

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

In the Matter

- of -

the Application of Besicorp-Empire
Development Company, LLC for a Part 201 Air
State Facility Permit; a State Pollutant
Discharge Elimination System (SPDES) Permit;
a Title IV Acid Rain Permit; a Water Quality
Certification; a Construction Stormwater
SPDES Permit; and an Excavation and Fill in
Navigable Waters Permit.

DEC Case No. 4-3814-00052/00001-00006

DECISION OF THE COMMISSIONER

September 23, 2004

DECISION OF THE COMMISSIONER

Applicant Besicorp-Empire Development Company, LLC ("applicant"), seeks various permits from the New York State Department of Environmental Conservation ("Department" or "DEC") for the construction and operation of a combined recycled newsprint manufacturing plant ("newsprint plant" or "RNMP") and major electrical generating facility ("cogeneration plant"). After hearings on the application, DEC Administrative Law Judge ("DEC ALJ") P. Nicholas Garlick issued a recommended decision and a supplemental recommended decision. In those recommended decisions, the DEC ALJ recommended that the DEC Commissioner approve the application.

Subject to the modifications discussed in this decision, and based upon the entire record of these proceedings, including the parties' comments on the recommended decisions, I conclude that applicant's project meets all statutory and regulatory requirements. Accordingly, the draft permits as modified herein are approved.

FACTS AND PROCEDURAL BACKGROUND

Applicant proposes to construct and operate an integrated project known as the Empire State Newsprint Project. The project would consist of two major components, a major electrical generating facility and a recycled newsprint manufacturing plant. The project also would include a Hudson

River water intake and outfall facility and wastewater treatment plant ("WWTP") that would service both the newsprint and cogeneration plants. The project would be located in the City of Rensselaer on a site presently owned by the BASF corporation ("BASF"). DEC is State Environmental Quality Review Act (see Environmental Conservation Law ["ECL"] article 8 ["SEQRA"]) lead agency for the newsprint plant, and the cogeneration plant is subject to review by the New York State Board on Electric Generation Siting and the Environment ("Siting Board") pursuant to Public Service Law ("PSL") article X.

The newsprint plant would be located on the current BASF main plant site and the cogeneration plant would be located on contiguous property south of the newsprint plant. The project site is bounded on the north by an Organichem facility; on the east by railroad tracks and the Port Access Highway; various industrial sites on the south; and Riverside Avenue, a Coastal Cogeneration facility, and the Hudson River to the west.

North of the Organichem facility is a residential area known as the Fort Crailo neighborhood. The neighborhood takes its name from Fort Crailo, an historic home and museum located on Riverside Avenue that overlooks the Hudson River.

Applicant filed a joint draft environmental impact statement ("DEIS") and Article X certificate application seeking various permits from DEC and an Article X certificate from the

Siting Board for the construction and operation of the project. A joint DEC/Article X issues conference was conducted on a combined record. On September 27, 2002, Presiding Examiner/Department of Public Service ("DPS") ALJ Jaclyn A. Brillling and Associate Examiner/DEC ALJ P. Nicholas Garlick (collectively "Article X Examiners") issued a joint Ruling Specifying Article X and DEC Issues ("Joint Issues Ruling"). In that ruling, the Article X Examiners certified the following 15 issues for adjudication in both the DEC and Article X proceedings: (1) traffic impacts; (2) visual impacts; (3) air emissions of fine particulates ("PM_{2.5}"); (4) aquatic impacts and river water intake design; (5) cooling tower design; (6) cultural resources; (7) recreational resources; (8) water supply; (9) odors; (10) fugitive dust; (11) land use; (12) dredging and excavation; (13) community character impacts; (14) fire protection; and (15) air quality impacts. The Article X Examiners determined the following five issues were not adjudicable: (1) remediation of the BASF site; (2) environmental justice; (3) economic impacts of the newsprint plant; (4) the status of the agreement between applicant and the Albany County Sewer District for the provision of gray water for cooling the cogeneration plant; and (5) noise from the newsprint plant.

Applicant and DEC staff were automatically parties to the DEC proceedings by operation of regulation (see 6 NYCRR

624.5[a]). The DEC ALJ granted party status in the DEC proceedings to DPS staff; the City of Rensselaer (the "City"); the Rensselaer County Greens ("RCG"); the Fort Crailo Neighborhood Association ("FCNA"); Sierra Club; and Organichem; and amicus status to PSEG Power New York, Inc.

The only interim appeal filed in the DEC permit hearing proceeding (see 6 NYCRR part 624 ["Part 624"]) was by the City challenging the DEC ALJ's ruling that issues concerning the remediation of the BASF site were not adjudicable. The DEC ALJ's ruling was affirmed on appeal (see Interim Decision of the Commissioner, Aug. 22, 2003).

The parties began formal negotiations in October 2002, and in June 2003, some of the participants entered into a Joint Settlement Agreement ("JSA"). The signatories to the JSA included applicant, DEC staff, Department of Health staff, Rensselaer County Environmental Management Council, Niagara Mohawk Power Corporation, and Sierra Club Hudson Mohawk Group. DPS staff and the City signed the JSA subject to reservations. The JSA was not signed by RCG, FCNA and Organichem (by this time Organichem had withdrawn from the proceedings).

As a result of the JSA, the only DEC issues adjudicated were (1) visual impacts, (2) traffic, and (3) community character. All three issues are relevant to DEC's review as SEQRA lead agency with approval authority for the newsprint

plant.

The DEC ALJ issued a recommended decision on January 9, 2004 ("DEC RD").¹ In the DEC RD, the DEC ALJ held that with respect to the 12 issues advanced to adjudication that were settled in the JSA, applicant carried its burden of proof that its project meets all relevant regulatory criteria (see DEC RD, at 19-21). Accordingly, the DEC ALJ concluded that the record supports the appropriate SEQRA findings with respect to those 12 issues and issuance of the applicable permits (see id.).

With respect to visual impacts, the DEC ALJ questioned whether DEC staff had complied with DEC's visual impact assessment guidance and, thus, whether final approvals for the project may be granted. The DEC ALJ went on to conclude that, assuming the guidance requirements were met by DEC staff, the record demonstrates that the visual impacts of the proposed project have been mitigated to the maximum extent practicable, and that remaining impacts do not warrant permit denial.

With respect to traffic impacts, the DEC ALJ concluded that, with one exception, the record was sufficient for the DEC Commissioner to make the required SEQRA findings. The DEC ALJ held, however, that one piece of information was missing -- an

¹ On January 9, 2004, the Article X Examiners also issued a recommended decision in the related Article X proceeding ("Article X RD"). Before the joint hearings were held, Presiding Examiner Brillling became the Siting Board Secretary. She was replaced on the case by DPS ALJ J. Michael Harrison.

analysis of the impacts of the release of construction worker vehicles before and after the evening peak hour -- and provided the parties with the opportunity to supplement the record and file comments on the supplemental information (see id. at 88-89).

With respect to community character impacts, the DEC ALJ concluded that the sub-issues raised by FCNA (the only party that adjudicated the community character impacts issue) were without merit and do not prevent the Commissioner from approving the proposed project (see id. at 84-88).

Thereafter, applicant submitted an additional traffic analysis and provided the information identified as missing from the record. The City and DPS staff challenged applicant's supplemental traffic analysis, and requested that hearings be reopened. On March 9, 2004, the DEC ALJ issued a supplemental recommended decision ("DEC Supp RD").² In that RD, the DEC ALJ denied the application by the City and DPS staff to reopen hearings (see DEC Supp RD, at 3-4). The DEC ALJ also proposed additional DEC permit/Article X certificate conditions that resolved the remaining traffic issues (see id. at 4-6).³

² On March 9, 2004, the Article X Examiners also issued a supplemental recommended decision in the related Article X proceedings ("Art X Supp RD").

³ The DEC ALJ also noted that because no issues were raised concerning the emission reduction credits ("ERCs") obtained by applicant, a supplemental issues conference regarding the ERCs was cancelled (see DEC Supp RD, at 6).

Post-Recommended Decision Proceedings

I granted two one-week extensions for the filing of comments and replies on the DEC RD and DEC Supp RD. The final dates for filing were April 6, 2004 for comments, and April 19, 2004 for replies. Timely comments were subsequently filed in the DEC proceedings by applicant, DEC staff, RCG and the City. Timely replies were filed by applicant and RCG. Although DPS staff did not file comments in the DEC proceedings, it did file timely comments and replies in the related Article X proceedings. The hearing record closed on April 19, 2004.

The DEC Commissioner's office received several additional documents required to complete the record in the DEC proceedings. The documents included a March 2004 responsiveness summary and a May 5, 2004 letter submitted by DEC staff to support SEQRA findings on the non-adjudicated issues (see Hogan Letter, May 5, 2004). In a May 13, 2004 memorandum to the parties, DEC Chief Administrative Law Judge James T. McClymonds ("DEC Chief ALJ") authorized submission of the letter supporting SEQRA findings, accepted the documents as filed into the record, and reclosed the record. On September 2, 2004, the responsiveness summary was distributed to all parties entitled to receive a copy of the final EIS pursuant to SEQRA regulations

(see 6 NYCRR 617.12[b][1]).⁴

In a letter dated June 8, 2004, Siting Board Secretary Jaclyn A. Brillling requested that the City clarify its position concerning application of its local zoning laws to the proposed WWTP and whether it was necessary to reopen hearings on the matter. Secretary Brillling authorized the City to respond by June 14, 2004, and the remaining parties to comment by June 21, 2004. By letter of the same date, the DEC Chief ALJ also reopened the DEC Part 624 record to receive the City's clarification and the remaining parties' responses. The City filed its clarification on June 14, 2004. Responses were filed by DEC staff on June 18, 2004, and by applicant and DPS staff,

⁴ In this DEC Part 624 proceeding, where the DEIS was the subject of the adjudicatory hearing, the DEC RD and DEC Supp RD, together with the DEIS constitute the final EIS (see 6 NYCRR 624.13[c]). The responsiveness summary, which is also part of the final EIS (see 6 NYCRR 617.9[b][8]), would ordinarily be entered into the hearing record before close of that record (see 6 NYCRR 624.12[b]), and would be attached as an exhibit to the ALJ's hearing report when released (see Part 624 Public Comment Responsiveness Document). The responsiveness summary in this case was entered into the hearing record and filed with the appropriate parties after the release of the hearing reports (in this case, the DEC RD and DEC Supp RD) due to its submission later in the process.

The DEC RD, DEC Supp RD, and the responsiveness summary and, thus, the final EIS, were distributed to all parties entitled under the SEQRA regulations to receive notice and a copy of the final EIS (see 6 NYCRR 617.12[b][1]), more than ten day before issuance of this decision. Accordingly, the Department has satisfied its obligation to afford agencies and the public a reasonable time, not less than ten calendar days, in which to consider the final EIS before it issues the written SEQRA findings statement (see 6 NYCRR 617.11[a]).

respectively, on June 21, 2004.

The DEC ALJ forwarded to the DEC Commissioner's office a letter dated June 15, 2004, from the City and applicant to the Article X Examiners. The letter indicated that the City and applicant had reached agreement on the terms of a settlement of the traffic and transportation issues in these proceedings, and proposed new DEC permit/Article X certificate conditions relating to traffic impact mitigation ("exhibit 114 revised June 10, 2004"). Specifically, the City and applicant requested that (1) the existing exhibit 114 be removed from the record of these proceedings, and a proposed exhibit 114 revised June 10, 2004, which was attached to the June 15 letter, be inserted in its place, and (2) the revised permit/certificate conditions be accepted by the Examiners and adopted by the Siting Board and the DEC Commissioner. The City also withdrew its pending request for a remand on the traffic and transportation issues.

In a memorandum dated June 16, 2004, the DEC Chief ALJ granted the request to the extent of admitting the June 15, 2004 letter and attached exhibit 114 revised June 10, 2004 into the record. The DEC Chief ALJ extended the closing of the hearing record until June 30, 2004, for submission of comments by the remaining parties on the June 15 letter and attached exhibit. The DEC Chief ALJ also authorized DEC staff to submit revised SEQRA findings by the same date.

On June 29, 2004, DEC staff submitted comments and proposed SEQRA findings on traffic and transportation issues in both the DEC Part 624 and related Article X proceedings. DPS staff, which is a party to the DEC Part 624 proceeding, submitted comments dated June 30, 2004, in the Article X proceedings, whereupon the record in the DEC proceedings reclosed.

Finally, on August 27, 2004, the DEC Chief ALJ requested that applicant clarify a discrepancy regarding the dredge and fill volumes requested to be authorized by the ECL article 15 permit. In a letter of the same date, applicant indicated that the correct volumes were those provided for in the JSA and that, accordingly, the draft ECL article 15 permit required revision. In an August 30, 2004, letter, DEC staff confirmed that the draft permit required revision.

DISCUSSION

A. Findings of Fact -- Site and Project Description; ECL Article 15 Permit

The DEC ALJ's findings of fact concerning site and project description are hereby adopted (see DEC RD, at 12-14, ¶¶ 1-6, 8-11), except for paragraph 7, which is modified as follows:

7. Both the RNMP and the cogeneration plant will withdraw process water from the Hudson River. A maximum of 9.7 million gallons per day ("mpd") will be withdrawn, approximately 7.8 mgd for the RNMP and 1.9 mgd for the cogeneration plant. The withdrawal of this water will be regulated by the plant's SPDES permit (Additional Conditions § 1(b),

JSA Exh 4).

The change in flow rates reflects the flow rates provided for in the JSA (see JSA, at 50), and the draft SPDES permit (see Additional Conditions § 1[b], JSA Exh 4).

Paragraph 9 of the adopted findings of fact contains the correct dredge and fill volumes for the ECL article 15 permit, as clarified by applicant and DEC staff (1,722 cubic yards of material to be dredged and 2,078 cubic yards of clean fill). Accordingly, the draft ECL article 15 permit should be modified to reflect these correct amounts.

B. Issues Not Adjudicated

As noted above, 12 of the issues certified by the DEC ALJ for adjudication were settled pursuant to the JSA. Those twelve issues were: (1) PM_{2.5}; (2) aquatic impacts and river water intake design; (3) cooling tower design; (4) cultural resources; (5) recreational resources; (6) water supply; (7) odors; (8) fugitive dust; (9) land use; (10) dredging and excavation; (11) fire protection; and (12) air quality impacts.

The DEC ALJ concluded that the evidence in the record supports the appropriate SEQRA finding with respect to these 12 issues and issuance of the applicable permits (see DEC RD, at 14 [findings of fact]; 19-21 [discussion]). None of the parties submitting comments on the DEC RD raise any issues concerning the DEC ALJ's conclusion.

Based upon a review of the entire record, including the DEIS and supplemental materials, the JSA, the hearing record, the DEC RD, and DEC staff's May 5, 2004 letter supporting SEQRA findings, I agree with the DEC ALJ's conclusions regarding the 12 settled issues. Accordingly, the findings of fact and conclusions of the DEC ALJ with respect to these 12 issues are hereby adopted.

C. Visual Impacts

In 2001, applicant, DEC staff, DPS staff, and other involved governmental agencies agreed that applicant would analyze the visual impacts of the proposed project using the methodologies described in the Department's Program Policy, DEP-00-2, Assessing and Mitigating Visual Impacts ("DEC Visual Policy") and the Visual Resources Assessment Procedure for U.S. Army Corps of Engineers ("VRAP"). Details regarding applicant's visual impact assessment are provided in the DEC ALJ's recommended decision, and will not be repeated here (see DEC RD, at 16-18, 54-58). In sum, the key steps in the process included the development of photo simulations of the project, both with and without plumes, from eleven viewpoints selected in consultation with DEC and DPS staffs; the scoring of the photo simulations pursuant to VRAP procedures; the presentation of the visual analysis in the DEIS; design changes and structural modifications to the project by applicant in response to the

visual impact concerns of the parties; and the development and submission of further photo simulations reflecting the revisions to the project.

During the hearing, RCG argued that the record on visual impacts was inadequate to allow DEC to make the required SEQRA findings or, in the alternative, that the record supported the conclusion that the visual impacts of the project were too great and, therefore, that the project must be denied. RCG produced and submitted their own set of simulations from different viewpoints.

As noted above, in the DEC RD and DEC Supp RD, the DEC ALJ initially questioned whether DEC staff complied with the requirements of the DEC Visual Policy and, thus, whether the Department may issue final project approvals before the policy requirements had been met. On the merits, however, the DEC ALJ concluded that, assuming that alleged noncompliance with the DEC Visual Policy did not stand as a bar to project approval, the record provided an adequate ground upon which to base SEQRA findings. The DEC ALJ noted that the proposed project would be visible from the Hudson River and a number of locations in the City of Albany, including from the Empire State Plaza. The DEC ALJ also held, "There is no denying that the proposed project is a large, industrial project" (*id.* at 83). The DEC ALJ cited applicant's mitigation measures and noted that RCG offered no

specific additional mitigation measures not already included in the project. Accordingly, the DEC ALJ concluded that the Commissioner can reasonably conclude that visual impacts have been adequately assessed and have been minimized to the maximum extent practicable (id.).

In their comments on the RDs, DEC Staff and applicant challenge the DEC ALJ's conclusions concerning DEC staff's compliance with the DEC Visual Policy. In its comments, RCG raises issues concerning the adequacy of the record on visual impacts.

1. DEC Staff's Compliance with DEC Visual Policy

In its comments on the DEC RD and DEC Supp RD, DEC staff argues that the DEC ALJ erred in holding that the DEC Visual Policy has the "force of law." As an initial matter, DEC staff points out that the policy at issue is a Program Policy, not a Commissioner Policy as suggested by the DEC ALJ. DEC staff contends that such program policies are guidance to staff and the regulated community intended to provide clear and consistent direction concerning the Department's operational methods and procedures. DEC staff contends that such policies do not dictate the results of administrative review or establish a standard of conduct for the future and, thus, do not have the effect of a law or regulation.

DEC staff also argues that the DEC ALJ erred in

concluding that the DEC Visual Policy was not complied with in this case. DEC staff contends that applicant provided a visual assessment compliant with the policy. In addition, DEC staff contends that the DEC project manager reviewed all submissions, including those provided after submission of the DEIS, and assured their compliance with the policy. Finally, DEC staff argues that a visual expert is not required to assure compliance with the policy and, therefore, the circumstance that DEC's visual expert retired during application review in this case is not relevant.

Applicant also argues that the DEC ALJ erred in suggesting that the lack of review by a DEC visual expert might prevent project approval. Applicant contends that the DEC Visual Policy is not a regulation, and that both applicant and DEC staff complied with the procedures outlined in the policy.⁵

In its reply, RCG argues DEC staff failed to adequately assess the visual impacts of the project and failed to enforce the requirements of the DEC Visual Policy. RCG also expresses concern about the lack of a DEC visual expert.

⁵ Applicant notes that the final version of the DEC Visual Policy was not published in the ENB and argues, therefore, that it is null and void (see ECL 3-0301[z]). The DEC Visual Policy was, however, published in the ENB in draft form for public review and comment. Moreover, the Policy has been publicly available since its issuance, including posting on the DEC website. In any event, all parties to these proceedings either stipulated to or assumed application of the DEC Visual Policy in this case.

The DEC ALJ erred in concluding that any alleged failure of DEC Staff to comply with the DEC Visual Policy would prevent project approval. DEC program policies do not have the force of law (see Matter of Pete Drown, Inc., Interim Decision of the Commissioner, Jan. 27, 1994, at 1; see also Commissioner's Policy CP-1, March 2002). They provide guidance to staff and the regulated community in an effort to assure consistent methods and procedures in the exercise of the discretion afforded the Department by statutes such as SEQRA. The ultimate standards governing permit application review and approval are those provided by SEQRA itself, not the terms of the Department's policies.

The specific purpose of the DEC Visual Policy is to provide DEC staff with a framework for evaluating the potential for adverse visual and aesthetic impacts associated with a project, and for assessing whether such impacts are fully addressed in each application. Review pursuant to the Policy is intended to assure that an adequate record is developed upon which the ultimate Department decision maker may base SEQRA findings.

Contrary to the DEC ALJ's conclusions, nothing in the DEC Visual Policy or in SEQRA itself requires that review of the adequacy of an applicant's visual analysis be conducted by a visual expert. Although the DEC Visual Policy was developed by a

visual expert, it was designed to provide a methodology to be applied by permit application reviewers not otherwise specifically qualified as visual experts.

The DEC Visual Policy expressly recognizes the distinction between expert and non-expert review. The Policy provides that "Staff should not try to judge the quality of a design nor its effect on the aesthetics of the listed resource unless they are qualified to do so. Such qualifications normally include academic or other accepted credentials in architecture or landscape architecture" (DEC Visual Policy, at 8). Thus, the only consequence of a lack of a visual expert conducting permit application review is that DEC staff would be unable to offer its own expert evidence and opinion on the visual and aesthetic impacts of a project design, to the extent expert credentials would be required to give such an opinion. Lack of review by a qualified visual expert, however, does not render an otherwise adequate SEQRA record deficient. Only the lack of an adequate SEQRA record, and not the lack of a staff visual expert, is a basis for project denial under SEQRA.

In this case, a DEC project manager, who is eminently qualified to conduct a review of applicant's assessment, reviewed all phases of project development. Even assuming inadequate DEC staff review, once the matter was referred to hearings, any deficiencies in the visual assessment and, thus, the DEIS, are

subject to review in that process (see 6 NYCRR 624.4[c][6][i][b]). Thus, any deficiencies in the SEQRA record may be remedied through the hearing process.

In sum, the record reveals that DEC staff carried out its responsibilities under SEQRA and the Policy when reviewing applicant's visual assessment. Moreover, even assuming DEC staff's review failed to assure an adequate record upon which to make SEQRA findings, the record was supplemented by the hearing process. Any alleged failure by DEC staff to follow the analysis laid out in the DEC Visual Policy does not prevent the Commissioner from making SEQRA findings if the record is otherwise determined to provide an adequate basis for such findings.

DEC staff objects to the DEC ALJ raising the issue of its compliance with the Policy on his own and without an objection by the parties. The DEC ALJ indicated that he raised this issue for the first time in the DEC RD in an effort to protect the record and any subsequent Commissioner's action.

Generally, DEC ALJs have the authority to raise an issue not addressed by the parties where it appears that a legal requirement has not received adequate treatment by the parties (see Matter of Conover Transfer Sta. and Recycling Corp., Interim Decision of the Commissioner, Aug. 21, 1992, at 2). However, in exercising this authority, it is incumbent upon the DEC ALJ to

raise the issue at a time and in a manner that provides the parties with an adequate and effective opportunity to respond (see id. [DEC ALJ properly signaled prior to issues ruling an intent to raise an issue sua sponte]; see also 6 NYCRR 624.4[a][4] [DEC ALJ may use statements made at legislative hearing as a basis to inquire further at the issues conference]). In this case, the parties had an adequate opportunity to respond to the DEC ALJ's concerns. Nevertheless, the better course would have been for the DEC ALJ to raise the issue at the latest before closing the evidentiary record or to otherwise afford the parties an opportunity to comment before issuing the recommended decision. Such a course would have allowed the parties to supplement the hearing record in the event it was necessary.

2. Adequacy of the SEQRA Record

In its comments on the DEC RD, RCG challenges the reliability of applicant's visual impacts assessment as a basis for making SEQRA findings. Specifically, RCG argues that the DEC ALJ erred in recommending that the Commissioner base the SEQRA determination on the versions of applicant's simulations enlarged by RCG. RCG contends that it provided those larger versions only in an effort to demonstrate how distorted and unreliable applicant's smaller versions are.

RCG also contends that the VRAP process was flawed and, therefore, irrelevant. RCG contends that the VRAP did not assess

the proposed revisions to the project design; did not include key viewpoints, such as the view from Island Creek Park; used poor quality photo simulations; and only assessed views from locations where the greatest number of people would view the project, and not from locations with a direct line of sight. RCG also contends that the scores of the public panel were unreliable, and that the professional panel was biased and, therefore, should be disregarded.

RCG concludes that having discredited applicant's photo simulations, including the larger versions of those simulations RCG introduced at hearings, and the VRAP process itself, RCG's own photo simulations are the only reliable evidence in the record. RCG contends that the DEC ALJ applied a double standard when concluding that RCG's photo simulations overstate the potential impacts from the project.

In reply, applicant argues that the record provides a sufficient basis upon which to make SEQRA findings. Applicant argues that the DEC ALJ did not err in concluding that the larger versions of the photo simulations may be relied upon, even if only to make assessments concerning the size and scale of the project. Applicant also argues that the VRAP process was not fatally flawed. In particular, applicant contends the post-VRAP submissions supplement the VRAP pre-design-change analysis; that the viewpoints chosen did not violate selection standards; that

the VRAP panels used larger photo simulations; and that the record contains no evidence that the professional panel was biased.

In its comments and reply to RCG's comments, applicant contends that the DEC ALJ erred in entirely rejecting the public panel's score. Applicant concedes that the public panel had difficulty with the rating process, but that the panel's difficulty resulted in a single change, raising one similarity zone's classification by one grade (Large City, Urban Zone was raised from "modification" to "partial retention") (see DEIS, at 10-8). Applicant contends that because participation of the public panel benefitted the VRAP process, it was improper for the DEC ALJ to completely disregard it.

Finally, in its reply to RCG, applicant argues that RCG's evidence is not the only reliable evidence in the record. Moreover, applicant contends that some of RCG's evidence is itself unreliable. In particular, applicant notes that RCG's expert has never seen a plume from a 20 degree Fahrenheit hybrid cooling tower and, thus, lacks a basis for the photo simulations he prepared. Applicant also notes that RCG's photograph from the Dunn Memorial Bridge was taken after the photographer illegally stopped on the bridge and took the picture over the guardrail and, thus, does not represent a typical viewpoint. Nonetheless, applicant urges the Commissioner to consider the entire record

when making the SEQRA determination.

I agree with the DEC ALJ that the record provides an adequate basis upon which SEQRA findings may be made. Nothing in the parties' arguments suggests that either party's evidence must be rejected in its entirety. Rather, the parties' criticisms raise issues concerning the weight of the evidence supporting each party's analyses. The DEC ALJ recognized the strengths and weaknesses of the evidence presented by each party, and ascribed the appropriate weight to such evidence when concluding that the record provides an adequate basis upon which to make the required SEQRA findings.

With respect to the quality of each party's photo simulations, again, the DEC ALJ appropriately recognized their strengths and weaknesses, and assigned the appropriate weight to each. RCG's offer of the larger photo simulations in an effort to challenge the reliability of applicant's smaller versions of those simulations does not deprive them of value in evaluating the scale of the proposed project.

With respect to viewpoint selection, views affecting the greatest number of people, even if such views are partially obstructed, are not only legitimate, but are often crucial to the visual impact analysis. Conversely, the mere circumstance that an unobstructed, direct line of sight viewpoint can be identified does not necessarily mean such a viewpoint, regardless of the

number of people affected, is significant or critical to the analysis. In either instance, whether the viewpoint is direct or partially obstructed, the significance of the viewpoint is what must be assessed under SEQRA. In any event, RCG's provision of photo simulations with more direct line of sight viewpoints supplemented the record and were given the appropriate evidentiary weight by the DEC ALJ.

The strengths and weaknesses of the VRAP process in this case are also recognized and the results were given their appropriate weight by the DEC ALJ. The DEC ALJ did not rely solely on the panel's confusion over the scoring system, and I agree with the DEC ALJ's recommendation that the scores should be disregarded. RCG's contention that the professional panel was inherently biased because they were paid by applicant is not sufficient, without some other record evidence of bias, to reject that panel's results.

With respect to the analyses of design changes made after the DEIS was complete, the record is sufficiently supplemented to allow for SEQRA review. Again, the DEC ALJ ascribed the appropriate weight to such evidence.

3. Mitigation Issues

a. Status of Trees Along the Hudson River

Attached to applicant's comments on the DEC RD is an e-mail message from Dan Lightsey, DEC remediation staff, to Chris

Hogan, the DEC project manager for the subject application. In that e-mail, Mr. Lightsey indicates that the BASF Record of Decision ("ROD") for the remediation of the subject site does not contemplate the removal of the trees between the Hudson River and the existing lagoons in the vicinity of the proposed WWTP. Mr. Lightsey also indicated that to the extent that some of the "hedge row" between the lagoons and Riverside Avenue must be removed during remediation, that hedge row will be replaced.

Applicant and DEC staff contend that this information from DEC's remediation staff indicates that the subject trees will not be removed as part of the BASF remediation. DEC staff further asserts that if some of the trees must be removed, applicant would be expected to replace them as part of the riverside screening for the proposed project, and that the final details can be addressed in the final landscape plan to be submitted after permit issuance. RCG raises no issue in its submissions on the DEC RD concerning the plans for the trees.

The information submitted by DEC staff and applicant resolves the issue raised by the DEC ALJ. Accordingly, tree screening along the Hudson River may be considered part of the mitigation measures for the proposed project. As part of its final landscape plan, however, applicant should provide for replacement, if need be, of as much of the screen as is possible, consistent with the remediation of the BASF site, and subject to

the approval of DEC remediation staff.

b. Submission of Final Design Plans

The DEC ALJ concluded that given the mitigation measures stipulated to by applicant, the record provides a sufficient basis upon which SEQRA findings may be made. However, the DEC ALJ recommended that the final lighting plan, final landscape plan and final architectural details be submitted to DEC staff for review after permit issuance. Moreover, the DEC ALJ recommended that RCG be allowed to comment on the final lighting plan for DEC staff review.

I conclude that adequate assurances of SEQRA compliance have been provided by applicant to allow SEQRA findings to be made (see Matter of Hyland Facility Assocs., Decision of the Commissioner, April 13, 1995, at 5 [applicant provided reasonable assurances and demonstrated that the pollution control devices proposed would meet regulatory standards even though final plan still not complete]). Nevertheless, applicant must submit final plans consistent with those assurances for review and approval prior to project construction (see id.).

In its comments on the DEC RD, however, DEC staff takes issue with the DEC ALJ's recommendation that the final plans be submitted to DEC staff for approval. DEC staff contends that because applicant will be required to submit its final plans to the Siting Board in compliance filings, DEC staff review will be

redundant. Moreover, DEC staff contends that review solely by the Siting Board is consistent with the DEC ALJ's conclusion that the respective decision makers (the DEC Commissioner and the Siting Board) should consider the impacts from the entire project, not just the discrete portions of the project under each agencies' respective jurisdiction. Applicant defers to the Commissioner and DEC staff regarding the resolution of this issue, but essentially agrees with DEC staff's position.

It is appropriate for both DEC and the Siting Board to consider the impacts of the entire project where the combined impacts of both the newsprint plant and cogeneration plant may be of decisional consequence to each agencies' respective environmental review and approvals. However, the Siting Board lacks approval authority over the newsprint plant, just as DEC lacks the ultimate approval authority over the cogeneration plant. DEC is responsible for and must fulfill its statutory obligations concerning the newsprint plant. In order for DEC to carry out its responsibilities under SEQRA, applicant must submit its final plans to DEC for approval, whether through the compliance filing procedures or by some other means. DEC staff will review such plans only to assure that the mitigation measures stipulated to by applicant relevant to the newsprint plant have been incorporated into those plans.

It is not necessary, however, for RCG to offer comments

on the final lighting plan and, thus, the DEC ALJ's recommendation in this regard is not adopted. As provided for in the JSA, detailed reviews are best left to the City Planning Commission as part of the City approval process (see JSA, at 81). To the extent RCG seeks to have further input into the final details of applicant's plan, it should avail itself of the opportunities for public comment provided for in the City's approval process. DEC staff's review role is limited to assuring that the SEQRA mitigation measures agreed to by applicant have been incorporated into the plan.

c. Remaining Mitigation Issues

In its submissions on the DEC RD, RCG raises no argument concerning the DEC ALJ's resolution of the remaining issues including FAA lighting (see DEC RD, at 78-79), the visual impacts of truck traffic (see id. at 80), and alleged conflicts with land use trends along the Hudson River (see id. at 81-82). The DEC ALJ's recommendations on these issues are hereby adopted.

4. Recommended SEQRA Findings Concerning Visual Impacts

RCG argues that applicant's mitigation measures are insufficient and, therefore, the visual impacts of the project have not been minimized to the maximum extent practicable. Moreover, RCG contends that the repositioning of the newsprint plant, as contemplated by the JSA, in fact maximizes the overall impacts of the project. Applicant, on the other hand, urges the

Commissioner to consider the entire record and affirm the DEC ALJ's conclusion that the adverse visual impacts of the proposed project have been mitigated to the maximum extent practicable.

As noted above, the DEC ALJ recommended that the Commissioner conclude that the requirements of SEQRA have been met and that the visual impacts of the proposed project have been minimized to the maximum extent practicable. For the reasons stated by the DEC ALJ, I agree. The DEC ALJ properly concluded that impacts not only from the newsprint plant and related facilities, but from the entire project including the cogeneration plant are appropriately considered to assure comprehensive environmental review. The entire record indicates that the visual impacts have been mitigated to the maximum extent practicable, and RCG offers no additional mitigation not already considered and incorporated into the project. Moreover, the record supports the conclusion that the design changes to the project agreed to in the JSA had the net effect of further minimizing visual impacts. RCG's assertion that those measures actually increased the visual impacts is not supported by the weight of record evidence.

In sum, I adopt the DEC ALJ's findings of fact on the visual impacts issue (see DEC RD, at 16-18). Based upon the entire record, I conclude that the visual impacts of the project have been mitigated to the maximum extent practicable.

D. Traffic and Transportation Impacts

Throughout these proceedings, potential adverse impacts from increased project-related truck and automobile traffic on local roadways were identified for both the 30-month construction period, and the operational phases of the project. Other traffic impacts identified included on-street parking problems in the Fort Crailo neighborhood. Applicant proposed a variety of mitigation measures, which were challenged by the City and DPS staff during hearings. In the DEC RD and DEC Supp RD, the DEC ALJ rejected most of the challenges and concluded that the record was sufficient to support the conclusion that traffic impacts have been minimized to the maximum extent practicable and that the Commissioner could make the relevant SEQRA findings (see DEC RD, at 14-15 [findings of fact], 21-52 [discussion], and 88 [conclusion]; DEC Supp RD, at 1-5). The DEC ALJ held that applicant's proposed mitigation measures, including the staggered construction-phase release of workers during the afternoon hours would not result in unacceptable levels of service at all relevant intersections (see DEC RD, at 36; DEC Supp RD, at 1, 4). The DEC ALJ further recommended that the proposed draft DEC permit/Article X certificate conditions developed by the parties to reflect the mitigation measures be incorporated into any DEC permits issued in this case.

In its comments on the DEC RD and DEC Supp RD, the City

continued to press challenges to applicant's proposed traffic mitigation measures and requested a remand to the DEC for further development of the record. DPS staff raised a similar challenge in the companion Article X proceeding.

As noted above, however, the City and applicant have since reached agreement on the terms of a settlement of the traffic and transportation issue and submitted new proposed DEC permit/Article X certificate conditions relating to traffic impact mitigation. Accordingly, the City withdrew its pending request for a remand on the traffic and transportation issue.

The traffic impact mitigation measures agreed to by the City and applicant are reflected in the new DEC permit/Article X certificate conditions proposed by the City and applicant. Included in the proposed mitigation measures are the routing of all construction and operation traffic away from the Fort Crailo neighborhood, and a prohibition on construction-related parking in the neighborhood. In addition, applicant will provide up to \$100,000 to fund design and construction of a "traffic gate" between the industrial area where the project is sited, and the Fort Crailo neighborhood. Other key mitigation measures include the use of City police officers for traffic control during project construction, use of a third-party monitor to report to the City on applicant's compliance with traffic conditions, and the staggered departure of construction workers during the

afternoon.

Applicant and the City contend that the mitigation measures and off-sets embodied in the new proposed conditions give the City the control it needs to protect the health and safety of its residents during project construction and urge that those conditions be approved and incorporated into the final decisions of the DEC Commissioner and the Siting Board, respectively.

DEC staff agrees with applicant and the City. Based upon the record, including the revised traffic conditions, DEC staff concludes that the project has been designed and, where necessary, revised to avoid or minimize adverse environmental impacts related to traffic and transportation. Accordingly, DEC staff provides proposed SEQRA findings concerning traffic and transportation upon which the appropriate SEQRA determinations may be based.

In its submissions in the companion Article X case, DPS staff⁶ argues that the record is insufficient to support the conclusion that traffic impacts are minimized, and therefore seeks a remand for further development of the record. DPS staff also asserts that the settlement between applicant and the City does not remedy the deficiency. In the alternative, DPS staff

⁶ DPS staff is a party to these DEC Part 624 proceedings and, therefore, its submissions in the companion case are appropriately considered.

provides specific criticisms of various elements of the proposed permit conditions, and recommends changes it believes are necessary.

Notwithstanding DPS staff's objections, the new proposed DEC permit conditions are accepted, subject to modifications explained below. Although the City, which has significant responsibility and authority concerning the traffic issue, originally challenged applicant's traffic impact mitigation, it is now satisfied that traffic impacts have been minimized and are acceptable.

Moreover, the new permit conditions proposed by applicant and the City essentially reflect the recommendations made by the DEC ALJ. The primary differences are that responsibility for monitoring and enforcing traffic impact mitigation is shifted from DEC, as recommended by the DEC ALJ, to the City, where such responsibility more appropriately lies. Because agencies, such as the City and the Department of Transportation ("DOT"), with the appropriate jurisdiction over the traffic issue, are satisfied with, and will be involved in implementing and enforcing the proposed mitigation measures, DEC can be reasonably assured that the traffic impacts have been minimized to the maximum extent practicable for purposes of the Department's SEQRA review of the project.

DPS staff's specific concerns do not compel a contrary

conclusion. DPS staff's recommended changes concern arrangements between applicant and the City. The City, however, is satisfied with those arrangements. Moreover, DPS staff's contention that based upon the traffic study used to determine level of service of affected intersections, worker release intervals should be reduced from one-hour intervals to one-half hour intervals, could have been argued during hearings, but was not. Accordingly, DPS staff failed to develop the record on this point.

In the DEC RD, the DEC ALJ recommended that (1) the final traffic mitigation compliance plan, (2) the final selected satellite parking location plan, and (3) the final fill route plan, all relevant to the traffic impact mitigation measures, be submitted to DEC staff for approval before project construction begins. The settlement between applicant and the City still contemplates the submission of these plans and, thus, the DEC ALJ's recommendations remain relevant.

For the reasons stated above in the discussion of visual impacts mitigation, I adopt the DEC ALJ's recommendation. Adequate assurances of SEQRA compliance have been provided by applicant to allow SEQRA findings to be made at this time. Again, however, applicant will have to submit final traffic mitigation plans consistent with those assurances (see Matter of Hyland Facility Assocs., Decision of the Commissioner, April 13, 1995, at 5). Accordingly, applicant must submit the completed

plans to DEC staff for final approval before construction begins. DEC staff will review such plans to determine whether the mitigation measures proposed by applicant have indeed been incorporated. Because traffic mitigation measures associated with the newsprint plant and cogeneration plant, respectively, may not be readily differentiated, DEC staff should consult with DPS staff and DOT to coordinate review and approval of the plans.

In sum, I adopt the DEC ALJ's findings of fact on traffic and transportation impacts (see DEC RD, at 14-16) and accept the new DEC permit conditions proposed by applicant and the City, subject to the modifications discussed above. I conclude, based upon the entire record, and the expectation that final traffic mitigation plans incorporating the proposed mitigation measures will be submitted before project construction, that adverse traffic and transportation impacts have been mitigated to the maximum extent practicable, and that the remaining traffic impacts from the project are acceptable.

E. Community Character

At the hearing, FCNA was the only party to present evidence on the community character issue. FCNA raised four challenges to applicant's analysis of community character impacts in the DEIS. FCNA argued that (1) the DEIS was flawed and incomplete; (2) applicant failed to properly evaluate the cumulative impacts of the proposed project; (3) a separate

analysis should have been conducted concerning the impacts on the Fort Crailo neighborhood; and (4) applicant failed to adequately analyze the impacts of the proposed project on property values in the Fort Crailo neighborhood.

The DEC ALJ concluded that the issues raised by FCNA were without merit and would not prevent project approval (see DEC RD, at 89). With respect to the alleged flaws in the DEIS, the DEC ALJ concluded that the DEIS was sufficiently complete, including an analysis of a reasonable range of alternatives to the proposed project, and that an analysis of a host community agreement and the impacts of a PILOT agreement upon the neighborhood was not required (see DEC RD, at 85-86). With respect to the second and third issues raised by FCNA -- impacts upon the Fort Crailo neighborhood -- the DEC ALJ concluded that SEQRA imposes no requirement that a separate analysis be conducted for each neighborhood near a proposed project, and that the DEIS's analysis of impacts on the area surrounding the proposed project was reasonable and legally adequate (see id. at 86-87). With respect to impacts upon property values, the DEC ALJ concluded that evidence of such impacts is not reviewable in DEC permit proceedings (see id. at 87-88 [citing Matter of Red Wing Props., Interim Decision of the Commissioner, Jan. 20, 1989]). However, the DEC ALJ noted that in the companion Article X case, the Article X Examiners concluded that FCNA failed to

demonstrate that the proposed project would have an impact on property values in the Fort Crailo neighborhood (see id. at 88). FCNA did not file comments on the RDs, and the commenting parties did not raise any argument concerning community character impacts or the DEC ALJ's resolution of this issue.

Based upon my review of the record, the DEC ALJ's findings of fact and ultimate recommendation on the community character issue are adopted (see DEC RD, at 18-19 [findings of fact]; 89 [conclusion]). The DEC ALJ's resolution of the first three issues raised by FCNA is sound and supported by the record.

With respect to the question of property values, however, the DEC ALJ's conclusion that evidence concerning a proposed project's impacts upon property values may not be considered by DEC when conducting SEQRA review is an overstatement of the DEC Commissioner's interim decision in Red Wing. In Red Wing, the DEC Commissioner held that property value impacts, considered in isolation, are not an environmental impact under SEQRA (see Interim Decision, at 1-2). Moreover, if, after mitigation, any residual environmental impacts of a project are adjudged acceptable under SEQRA, any further restrictions on a project in order to preserve property values can only be imposed by local, not State, authorities (see Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, May 14, 1992, at 1 [citing Red Wing]).

Nevertheless, in Red Wing, the Commissioner held that property value impacts may be considered in situations where adverse environmental impacts of a project are not completely mitigated or avoided (see Interim Decision, at 1-2). In such a context, property value effects may be relevant to the balancing the Department conducts when issuing its SEQRA findings statement pursuant to ECL 8-0109(8) -- whether the economic, social and other considerations warrant anything less than complete mitigation or avoidance (see id.).⁷

The circumstances suggested in Red Wing warranting consideration of property values impacts, however, are not presented in this case. Based upon a review of the evidence presented by FCNA in this case, I agree with the Article X Examiners that FCNA failed to prove that the proposed project will have a negative impact on property values in the Fort Crailo neighborhood (see Article X RD, at 55-60). Because no proof exists that the project will diminish property values, those impacts need not be considered pursuant to ECL 8-0109(8).

Accordingly, I conclude that the project's impacts upon community character have been mitigated to the maximum extent practicable.

⁷ Although property value impacts may be relevant to the balancing required under SEQRA, this does not necessarily mean that such impacts would be subject to adjudication in DEC hearings.

F. Jurisdiction Over WWTP and Hudson River Water Intake Facilities

In the DEC RD, the DEC ALJ raised for the first time an issue concerning which agency, DEC or the Siting Board, has jurisdiction over the WWTP and water intake facilities proposed to be used by both the newsprint plant and the cogeneration plant ("ancillary facilities"). During hearings, no party argued that DEC lacked authority to issue the ECL article 15 permit⁸ applicable to the ancillary facilities, and no issues concerning the draft ECL article 15 permit were adjudicated. Nevertheless, the DEC ALJ held that the ECL article 15 permit was properly issued not by DEC, but by the Siting Board pursuant to PSL § 172(1) and 16 NYCRR 1000.7 (see DEC RD, at 88). The DEC ALJ reasoned that, although most of the ancillary facilities' capacity will be used by the newsprint plant, water withdrawn from and discharged to the Hudson River through these structures was necessary for the operation of the cogeneration plant and, thus, fell under the jurisdiction of the Siting Board.⁹

⁸ The ECL article 15 permit consists of an ECL article 15, title 5 excavation and fill in navigable waters permit and a 6 NYCRR 608 water quality certification.

⁹ Similarly, in the January 9, 2004 recommended decision issued in the Article X proceeding ("Article X RD"), the Article X Examiners held that the ECL article 15 permit fell within the Siting Board's authority pursuant to PSL § 172(1) (see Art X RD, at 14). The Examiners concluded, however, that the Siting Board may delegate the authority to issue the ECL article 15 permit back to DEC.

In a related ruling concerning the intake and outfall structures and the WWTP, the Examiners held that, notwithstanding

In the circumstances of this case, the DEC ALJ erred in deciding the jurisdictional issue. First, throughout the process of agency review of the joint DEC permit/Article X certificate application, and during the joint hearing process on that joint application, no party asserted that the Siting Board rather than DEC had jurisdiction over the ancillary facilities. All parties involved, including applicant, assumed that the ancillary facilities were a part of the proposed newsprint plant and, thus, within DEC's SEQRA jurisdiction. Although applicant indicated in its brief on exceptions in the related Article X proceedings that it agreed with the Article X Examiner's conclusions on jurisdiction, its most recent submissions indicate that it defers to the agencies' determinations on this issue.

The failure of any party to assert that the Siting Board has jurisdiction over the ancillary facilities is significant in the context of this case and proposed project. It is not clear that in the unique circumstances presented here, where a project incorporates both an Article X and non-Article X facility, that ancillary facilities associated with both would be covered by Article X. Moreover, because the ancillary facilities are primarily designed for use by the newsprint plant,

applicant's assumption that these facilities were not part of the Article X application, jurisdiction over the facilities was within the Siting Board's authority and, thus, the Siting Board must consider the application of local City of Rensselaer laws related to the facilities (see id. at 110).

shifting jurisdiction over those facilities to the Siting Board would place within its responsibilities a facility of a type that lies outside its ordinary experience. The agencies have not had occasion to consider the question in the precise factual context presented by this case. Thus, this issue presents an unsettled question.

A realignment of the respective agencies' jurisdiction in the absence of a request to do so by the parties creates significant potential for error. As previously noted, the parties all assumed throughout almost the entire proceeding that the ancillary facilities were part of the newsprint plant. The record, draft permits, JSA, and draft DEC permit/Article X certificate conditions were developed based upon this assumption. Because the DEC ALJ's determination was made after the hearings closed, the parties have been afforded limited time and opportunity to consider, comment on, and develop a record on the ramifications of a shift of jurisdiction. Although the parties in their comments on the recommended decision in each proceeding have attempted to identify how the respective DEC permits and Article X certificate conditions would be altered, it is not entirely clear that all modifications necessitated by a shift in jurisdiction have been identified or the full implications considered. Thus, prudence suggests that the parties' decision

not to raise the jurisdictional issue should be respected.¹⁰

Moreover, on this record, it is not necessary to decide the jurisdictional issue in order for the agencies to issue their respective approvals for this project. With respect to the ECL article 15 permit, applicant has carried its burden of establishing compliance with the applicable statutory and regulatory requirements for such a permit, and no issues concerning the article 15 permit were raised or adjudicated. Thus, whether pursuant to DEC's own jurisdictional authority, a delegation by the Siting Board as recommended by the DEC ALJ and Article X Examiners, or some other arrangement between the agencies, DEC will issue, administer and enforce the permit.

With respect to environmental review of the ancillary facilities, as the DEC ALJ correctly notes, DEC, as lead agency under SEQRA with approval authority for permits relative to the newsprint plant, has considered the environmental impacts of the entire project. On this joint record, the Siting Board is conducting a similar comprehensive review under Article X. Thus,

¹⁰ On a procedural note, as noted above, although a DEC ALJ generally has the authority to raise an issue not raised by the parties where it appears that a legal requirement has not received adequate treatment by the parties, such authority must be exercised at a time and in a manner that provides the parties with an adequate and effective opportunity to respond (see Matter of Conover Transfer Sta. and Recycling Corp., Interim Decision of the Commissioner, Aug. 21, 1992, at 2). The better course here would have been for the DEC ALJ to inform the parties of his concerns and allow the parties to submit comments addressing those concerns before issuing a decision on the matter.

both agencies have considered the environmental impacts associated with the ancillary facilities, and make their respective findings accordingly. In these circumstances, any duplication of environmental review is of no consequence in terms of project approval. Moreover, mitigation measures designed for the ancillary facilities have been incorporated into the JSA and proposed DEC permit/Article X certificate conditions which, in turn, will be incorporated into the DEC permits and Article X certificate, respectively, as will be discussed below. Thus, applicant will be obligated to implement those measures as required by the JSA, DEC permits and Article X certificate.

Finally, as noted in the Siting Board decision in the companion Article X case, no issue concerning the waiver of local laws applicable to the ancillary facilities is presented on this record. Thus, the question concerning which agency has jurisdiction over the ancillary facilities need not be decided in the context of this case. Accordingly, the DEC ALJ's determination on this point is rejected, and should not be read as stating DEC's position on the issue.

G. Miscellaneous Issues

1. Incorporation of JSA and Proposed Permit/Article X Conditions into DEC Permits

The DEC ALJ recommended that the proposed DEC permit/Article X certificate conditions, or some variation thereof, be incorporated into the DEC permits in this case. DEC

staff argues that inclusion of the proposed DEC permit/Article X certificate conditions concerning visual and traffic impacts mitigation as part of the DEC permits is unnecessary. DEC staff contends that because the Siting Board will be enforcing the same conditions as part of the Article X certificate, including the conditions in the DEC permit would be needlessly redundant.

I accept DEC staff's contention, but only in part. Although for purposes of their respective approvals, both DEC and the Siting Board are considering the environmental impacts from the entire, unified project, each agency has separate jurisdiction and responsibilities. DEC has the obligation to review the mitigation measures proposed by applicant insofar as they are relevant to the newsprint plant, and to incorporate those mitigation measures into its approval (see 6 NYCRR 617.11[d][5]). The imposition of permit conditions based upon SEQRA are the means through which the Department incorporates mitigation measures under its jurisdiction into its approval (see Matter of Town of Henrietta v Department of Env'tl. Conservation, 76 AD2d 215 [4th Dept 1980]).

In this case, the JSA incorporates the mitigation measures not only for visual and traffic impacts, but for all impacts relevant to SEQRA review of and approval for the newsprint plant. Thus, the JSA should be incorporated by reference into the appropriate DEC permit with the direction that

the project must be constructed consistent with its terms. Moreover, because the proposed new DEC permit/Article X certificate conditions relating to traffic and transportation issues incorporate the most recent version of the mitigation measures related to traffic impacts, those new conditions must also be incorporated into the appropriate DEC permit, modified as necessary to reflect DEC's approval responsibilities. The remainder of the proposed DEC permit/Article X certificate conditions, however, need not be incorporated into the DEC permits.

2. Reservation of Enforcement Authority

The DEC ALJ noted that a provision in the JSA appears to give the Siting Board jurisdiction to resolve any dispute that may arise under the JSA, including those related to DEC permits and the SEQRA process (see JSA, at 8). The DEC ALJ directed the parties to comment on this provision (see DEC RD, at 7).

DEC staff contends that the Siting Board is the appropriate body to resolve disputes concerning the JSA, but that DEC's responsibility for and enforcement authority over its permits is not limited by the provision. Applicant agrees that if a dispute regarding the JSA arises and the dispute relates only to the newsprint plant, the Siting Board would not have jurisdiction.

DEC staff and applicant's understanding of the JSA

provision is acceptable. Accordingly, a DEC permit condition should be included providing that disputes arising under the JSA that relate to the newsprint plant are not within the Siting Board's jurisdiction, and that nothing in the JSA should be understood to limit DEC's responsibility for and enforcement authority over the newsprint plant and the permits related thereto.

3. Applicant's Submission of Final Plans

As concluded in the sections above on visual and traffic impacts, applicant must provide certain final plans to DEC for review and approval before construction commences. These plans may be submitted to DEC through the compliance filing process or by whatever other means are deemed efficient and appropriate. In addition, several other final plans related to other aspects of the Department's review of the project, whether pursuant to SEQRA or other statutory or regulatory authority, must be submitted for approval. Conditions relevant to the submissions of these plans should be incorporated into the appropriate DEC permits. To the extent such plans involve matters that are not readily ascribable to either the newsprint plant or cogeneration plant, such as the fugitive dust plan, DEC staff should consult with DPS staff and coordinate approvals.

SEORA FINDINGS AND CONCLUSION

Having concluded that the environmental impacts from the proposed project have been mitigated to the maximum extent practicable, it must be determined whether the remaining significant adverse impacts warrant project denial. The DEC ALJ concluded that the proposed project will result in significant unmitigated visual impacts, stating that "[t]here is no denying that the proposed project is a large, industrial project that will be visible from many points around the site" (DEC RD, at 83). Nevertheless, the DEC ALJ held:

"Given the landscape into which the proposed project would be placed (an industrialized section of the Hudson Riverfront) and the extensive visual impact mitigation set forth in the JSA, the Commissioner can reasonably conclude that the visual impacts of the proposed project are not unacceptable and approval can be granted for the project"

(id.).¹¹

RCG concludes that despite applicant's and the other parties' efforts to minimize the visual impacts of the proposed project, the adverse visual impacts of the proposed project would degrade the visual resources of the community and the region in which it would be located. Thus, RCG urges project denial.

¹¹ The DEC ALJ also stated that "whether the visual impacts are acceptable and [] whether the permit should be issued rests with the Commissioner alone" (DEC RD, at 83). The approvals for the project, however, rest with both the DEC Commissioner and the Siting Board, acting within the scope of each agency's jurisdiction.

Applicant, on the other hand, urges the Commissioner to conclude that the remaining visual impacts do not warrant project denial.

I agree with the DEC ALJ that the remaining visual impacts do not warrant project denial. The record supports the conclusion that the project would be a large industrial project visible from many locations in Albany and Rensselaer, including along the Hudson River. However, as the DEC ALJ noted, the record does not suggest that the project would obstruct the view from any historically or culturally significant site. Moreover, the project would be located in an industrial zone that already contains industrial facilities. The newsprint plant would replace an old, aging, and polluted facility with a new and less cluttered facility.

In addition, the record reveals multiple economic, social and environmental benefits from the project. Those benefits include, among other things, that the project would increase the capacity for newspaper and magazine recycling, would promote energy efficiency, and would involve the reuse of an industrial brownfield. Accordingly, after weighing and balancing the potential visual impacts against social, economic and other considerations relevant to the project (see 6 NYCRR 617.11[d][2]), I conclude that the visual impacts of the project do not warrant project denial.

In sum, based upon the entire record, including the DEC

RD and DEC Supp RD, DEC staff's letter in support of SEQRA findings, the JSA, and the proposed DEC permit/Article X certificate conditions, I conclude that the requirements of SEQRA contained in ECL 8-0109 and 6 NYCRR part 617 have been met, and that all adverse environmental impacts have been mitigated to the maximum extent practicable. I also conclude that the remaining adverse environmental impacts from the project, including visual impacts, are outweighed by social, economic and other essential considerations (see 6 NYCRR 617.11[d][2]).

Accordingly, I certify that consistent with social, economic and other essential considerations, including the reasonable available alternatives, the project avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts have been avoided or minimized to the maximum extent practicable by incorporating as conditions to the permits those mitigative measures that were identified as practicable. I also certify that the action is consistent with applicable coastal zone management policies set forth in 19 NYCRR 600.5.

