of groundwater flow must be rejected (see, e.g., Freeze & Cherry, Groundwater, §§ 2 & 6.4 [1979]; Neilsen, Groundwater Monitoring, chs 4 & 10 [1991]; Driscoll, Groundwater and Wells, ch 5 [2d ed 1986]).

prevent spills from occurring and, if any spill does occur, to ensure an appropriate and effective response. In light of the foregoing, additional aquifer studies, as contemplated by sub-issues (f), (g) and (h), are unnecessary. FRC's offer of proof regarding additional aquifer studies presents only speculative and generalized concerns, and is insufficient to advance a review of the aquifer and its properties to adjudication. Accordingly, sub-issues (f), (g) and (h) shall not be part of this adjudication.

The record, however, reveals that an adjudicable issue has been raised under the Mined Land Reclamation Law and its implementing regulations with respect to the adequacy of applicant's plan to address spills on the site including spills in the excavated lake. In the course of this proceeding, the ALJ identified certain information which is not in the record and which may bear on the adequacy of the proposed spill prevention and response plan and require its refinement. The ALJ set forth this information in sub-issues (a) through (d) of the Ruling (Ruling, at 31-32). Specifically, this includes the types of equipment that applicant will use in mining below the water table, the organic and inorganic compounds to be used in

applicant's mining operation,<sup>7</sup> the location of any equipment during mining operations in the 22 acre lake, and the type and nature of contaminants that could be introduced into the aquifer as a result of applicant's mining below the water table. I concur with the ALJ that this information bears on the adequacy of the spill prevention and response plan and should be provided by applicant as part of the adjudication of this issue.

Consideration of this information may lead to refinement of the spill prevention and response plan with respect to its operating safeguards and emergency response measures.

The ALJ notes that Department staff, in its post-issues conference closing brief, proposed the following additional special permit condition:

"The permittee shall retain a spill response and control contractor, who will be notified immediately and deployed to the site within one hour of any spillage of fuels, waste oils, other petroleum products or hazardous materials on any area of the mine site. Adequate spill containment materials will be kept on-site for ready use in the event of such a spill. A full containment berm shall be provided in the immediate work area in the excavation of the 22 acre lake at all times" (see Ruling, at 25).

Whether this condition is adequate as written or needs to be revised should be addressed in the adjudication of the spill

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<sup>7</sup> Applicant is directed to identify which of these compounds would, if released, tend to float on the surface of the water and which would tend to sink to lower depths and how the spill prevention and response plan would address such compounds.

prevention and response plan. In the adjudication of this issue, the parties may propose additional refinements to the spill prevention and response plan including but not limited to sampling schedules and testing protocols relevant to the mining operation.

Department staff proposed in its appeal that, rather than adjudicating sub-issues (a) through (e), the sub-issues be remanded to the ALJ, and applicant should be permitted to supplement the issues conference record in writing with these particulars. Department staff further proposed that it be permitted to modify the proposed spill prevention and response measures of the draft permit if appropriate, subject to the remaining participants' right to submit written comments on those submissions (Staff Appeal, at 7-8). I have considered Department staff's proposal, but have concluded that at this stage of the proceeding, it would be more efficient to advance the issue of the adequacy of the spill prevention and response plan to adjudication, and have the information requested by (a) through (d) considered in that context.

The final sub-issue that the ALJ identified for adjudication - "(i) the appropriate design and placement of monitoring wells, and the adequacy of testing and response

protocols" - relates to the agreement between applicant and the Village of Fishkill dated March 24, 2003 for the construction of monitoring wells and a subsequent schedule for groundwater sampling (see IC Exh 10). Although I do not find the terms of this agreement between applicant and a local municipality to be a matter for adjudication in a proceeding before the Department, it would be helpful for applicant to provide information on the agreement including but not limited to the intended location of the monitoring wells, the frequency of sampling, the parameters to be sampled, and the responses that would be implemented if contamination were found. Accordingly, this information is to be provided in the context of the adjudication of the spill prevention and response plan.

I note that various of the matters relating to the spill prevention and response plan may be amenable to resolution by the parties prior to the adjudicatory hearing. I would, therefore, urge the parties to discuss these matters in an effort to resolve them.

#### Stormwater Diversion Plan

The ALJ concluded that Department staff and FRC have raised a substantive and significant issue regarding potential impacts of the proposed stormwater diversion plan to Clove Creek

and its unnamed tributaries. As matters to be considered in the adjudication of this issue, the ALJ specifically referenced erosion impacts, stormwater volumes and velocities, and the impact to trout (Ruling, at 36).

The ALJ noted Department staff's assertion that the application lacks "sufficient information to assess the potential impacts of increased volumes and velocities to the proposed drainage swale and the potential impacts of increased erosion and sedimentation to Clove Creek" (Ruling, at 34). He concluded that, in light of the questions raised regarding the stormwater diversion plan, it is uncertain whether applicant can satisfy the regulatory standards imposed by 6 NYCRR 422.2(c)(4)<sup>8</sup> or applicable State water quality standards for Clove Creek, which is a Class C(TS) stream (see Ruling, at 35).

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<sup>8</sup> This regulatory provision requires an applicant for a mining permit to include the following information in its mining plan:

"A description of the applicant's proposed method for preventing pollution, reducing soil erosion, and minimizing the effect of mining on the people of the State shall be required when and to the extent necessary to achieve compliance with the regulations of the department relative to: land use; air and water quality; solid waste management; the use and protection of waters; the protection of the natural resources of the State including soil, forests, water, fish, wildlife, and all aquatic or terrestrial related environment, and to any other applicable standards."

The ALJ also stated that it is unknown whether increases in the volume or velocity of waters entering Clove Creek as a result of the implementation of the stormwater diversion plan will affect trout spawning areas or juvenile trout populations in this section of Clove Creek, and concluded that further inquiry would be mandated by 6 NYCRR 422.2(c)(4)(id.).

Department staff, in its appeal, requested that the ALJ's ruling with respect to the adjudicability of the stormwater diversion plan be upheld in its entirety.

Applicant, in its appeal, noted that its Tributary Assessment Report which addressed the potential impacts of the stormwater diversion plan on Clove Creek was not part of the issues conference record. To address that omission that occurred prior to their participation in this proceeding, applicant's new attorneys included the Tributary Assessment Report, and related transmittal correspondence, as attachments to applicant's appeal.

Applicant proposed that, rather than proceed to an adjudicatory hearing on the stormwater diversion plan, the ALJ could reconvene the issues conference to address the information contained in the Tributary Assessment Report. In the alternative, applicant proposed that I rely on the information in

the Tributary Assessment Report as a basis to independently determine that no adjudicable issue exists with respect to the stormwater diversion plan.

I have reviewed the Tributary Assessment Report and agree that it would have been helpful for the information in this report to have been available during the issues conference. However, rather than directing that the issues conference be reconvened, I conclude that it would be more efficient to adjudicate the stormwater diversion plan at this stage and have the Tributary Assessment Report considered in that context. Reconvening the issues conference would necessitate a supplemental issues ruling on the stormwater diversion plan, with a possible further round of appeals from that supplemental ruling and a second interim decision, which would result in further delays of the resolution of this matter.

I also decline to consider the Tributary Assessment Report as a basis to conclude that no adjudicable issue exists with respect to the stormwater diversion plan. For purposes of our administrative proceedings, information must be submitted in a timely fashion so that it may be considered fully and in a manner that would not prejudice other parties. My consideration of the Tributary Assessment Report at this stage, without

affording an opportunity for the other parties to be heard, would deprive Department staff and the other parties of an opportunity to participate and comment in any review. In this instance, the adjudicatory hearing is the proper forum to consider the report.

Applicant also argues that, with respect to the stormwater diversion plan, the issue raised by FRC on the potential impacts of the plan on trout spawning in Clove Creek is not supported by a competent offer of proof, and that FRC failed to sustain its burden of persuasion on that issue (Applicant's Appeal, at 10 [footnote 4]). I have reviewed the record before me, including but not limited to the discussion by FRC at the issues conference and the ALJ's analysis of applicable regulatory standards relating to trout impacts. I concur with the ALJ's determination that the potential impact to trout should be considered in the adjudication of the stormwater diversion plan.

#### Party Status of FRC

The ALJ determined that FRC had filed an acceptable petition for party status, raised issues that were substantive and significant, and demonstrated an adequate environmental interest. Accordingly, the ALJ concluded that FRC was entitled to full party status in this proceeding (see Ruling, at 7; see also 6 NYCRR 624.5[d][1]).

Applicant in its appeal, however, contends that FRC did not meet its regulatory burden of persuasion because it failed to make a competent offer of proof on a substantive and significant issue. Accordingly, applicant argues that the ALJ should have denied FRC's application for full party status.

Department staff, in its appeal, have not appealed from the ALJ's ruling on FRC's party status. FRC, in its response to applicant's appeal, argues that it made a competent offer of proof "by way of testimony from its expert, Dr. Donald W. Groff" (FRC response dated June 1, 2005, at 2).

I have reviewed the record before me, including FRC's petition for party status dated March 26, 2003. FRC's petition consisted of a transmittal letter from Thomas P. Halley, Esq., with letters from Donald W. Groff, Ph.D., FRC's hydrogeologist, and FRC's President, Dr. Peter O. Rostenberg. Although FRC's primary argument was that the negative declaration should be rescinded and an environmental impact statement prepared, it raised various issues relating to the stormwater diversion plan (see, e.g., September Tr, at 141-44 & IC Exh 51, at 2-3). Accordingly, I shall not disturb the ALJ's ruling which grants full party status to FRC.

To the extent that other issues have been raised on the appeals, these have been considered and rejected. Accordingly, this matter is remanded to the ALJ for further proceedings consistent with this Interim Decision.

New York State Department of Environmental  
Conservation

/s/

By: \_\_\_\_\_  
Carl Johnson, Deputy Commissioner

Dated: March 9, 2006  
Albany, New York