

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

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

CASE No.4-3814-00052/00001 – 00006

HEARING REPORT/RECOMMENDED DECISION

-by-

P. Nicholas Garlick
Administrative Law Judge
January 9, 2004

SUMMARY

Three issues were adjudicated relating to approvals the Applicant needs from the Department of Environmental Conservation ("DEC"). With respect to traffic impacts, the Administrative Law Judge ("ALJ") finds that the record is sufficient for the Commissioner to approve the project (subject to the modified permit conditions discussed herein), except that an analysis of impacts of releasing construction worker vehicles before and after the afternoon peak hour needs to be supplied by the Applicant. With respect to visual impacts, the ALJ finds it is unclear from the record whether DEC's visual impact program policy has been complied with, however, should the Commissioner find that it has, the ALJ finds that the Applicant has met its burden of demonstrating that visual impacts from the proposed project have been minimized to the maximum extent practicable. With respect to community character impacts, the ALJ finds that the record is sufficient for the Commissioner to approve the project.

The Applicant is directed to notify the ALJ by January 20, 2004 of how it wishes to proceed regarding the missing traffic analysis. If the Applicant declines to supply the analysis and opposes the ALJ's recommendation, a briefing schedule will be set immediately. If the Applicant wishes to provide the analysis to all parties, the Applicant must notify the ALJ when such analysis will be available and how it wishes to proceed. Thereafter, a conference call among the parties will be scheduled to discuss this matter.

Finally, the ALJ finds that the Siting Board, not the DEC Commissioner has the authority to issue the water quality certification and the permit for the excavation and fill in the Hudson River.

INTRODUCTION

The Applicant proposes to construct a single project which consists of two components, a major electrical generating facility ("cogeneration plant") and a recycled newsprint manufacturing plant ("RNMP"), in the City of Rensselaer.

The recycled newsprint manufacturing plant will be located on the northern portion of the site where the existing BASF manufacturing plant is located. A majority of the existing buildings at the BASF manufacturing plant will be demolished to

accommodate construction of the recycling facility. The recycled newsprint manufacturing plant will consist of a deinking plant, stock preparation and paper mill, and finishing and shipping areas. The recycled newsprint manufacturing plant will process approximately 430,000 metric tonnes/year of waste newspapers and magazines to produce 330,000 metric tonnes/year of 100-percent recycled newsprint.

The cogeneration plant will supply steam and electricity (approximately 55 MW) to the recycled newsprint manufacturing plant. The remainder of the electricity generated will be offered on the merchant market. The cogeneration plant is configured with two GE Frame 7FA combustion turbines with dry low-nitrogen oxide (NO_x) combustors, heat recovery steam generators (HRSGs), a steam turbine and an auxiliary boiler. With all of these components of the facility included, the maximum electrical output will be 670 MW. The cogeneration plant will use natural gas as the primary fuel and low sulfur (0.05%) distillate as the secondary fuel in the combustion turbines and duct burners within the HRSGs. The auxiliary boiler will also fire natural gas and low-sulfur distillate fuel. Distillate fuel use will be limited up to the equivalent of 1,080 hours per year at 100 percent load.

Process water for the facilities will be withdrawn from the Hudson River at a maximum rate of 9.6 millions gallons per day (MGD), including approximately 7.9 MGD for the recycled newspaper manufacturing plant and 1.7 MGD for the cogeneration plant. Non-contact cooling water for the cogeneration plant will be supplied by Albany County Sewer District South Plant at a maximum rate of 6.6 MGD. Wastewater from the facility will be treated on-site and discharged to the Hudson River. The daily flow rate of wastewater is proposed to be 6.25 MGD (average daily) and 8.1 MGD (peak daily).

The water intake structure for process water will consist of two cylindrical 1-mm wedgewire screens and the seasonal deployment of a Marine Life Exclusion System structure. The installation of the intake structure and outfall will require the dredging of 1,100 cubic yards from the Hudson River that will be disposed of off site. Approximately 1,340 cubic yards of clean material will be used for backfill in the Hudson River.

While every case referred to DEC's Office of Hearings and Mediation Services is unique on its facts, this case is unique procedurally. The Applicant has proposed both components as part of the same project and in a single application. This

application requires a different environmental review process for the construction and operation of each component.

In order to construct and operate the cogeneration plant the Applicant must obtain a number of approvals. Chief among these is a Certificate of Environmental Compatibility and Public Need ("Certificate") from the Siting Board. In order for the Siting Board to issue the Certificate it must complete an environmental review pursuant to Article X of the Public Service Law ("PSL"). In addition, the Applicant must also secure environmental permits under the federal Clean Air Act ("CAA") and Clean Water Act ("CWA"). These permits would be issued by DEC pursuant to its delegation agreements with the federal Environmental Protection Agency ("EPA"). The PSL authorizes the Siting Board to issue all state permits necessary for the cogeneration plant (PSL §172(1)).

In order to construct and operate the RNMP, the Applicant needs a number of state and local approvals. Relevant in this proceeding are environmental permits from DEC issued pursuant to both state and federal law. In addition, DEC has been designated as lead agency pursuant to the State Environmental Quality Review Act ("SEQRA", Environmental Conservation Law ("ECL") Article 8). The SEQRA process must be completed before the permits may be issued.

DEC Staff have prepared draft permits for this proposed project (Exh. 4) and these permits relate to the entire proposed facility. Thus, the Part 201 Air State Facility Permit and the Title IV Acid Rain Permit address air pollution from both the cogeneration plant and the RNMP. Similarly, the State Pollutant Discharge Elimination System ("SPDES") permit and Construction Stormwater SPDES Permit address water pollution from the entire facility. As proposed by the parties, DEC would issue two permits required by state law, a water quality certification and a permit allowing excavation and fill in the Hudson River. For reasons discussed at the end of this recommended decision, since both these permits are necessary for the operation of the cogeneration plant as well as the RNMP, only the Siting Board can issue these permits.

The laws that apply to this application include: ECL article 3, title 3 (General Functions), ECL article 17 (Water Pollution Control), ECL article 19 (Air Pollution Control), ECL article 15 (Protection of Waters) and 6 NYCRR subparts 201-6 (Permits and Registrations) and 231-2 (Requirements for Emission Sources Subject to sections 172 and 173 of the Clean Air Act, 42 USC §7502 and §7503 on or after November 15, 1992), 6 NYCRR part 608 (Protection of Water), part 621 (Uniform Procedures), part

624 (Permit Hearing Procedures), parts 750-758 (State Pollutant Discharge Elimination System) and the Clean Water Act part 401 Water Quality Certification.

Both the Article X and DEC SEQRA/permitting environmental reviews allow the opportunity for an administrative hearing. In this case, in the interest of administrative efficiency and fairness to all involved, the hearing processes were combined (6 NYCRR 624.8(e)). However, the two hearing processes are not identical and significant differences exist, especially relative to the standards for granting party status to an intervenor and the standards for finding an issue adjudicable. Conflicts between the two hearing processes have been resolved in keeping with the intended purposes of Article X and SEQRA, to ensure that the decision makers are provided with the most robust and relevant record regarding environmental impacts to allow a hard look at the environmental consequences of the proposed project and conclude that adverse consequences have been minimized (as required by Article X, PSL 168(2)(c)) and minimized to the maximum extent practicable (as required by SEQRA, ECL 8-0109(8)). Concerns that this unique case may set precedent for future, routine DEC cases, are unfounded.

PROCEEDINGS

The Applicant submitted a Draft Environmental Impact Statement ("DEIS"), applications for the DEC permits referenced in the caption of this case, and an application for a Certificate of Environmental Compatibility and Public Need on December 20, 2001 (Exh 1). In response to questions posed by State agencies, the Applicant filed a supplement on May 8, 2002 (Exh. 2).

On May 29, 2002, DEC issued two notices: Announcement of Public Comment Period, Combined Notice of Complete Application, Public Hearing and Issues Conference and Notice of Acceptance of Draft Environmental Impact Statement; and Notice of Determination to Issue Prevention of Significant Deterioration ("PSD") Permit. These notices were published in DEC's electronic *Environmental Notice Bulletin* on May 29, 2002. The Applicant arranged for their publication in the *Troy Record* on May 31, 2002 and in the *Albany Times Union* on June 4, 2002.

LEGISLATIVE HEARING

As provided in the notices joint legislative hearings were convened at 2:00 p.m. and 7:00 p.m. on July 9, 2002 at the Rensselaer High School, 555 Broadway, Rensselaer, New York. These hearings were held on a common record with the companion Article X case (Siting Board Case #00-F-2057).

In the afternoon, approximately 35 people attended and 6 people made oral statements for the record. Of those who spoke, 2 spoke in favor of the project and 4 spoke against. In the evening, approximately 55 people attended and 15 people made oral statements for the record. Of those who spoke, 2 spoke in favor of the project and 11 spoke against. Among the active parties, representatives of the following attended: the Applicant, staff of the Department of Environmental Conservation ("DEC Staff"), staff of the Department of Public Service ("DPS Staff"), Sierra Club and the Rensselaer County Greens ("RC Greens").

ISSUES CONFERENCE AND TECHNICAL CONFERENCE

An Issues Conference was held on July 10 and 11, 2002. At the Issues Conference, certain parties indicated that upon receipt of additional information from the Applicant, some of the issues proposed for adjudication could be resolved. In an effort to facilitate settlements and foster an exchange of information, a technical conference was held on August 27 and 28, 2002.

ISSUES RULING

On September 27, 2002, the DEC issues ruling was released which identified 15 issues to be advanced to adjudication and identified 5 issues which were not to be advanced. The fifteen issues proposed by intervenors and advanced to adjudication were: traffic impacts; visual impacts; emission of fine particulates ($PM_{2.5}$) into the air; aquatic impacts and river water intake design; cooling tower design; cultural resources; recreational resources; water supply; odors; fugitive dust; land use; dredging and excavation; community character impacts; and air quality impacts. The five issues not advanced to adjudication were: remediation of the BASF site (site of the RNMP); environmental justice; the economic impacts of the RNMP; the status of the agreement between the Applicant and the Albany County Sewer District; and Noise from the RNMP. Party Status was granted to DPS Staff; the City; the RC Greens; the Fort Crailo Neighborhood Association ("FNCA"); Sierra Club; and Organichem.

The schedule to appeal the issues ruling was suspended in order to allow the parties an opportunity to reach negotiated settlements.

SETTLEMENT NEGOTIATIONS AND THE JOINT SETTLEMENT AGREEMENT

The parties began formal negotiations in October 2002. These negotiations resulted in a Joint Settlement Agreement which was presented in June 2003 (Exh. 48). The JSA states that it and its attachments provide the legal and factual basis for: 1) the Siting Board to making findings necessary to issue a Certificate; 2) the DEC Commissioner to make SEQRA findings; and 3) the DEC Commissioner to decide if the federally delegated permits should be issued (JSA p.7). Also, the JSA seems to authorize the Siting Board to resolve any disputes that may arise regarding it, even those related to DEC permits and the SEQRA process (p.8). The parties should address this in their briefs.

The JSA was signed by the following parties: the Applicant, DEC Staff, Staff of the Department of Health ("DOH Staff"), Rensselaer County Environmental Management Council ("RCEMC"), Niagara Mohawk, and Sierra Club. DPS Staff signed the JSA but withheld its assent with regards to the issues of traffic, compliance with state and local laws (an Article X issue of no relevance here), and decommissioning of the Cogeneration Plant (also an Article X issue of no relevance here). DPS Staff also took no position as to any provisions of the JSA that related solely to the RNMP, any off-site industrial wastewater discharge lines or treatment structures to be sited outside of the Article X process, the Hudson River water intake structures and supply lines, and compliance with SEQRA. DPS Staff also conditioned its agreement upon the Applicant's entering into an agreement with the Albany County Sewer District to supply gray water for the Cogeneration Plant.

The JSA was not signed by the following parties: RC Greens, FCNA and Organichem (which withdrew from these proceedings).

APPEALS FROM ISSUES RULING

Following the negotiation process and the execution of the JSA, a schedule for appeals was set. Only one appeal was received by the Commissioner. The City appealed the ruling excluding from adjudication issues relating to the remediation of the site of the RNMP. The Commissioner upheld the ruling, holding that issues concerning the remediation of the RNMP site

were being reviewed in a separate proceeding pursuant to ECL article 27, title 13 inactive hazardous waste disposal site remedial program and, thus, were not reviewable in this Part 624 administrative permit hearing process (see Matter of Besicorp-Empire Development Company, LLC., Interim Decision of the Commissioner, August 22, 2003).

DEC Staff did not appeal the issues ruling; however, it felt compelled to write a letter, on the date appeals were due, for inclusion in the record stating its concerns and objections with the issues ruling. Of the numerous applications filed for a Certificate with the Siting Board, only this one combines a proposed power plant and a major manufacturing facility. Because DEC was selected as lead agency under SEQRA for the RNMP while the cogeneration plant is subject to Article X and, thus, exempt from SEQRA, there are two separate, but very closely linked reviews of environmental impacts of a single proposed project. These reviews are designed to provide information necessary for the DEC Commissioner, in the case of the RNMP, and the Siting Board, in the case of the cogeneration plant, to make findings that environmental impacts from the proposed plant have been minimized. Every effort has been made to ensure that a single, unified record has been created in this matter and the associated Article X case. This means that all evidence in these cases is identical, with a common reference. Also, all testimony is included in both records with identical page references (undoubtedly some testimony may not be relevant to one decisionmaker). The purpose of this is to ensure that all information in the record is available to both decisionmakers and to simplify the record.

The first concern raised by DEC Staff in its letter involves the ruling that an issue proposed by the Sierra Club relating to aquatic impacts and river water intake design should be advanced to adjudication. DEC Staff asserts that this issue should not have been advanced to adjudication in the DEC hearing process because Sierra Club's offer of proof was deficient. Sierra Club proposed this issue in both the Article X and DEC cases, and it was advanced to adjudication in the Article X case. DEC Staff did not object to this ruling. Thus, the position advocated by DEC Staff is that environmental impacts of construction in the Hudson River should not be examined in a DEC hearing while those same impacts should be examined in the Article X hearing. This would mean that all evidence introduced on this issue would be included in the administrative record before the Board and excluded from the record before the Commissioner. Accordingly, the Commissioner could not use this information in making her decision.

The second concern raised by DEC Staff involves the ruling granting DPS party status in the DEC case when DPS Staff had not sought this status. By law, DEC Staff is a party in the Article X case, however DEC regulations provide no such status for other state agencies. It was essential to include DPS Staff as a party because DPS Staff asserted that traffic from the proposed project would create unacceptable adverse impacts (as discussed in detail later). Had DPS Staff not been granted party status in the DEC hearing, none of the testimony proffered by the DPS traffic expert at the adjudicatory hearing could have been considered by the Commissioner. Having the information provided by DPS Staff in the DEC record is essential for the Commissioner in making SEQRA findings.

DEC Staff's third concern involves the ruling to advance issues relating to the water supply for the cogeneration plant to adjudication in the DEC hearing. This issue was advanced to hearing in the Article X process and involved, to some degree, the withdrawal of water from the Hudson River through the water intake that would also be used by the RNMP. Again, DEC Staff sought to exclude from consideration by the Commissioner information that may have been developed in the Article X process and could have impacted the DEC approval process.

DEC Staff's fourth concern involves the ruling to advance to adjudication issues relating to the dredging and excavation in the Hudson River related to the construction of the water intake structure. DEC Staff asserts that the City, who proposed the issue, failed to make an adequate offer of proof. Again this issue was advanced to adjudication in the accompanying Article X case and settled before the adjudicatory hearing. Had this issue been adjudicated, all information would have been excluded from the DEC hearing record and could not be relied upon by the Commissioner.

The fifth and final concern raised by DEC Staff involves the ruling to advance air impacts, specifically the adequacy of the air quality monitoring relied upon by the Applicant, to adjudication. DEC Staff argues that the offer of proof was inadequate to advance this issue. This is a dispute regarding what constitutes an adequate offer of proof after the issue had been settled.

All of the issues raised by DEC Staff's letter had been resolved in the JSA before the letter was authored, so it is difficult to understand why a party would want to argue that had the issue not been resolved, it would have won on appeal.

ADJUDICATORY HEARING

An adjudicatory hearing was held in this matter on September 17, 19, 24, 25 and 26, 2003 at the headquarters of the Public Service Commission in the Empire State Plaza, Albany, New York. The adjudicatory hearing was held on a joint record with the accompanying Article X case.

Only issues not resolved in the JSA were heard. These issues were: visual impacts (both a DEC and an Article X issue), traffic (both a DEC and an Article X issue), community character (both a DEC and an Article X issue), decommissioning of the cogeneration plant (an Article X issue), and local laws (an Article X issue).

The following parties provided pre-filed testimony: DPS Staff, City of Rensselaer, RC Greens, FCNA, and the Applicant. During the adjudicatory hearing, DEC Staff did not submit any pre-filed direct testimony or any prefiled rebuttal testimony, cross examine any witnesses, or offer any exhibits.

CLOSING OF THE RECORD

At the close of the adjudicatory hearing, a briefing schedule was set. Closing briefs were received on October 22, 2003. The record has not yet closed because, among other things, the Applicant has yet to actually acquire its Emission Reduction Credits ("ERCs"), which must be acquired before the Commissioner makes a final decision. However, there is no information missing from the record that precludes the release of this Recommended Decision.

SUMMARY OF POSITIONS OF THE PARTIES

The Applicant asserts that the record supports a finding by the Commissioner that the proposed project will comply with all applicable laws and regulations, as conditioned by the DEC permits. In addition, the Applicant contends that the record is sufficient to allow the Commissioner to take a hard look at the environmental consequences of the proposed project and conclude that impacts have been minimized to the maximum extent practicable, as required by SEQRA.

DEC Staff asserts that the record supports DEC Staff's findings that the components of the Applicant's project, as

conditioned by the draft permits, conform to all applicable requirements of statute, regulation, and policy, including SEQRA. Accordingly, DEC Staff concludes the Commissioner can make a finding that the proposed project complies with all permit issuance standards and all environmental impacts associated with the project have been mitigated to the maximum extent practicable.

DPS Staff did not file a brief in the DEC case but did file a brief in the companion case before the Siting Board. DPS Staff expressed serious concern with the record regarding traffic. Specifically, DPS Staff states that the Applicant "has failed to demonstrate that the proposed facility can be constructed or operated without a significant adverse impact upon public transportation and traffic safety" (DPS Staff's Initial Brief, p. 6). DPS Staff seeks either denial of the Certificate on these grounds or supplementation of the record with regard to traffic impacts in the form of expert testimony from staff of the New York State Department of Transportation ("DOT"). Since there is no differentiation between traffic impacts from the two components of the proposed project in the record, it can reasonably be inferred that DPS Staff would take a similar position with regard to approvals by the DEC Commissioner.

The City of Rensselaer asserts a position similar to that adopted by DPS Staff. Specifically, the City claims that based upon the current record, the application is deficient. The City identifies five specific deficiencies relating to traffic impacts in the record that it says should be addressed in order for the Commissioner to have a sufficient basis to issue her approvals.

The FNCA asserts that the application is deficient and does not adequately assess the environmental impacts of the proposed project on community character. The FNCA seeks the creation of a neighborhood enhancement program to offset the impacts of the project.

The RC Greens assert that there is no basis in the record for the Commissioner to conclude that the Applicant has provided the information necessary to take a hard look at the potential adverse visual impacts. RC Greens seek denial of the permit applications.

BURDEN AND STANDARD OF PROOF

In this case, the Applicant has the burden of proof to demonstrate that its proposal will be in compliance with all applicable laws and regulations administered by DEC (6 NYCRR

624.9(b)(1)). DEC Staff is incorrect when it states in its brief that an intervener who proposes an issue that is accepted for adjudication bears "the ultimate burden of proof on that issue at the evidentiary hearing" (p. 6). While it is true that at the issues conference stage of a DEC administrative proceeding an intervener bears a burden of persuasion to demonstrate an issue is substantive and significant (6 NYCRR 624.4(c)(4)), the burden of proof remains on the applicant (6 NYCRR 624.9(b)(1)). Therefore, for all issues advanced to adjudication (including those resolved in the JSA), the Applicant bears the burden of demonstrating, by a preponderance of the evidence, that this proposed project complies with all applicable laws and regulations (6 NYCRR 624.9(b)(1), (c)).

SEQRA STATUS

DEC is lead agency and the Applicant has prepared a DEIS. The City is an involved agency as that term is used in SEQRA (6 NYCRR 617.2(s)). The City Planning Commission and Zoning Board of Appeals must issue site plan approval, special use permit approval, subdivision approval and several variances before the RNMP can be constructed and operated (City's Initial Brief, p.2, table 16.2). New York State Department of Transportation ("DOT") is an interested agency as that term is used in SEQRA (6 NYCRR 617.2(t)). DOT does not have any regulatory jurisdiction over any part of the proposed project.

FINDINGS OF FACT

Site and Project Description

1. The Applicant plans to construct a single, integrated facility consisting of a Recycled Newsprint Manufacturing Plant ("RNMP") and a nominal 505 megawatt ("MW") combined cycle electric cogeneration plant ("cogeneration plant").
2. The portion of the project under review in this DEC proceeding is a Recycled Newsprint Manufacturing Plant ("RNMP"). The RNMP will be located on the northern portion of the site of the existing BASF manufacturing plant, in the City of Rensselaer, Rensselaer County, New York.
3. A majority of the existing buildings at the BASF site will be demolished to accommodate construction of the RNMP. The RNMP will consist of a deinking plant, stock preparation and

paper mill, and finishing and shipping areas. The RNMP will process approximately 430,000 metric tons/year of waste newspapers and magazines to produce 330,000 metric tons/year of 100% recycled newsprint.

4. The site is zoned industrial and is bounded by the Organichem facility to the north; railroad tracks and the Port Access Highway to the east; various industrial sites to the south; and Riverside Avenue, the Coastal Cogeneration Facility and the Hudson River to the west.
5. Both the RNMP and the cogeneration plant will emit air pollution. DEC Staff has produced a single draft Air State Facility Permit and a single draft Title IV Acid Rain Permit for the entire facility, pursuant to the federal Clean Air Act (DEC draft permits #4-3814-00052/00001 and #4-3814-00052/00003, respectively).
6. Both the RNMP and the cogeneration plant will be constructed at the same time. Accordingly, DEC Staff has produced a single draft Construction Stormwater SPDES Permit, pursuant to the federal Clean Water Act (DEC #4-3814-00052/00005).
7. Both the RNMP and the cogeneration plant will withdraw process water from the Hudson River. A maximum of 9.6 million gallons per day ("mpd") will be withdrawn, approximately 7.9 mgd for the RNMP and 1.7 mgd for the cogeneration Plant. The withdrawal of this water will be regulated by the plant's SPDES permit (Additional Conditions, section 1(b), Exh 4).
8. The water withdrawn from the Hudson River and non-contact cooling water used at the Cogeneration plant (gray water supplied by the Albany County Sewer District Plant in the City of Albany) will be treated on-site and then discharged to the Hudson River. The proposed average daily flow of this discharge is 6.25 mgd with a peak allowable daily discharge of 8.1 mgd. This discharge will require a SPDES permit pursuant to the federal Clean Water Act (DEC #4-3814-00052/00002).
9. Water will be withdrawn from and discharged into the Hudson River through a new structure to be built in the river. This will require the dredging and off-site disposal of 1,722 cubic yards of sediment from and the placement of 2,078 cubic yards of clean fill in the Hudson. This will require a state Excavation and Fill in Navigable Waters Permit pursuant to ECL article 15, title 5 (DEC #4-3814-

00052/00004) and a Water Quality Certification, pursuant to 6 NYCRR 608 (DEC #4-3814-00052/00006).

10. The gray water to be supplied by the Albany County Sewer District Plant in the City of Albany will be transported by a new pipeline that will begin in Albany and pass underneath the Hudson River to the site. No DEC permit is required.
11. The cogeneration plant will supply steam and approximately 55 MW of electricity to the RNMP. It will take approximately 30 months to construct the proposed project.

ISSUES NOT ADJUDICATED

12. Twelve of the fifteen issues proposed by intervenors and advanced to adjudication were resolved through negotiation. The resolved issues are: emission of fine particulates (PM_{2.5}) into the air; aquatic impacts and river water intake design; cooling tower design; cultural resources; recreational resources; water supply; odors; fugitive dust; land use; dredging and excavation; and air quality impacts.

TRAFFIC IMPACTS

13. The Applicant, DEC Staff and other governmental parties set forth the process by which the Applicant would analyze the traffic impacts of the proposed facility in a document entitled "Article X Stipulations/DEIS Scoping Document" dated September 26, 2001 (Exh. 1, Appendix B-1). These parties agreed that the methodology to assess the potential traffic and transportation impacts would follow the "2000 Highway Capacity Manual."
14. In December 2001, the Applicant submitted its traffic analysis with its DEIS/Application. This analysis included information regarding existing conditions, traffic impacts expected during construction, traffic impacts expected during operation and proposed mitigation measures (Exh. 1, Chapter 13).
15. On November 19, 2002, the Applicant prepared two additional documents entitled "Recommended Traffic Mitigation Measures" (Exh. 24) and "Additional Traffic Analysis Information" (Exh. 21).
16. During settlement negotiations, the Applicant prepared "Traffic Impact Study Empire State Newsprint Project" ("traffic study") dated April 2, 2003 (Exh. 22) to

facilitate review of traffic impacts by the New York State Department of Transportation ("DOT"). This analysis was transmitted to DOT by cover letter dated April 3, 2003.

17. On May 28, 2003, William Logan, DOT's Regional Traffic Engineer, wrote to the Applicant's counsel (Exh. 23) following DOT's review of the Applicant's traffic study, a letter from the City's traffic consultant raising nine issues dated May 15, 2003 (Exh. 23a), and other materials. These other materials mentioned in DOT's letter (Exh. 23, p.1) included supplemental information faxed to DOT on April 24 and 25, 2003 (Exh. 116) and a letter from the Applicant's consultant to DOT dated May 27, 2003 (Exh. 120).
18. On July 8, 2003, a meeting was held to discuss traffic impacts. Attending were representatives of DPS Staff, DEC Staff, DOT Staff, the City and the Applicant.
19. On August 18, 2003 (between the date pre-filed direct testimony was due, August 12, 2003, and the date pre-filed rebuttal testimony was due, August 27, 2003) a meeting and field visit occurred among the parties (DPS Staff, the Applicant and the City) to discuss traffic issues.
20. Large trucks entering Routes 9&20 northbound from the South Street on-ramp often make a wide turn from the on-ramp and encroach into the left-hand westbound lane, before completing their turn into the right-hand northbound lane. The on-ramp leading to Routes 9&20 southbound also has this existing problem.
21. One cause of these wide turns is a series of signs and vegetation that block the view from the on-ramp. The signs are at such a height that car drivers can see beneath them, however, truck drivers (who are higher from the ground) cannot (Exh. 130). This causes truck drivers to pull farther forward to assess oncoming traffic which in turn forces the trucks to make wider turns.
22. A second cause of these wide turns is the design of the ramp, specifically, the geometric configuration of the intersection. This is not caused by the Applicant's proposed project.
23. The Applicant analyzed this ramp and submitted a sketch recommending widening the ramp by a maximum of six feet at the apex of the curve (Exh. 113) which, according to the Applicant's traffic expert, would allow large trucks to

better complete the right turn without encroaching on the left westbound lane.

24. The on-ramp is under the jurisdiction of DOT. The land upon which the vegetation grows and the signs are placed is owned and/or controlled by DOT. Any change to the on-ramp would require a permit from DOT pursuant to section 52 of the state's Highway Law.

VISUAL IMPACTS

25. In September 2001, the Applicant, DEC Staff, DPS Staff and other governmental parties set forth the process by which the Applicant would analyze the visual impacts of the proposed facility in a document entitled "Article X Stipulations/DEIS Scoping Document."
26. The Applicant's visual impact assessment began with a review of the existing land uses within five miles of the site of the proposed project, which include agriculture, industrial, commercial, transportation, historical, residential and recreational uses. The proposed site itself is located along a section of the Hudson riverfront.
27. The Applicant's visual expert then divided the area around the proposed project into nine similarity zones, which are geographic areas with common characteristics. These Similarity Zones are: Major Transportation Corridor; Hudson River Corridor; Large City, Urban; Residential and Commercial, Suburban; Government Centers; Industrial and Commercially Mixed; Bluffs Overlooking the Hudson River; Open Uplands, Mostly Undeveloped; and Rolling Hills with Mixed Forest, Agriculture and Villages.
28. On April 9, 2001, the Applicant's visual experts took digital photos of the site of the proposed project from 41 different locations. These photos were taken with a 35 mm lens.
29. A panel of six visual impact professionals and a quasi-public panel of local reviewers then rated photos of the site from each zone to create a Management Classification System.
30. After consultation with DPS and DEC Staff members (and other state and local government officials), 11 of these viewpoints were selected as representative of the Similarity Zones.

31. The Applicant's expert then prepared two photo simulations of each of the eleven photos, one simulation which only included the structures of the proposed project and one that added the plumes from the proposed plant.
32. These simulations were then scored by a professional panel of four and the quasi-public panel. The results showed only a minimal impact for the proposed structures without the plume. However, when simulations including plumes were rated, six of the viewpoints scored significantly higher, although the Visual Resources Assessment Procedure ("VRAP") thresholds were only exceeded for one zone.
33. In the December 2001 DEIS, the Applicant submitted its visual impact analysis with its application. The photo simulations included in the Application are approximately 3.5" x 5".
34. In March 2002, the Applicant provided additional information and photo simulations to reflect engineering design modifications to mitigate visual impacts. These included replacing the numerous short stacks and vents on the paper and deinking buildings with a 50 foot above roof level stack on the deinking building, the addition of a 213 foot above ground level stack to be located adjacent to the northwest corner of the receiving warehouse, and the addition of covers to the primary clarifier and aeration basin at the wastewater treatment plant. Five existing photos were used and a sixth simulation was developed from a new photo taken at Island Creek Park, in Albany.
35. In October 2002, at the request of the Office of Parks, Recreation and Historic Preservation (Exh. 32), the Applicant produced simulations from seven additional viewpoints of concern to OPRHP.
36. In April 2003, the Applicant agreed to changes to the layout of the proposed project and other measures to further mitigate visual impacts. Four simulations using the revised layout were produced from viewpoints 1, 17, 28 and the Rensselaer Train Station, which had been completed after the Application was filed.
37. Following the formal negotiation process, the Applicant proposed changes to the layout of the proposed project and the RNMP. For the RNMP, the building footprint has been reduced to minimize its apparent mass (it is 100,000 sq. ft.

smaller than when originally proposed); the layout has been changed to move truck loading and unloading activities away from the Fort Crailo neighborhood; the proposed hydrogen peroxide bleaching process has been removed, resulting in the elimination of a 135 foot tall stack and plume associated with the process; the RNMP will incorporate architectural details such as brick, glass block or fenestration in the facades; a screen will be constructed to minimize views of the truck parking area; slatting or other material will be installed to minimize truck headlight shine to the southeast; and masonry walls will be constructed between the RNMP and Riverside Avenue (transcript page or t. 1606).

38. For the cogeneration plant the JSA calls for: the use of two smaller stacks (20 feet wide) instead of one larger stack (50 feet wide), the use of a 20E F plume abatement cooling tower which will reduce the occurrence of visible plumes during daytime hours to 234 hours annually, the use of a low pressure economizer bypass when visible plumes are expected, and matching the exterior appearance of the existing waterfront pump house building to the proposed project. In addition, the Applicant proposes three mitigation measures which affect both parts of the proposed project: landscaping to partially screen the proposed project; the development of additional criteria for exterior lighting to reduce impacts; and the creation of a \$200,000 revolving loan fund for the City's Historic Residential zoning district and a \$60,000 donation to the Natural Heritage Trust for local historical sites.
39. The RC Greens produced their own set of simulations using a camera with a longer lens (either 50 mm or 70 mm), different viewpoints, and higher resolution film.

COMMUNITY CHARACTER

40. The Fort Crailo neighborhood is a triangular area bordered by the Hudson River on the west, Columbia Turnpike on the east, and Rensselaer Avenue on the South.
41. There are approximately 175 housing units and more than 425 residents in the Fort Crailo neighborhood and several businesses, primarily along Columbia Turnpike. The neighborhood takes its name from Fort Crailo, a historic home and museum located on Riverside Avenue that overlooks the Hudson River.

42. The Fort Crailo neighborhood is the residential area closest to the proposed project.

DISCUSSION

ISSUES NOT ADJUDICATED

Of the fifteen issues advanced to adjudication, only three were heard in the adjudicatory hearing. The remaining twelve were resolved during the settlement process. However, as discussed above, the Applicant bears the burden of proof that it meets all relevant regulatory criteria related to these twelve resolved issues, **and has done so**. Below is a brief discussion of each of the twelve resolved issues, individually.

Fine Particulates PM_{2.5}. The first issue advanced to adjudication but resolved and not litigated was Fine Particulates PM_{2.5} (Issue #2). The Applicant has met its burden of proof and demonstrated that air quality impacts associated with PM_{2.5} emissions have been identified and minimized and will not violate any applicable standard. Evidence in the record supports the issuance of the applicable permits and appropriate SEQRA findings (see Exh. 1, Chapter 4; Exh. 2, Attachment S1-4-A; Exh. 4; Exh. 9; Exh. 48, p. 32-36; and Tr. 1263-6.)

Aquatic Impacts and River Water Intake Design. The second issue advanced to adjudication and subsequently resolved was aquatic impacts and river water intake design (Issue #4). The Applicant has shown that these impacts have been identified and minimized. Evidence in the record supports the issuance of the applicable permits and appropriate SEQRA findings (see Exh. 1, Chapter 5 and 6; Exh. 2, Attachment S1-F3-A and Table F3-2; Exh. 4; and Exh. 48, pp. 49-53, 96-98).

Cooling Tower Design. The third issue advanced to adjudication and resolved was impacts related to cooling tower design (Issue #5). The Applicant has shown that these impacts have been identified and minimized. Evidence in the record supports the issuance of the applicable permits and appropriate SEQRA findings (see Exh. 1, Chapter 5 and 6; Exh. 2, Attachment S1-F3-A and Table F3-2; Exh. 4; and Exh. 48, pp. 49-53, 96-98).

Cultural Resources. The fourth issue advanced to adjudication and resolved is the impact of the proposed facility on cultural resources (Issue #6). The Applicant has met its burden of proof and demonstrated that impacts related to cultural

resources have been identified and minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see Exh. 1, Chapter 9; Exh. 31; Exh. 32; Exh. 48, pp. 74-5; and Tr. 1603-3, 1777-9).

Recreational Resources. The fifth issue advanced to adjudication and resolved relates to the impacts on recreational resources (Issue #7). The Applicant has met its burden of proof and demonstrated that impacts related to recreational resources have been identified and minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see Exh. 1, Chapter 11; Exh. 25; and Exh. 48, pp. 64-67).

Water Supply. The sixth issue advanced to adjudication and resolved relates to the water supply for the proposed project. The Applicant has met its burden of proof and demonstrated that impacts related to water supply have been identified and minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see Exh. 1, §19.4, Appendix D-2; Exh. 2, Attachments S1-19-A, B, C, D and E; Exh. 4; Exh. 6; Exh. 16; and Exh. 48).

Odors. The seventh issue advanced to adjudication and then resolved was odors. The Applicant has met its burden of proof and demonstrated that odor impacts have been identified and minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see Exh. 1, Chapter 4, Exh. 2, Attachment S1-2-C; Exh. 48, Appendix JS-A, Appendix JS-I, section III.F).

Fugitive Dust. The eighth issue advanced to adjudication and resolved is fugitive dust (Issue #10). The Applicant has met its burden of proof of showing that the impacts from fugitive dust have been minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see: Exh. 1, §§ 2.9.4.2, 4.6.7, and 15.1.1; and Exh. 48, Appendix JS-C).

Land Use. The ninth issue advanced to adjudication and resolved is land use. The Applicant has met its burden of proof and demonstrated that impacts on land use have been identified and minimized and will not violate any applicable standard. Evidence in the record supports this conclusion (see Exh. 1, Chapter 11; and, Exh. 2, Attachments S1-11-A, C, F, G, H and I).

Dredging and Excavation. The tenth issue advanced to adjudication and resolved is impacts related to dredging and

excavation in the Hudson River (Issue #12). The Applicant has shown that these impacts have been identified and minimized. Evidence in the record supports the issuance of the applicable permits and appropriate SEQRA findings (see Exh. 1, Chapter 5 and 6; Exh. 2, Attachment S1-F3-A and Table F3-2; Exh. 4; and Exh. 48, pp. 49-53, 96-98).

Fire Protection. The eleventh issue advanced to adjudication and resolved relates to fire protection. The Applicant has shown that these impacts have been identified and minimized. Evidence in the record supports the appropriate SEQRA findings (see Exh. 1, Chapter 12; Exh. 29; and Exh. 48, p. 70).

Air Quality Issues. The twelfth issue advanced to adjudication and resolved relates to air quality impacts of the proposed project. The Applicant has shown that these impacts have been identified and minimized. Evidence in the record supports the issuance of the applicable permits and appropriate SEQRA findings (see Exh. 1, Chapter 4; Exh. 2, Supplements to Chapter 4; Exh. 4; and Exh. 48, pp. 9-36).

TRAFFIC IMPACTS

INTRODUCTION

The first issue adjudicated is the expected traffic impacts from the proposed project. As originally proposed by both DPS Staff and the City, this issue contained many sub-issues. The issue was advanced to adjudication and no appeal was taken. The issue was narrowed through negotiation, but a number of disputes remain to be resolved.

The issue of traffic impacts from the proposed facility was identified early in these proceedings as a concern of both the City and DPS Staff. Negotiations have been ongoing throughout the process and continued up until the adjudicatory hearing began. After pre-filed direct testimony was received on August 12, 2003, and as a result of positions taken in this testimony, a field visit and meeting occurred involving the City, DPS Staff and the Applicant on August 18, 2003 (t. 2000). At this meeting, the Applicant was asked to furnish certain additional information. This information was provided with the Applicant's pre-filed rebuttal testimony on August 27, 2003. On September 24, 2003, the parties' respective experts were cross-examined. Following the hearing and before briefs were due, the Applicant provided a revised document which contained all of the

Applicant's proposed traffic mitigation measures in final form (Exh. 114, revised). The parties were directed to address these measures in their briefs.

As a result of this exchange of information and refinement of mitigation measures during the adjudicatory process, some of the initial direct testimony is no longer relevant. In some cases issues raised in testimony appear to have been settled, in other cases the nature of the dispute has changed, and in others it is not clear.

The analysis of traffic impact sub-issues is divided into four categories. First, the report examines general traffic sub-issues. Next, the report examines allegations that the record demonstrates that significant, unacceptable or unmitigated impacts remain. Third, the report examines claims that important information is missing from the record such that it would be impossible for the Commissioner to make SEQRA findings. Fourth, the report identifies those issues raised by parties in their testimony which appear to be settled.

POSITIONS OF THE PARTIES

While the purpose of the DEC administrative hearing process is to develop a record so that disputes may be resolved between parties, it is a rare occurrence that the process is used to resolve a dispute between the staffs of sister state agencies, as is the case here. The Applicant and DEC Staff take the position that traffic impacts have been minimized to the maximum extent practicable and the record is sufficient for the Commissioner to make SEQRA findings. DPS Staff and the City both believe the record is insufficient to support such a conclusion.

The Applicant argues that the record, including the revised Exhibit 114 (which are the revised "Recommended Certificate Conditions" relating to transportation and which the Applicant proposes to be made conditions of DEC's approval), demonstrates that it has minimized any potential adverse environmental impacts relating to traffic to the maximum extent practicable and that no unacceptable impacts or safety issues exist. Therefore, the Applicant believes that the Commissioner can make SEQRA findings and issue the permits.

DEC Staff asserts that, since it has no traffic experts on staff, it relied upon the expertise of New York State Department of Transportation ("DOT"). According to DEC Staff, DOT concluded in May, 2003 that the Applicant's traffic analyses are adequate and that the mitigation being proposed is appropriate (DEC's

Initial Brief, p.10, citing Exh. 23). While not explicitly stated, DEC Staff's position appears to be that because DOT reviewed and approved the project in May 2003, there is no reason to revisit the issue with DOT because the numerous adjustments to the traffic mitigation plan have only lessened traffic impacts. Therefore, while DOT has not reviewed the additional mitigation measures, since the impacts are now less than before, DEC Staff seems to be arguing that DOT's position is still that the Applicant's traffic analyses are adequate and that the mitigation being proposed is appropriate.

DPS Staff asserts that the record demonstrates that the nature of the combined traffic impacts of the power plant and the RNMP is such that there will be significant adverse and unacceptable impacts on transportation and public safety (DPS's Initial Brief, p.6). Based upon this, DPS Staff seeks either reopening of the record or denial of the Certificate by the Siting Board. It can be reasonably inferred that DPS Staff opposes issuance of the various DEC approvals as well, since the existing record on traffic impacts is identical in both cases.

The City asserts that unless the record is further developed regarding the traffic mitigation measures proposed by the Applicant, the Commissioner will have no alternative but to deny the project. The City contends that the record, in its present form, does not include enough detail regarding the Applicant's proposed mitigation measures, and therefore it is impossible to conclude that the proposed project's traffic impacts have been minimized to the maximum extent practicable. The City disputes DEC Staff's claim regarding DOT's position, and argues that DOT has adopted a position of neutrality.

GENERAL CONCERNS

Five general sub-issues relate to the traffic impacts of the proposed project. These are: 1) DEC Staff's reliance on DOT; 2) DEC's consideration of the legitimate concerns of the City; 3) arguments that failure to further specify mitigation violates SEQRA; 4) the request by the City that the Commissioner defer to the City on the issue of traffic impacts; and 5) concerns about the enforceability of the Applicant's proposed traffic mitigation measures.

DEC Staff's Reliance on DOT

DEC Staff states that since it has no traffic experts on staff, it relied upon DOT. DEC Staff claims that DOT's May 28, 2003 letter concluded that the analyses conducted by the Applicant are adequate and the mitigation being proposed is appropriate for the impacts predicted. DEC Staff concludes that should DOT subsequently determine that any of the proposed mitigation measures have a significant impact, then a Supplemental EIS could be required after permit issuance.

The City challenges DEC Staff's reliance on DOT's review of the traffic impacts proposed project, and asserts that DEC Staff is misrepresenting DOT's position. Specifically, the City contends that DOT has not issued any approval nor has it made any overall determination regarding the Applicant's proposed traffic impact mitigation plan (City's Initial Brief, p. 12).

DPS Staff have not directly commented on DEC Staff's position but contend that DOT has had no formal involvement in the process (tr. 2230). In fact, DPS Staff is seeking an order in the companion case from the Siting Board requiring DOT to provide expert testimony on the traffic impacts of the proposed facility (DPS Staff's reply brief, p. 3).

The Applicant's traffic expert testified that he thought DOT's opinion on the proposed project, as set forth in May 28, 2003 letter (Exh. 23), was that intensive mitigation efforts involving physical improvements or operational changes to the transportation infrastructure may not be necessary or justified (t. 2011).

Before proceeding, it is useful to establish exactly what the record contains regarding DOT's role in reviewing traffic impacts. Following commencement of the formal settlement process, the Applicant prepared "Recommended Traffic Mitigation Measures" dated November 19, 2002 (Exh. 24) and "Additional Traffic Analysis Information" (Exh. 21). As the settlement process continued, DPS Staff, supported by the City, requested that the Applicant consult with DOT (t. 1989). To facilitate DOT's review, the Applicant prepared "Traffic Impact Study Empire State Newsprint Project" ("traffic study") dated April 2, 2003 (Exh. 22). This analysis incorporated the conservative "maximum truck" scenario into its modeling of traffic during operation, which assumes less use of rail traffic to the RNMP than planned and more truck deliveries of oil than permitted. The traffic study was specifically prepared for review by DOT (t. 1992) and transmitted to DOT by cover letter dated April 3, 2003. DOT reviewed the Applicant's traffic study, a letter from the City's traffic consultant raising nine issues dated May 15, 2003 (Exh.

23a), and other materials. These other materials mentioned in DOT's letter (Exh. 23, p. 1) included supplemental information faxed to DOT on April 24 and 25, 2003 (Exh. 116) and a letter from the Applicant's consultant to DOT dated May 27, 2003 (Exh. 120).

On May 28, 2003, William Logan, DOT's Regional Traffic Engineer, wrote to the Applicant's counsel (Exh. 23). DEC Staff claims that this letter supports its position that DOT has concluded that the Applicant's traffic analyses are adequate and that the mitigation being proposed is appropriate. On the other hand, the City argues that DOT has taken no position on most traffic issues and has offered no conclusions or opinions on the traffic mitigation measures offered by the Applicant (except to disapprove a four way stop sign at the intersection of South Street and Routes 9&20 westbound) (City's reply brief, p.2).

The record indicates that DOT has had additional involvement in discussions regarding the traffic impacts of the proposed plant, after sending this letter,. On July 8, 2003, a meeting to discuss traffic impacts was held among DEC Staff, DPS Staff, DOT Staff, the City and the Applicant (t. 2002, 2178). The City's traffic expert recalls the DOT representative taking a position of neutrality and that DOT did not offer an opinion on whether the proposed mitigation measures were appropriate (t. 2134). Following this meeting, the Applicant's traffic consultant contacted DOT regarding the appropriate method of conducting modeling necessary to evaluate the traffic impacts (tr. 2010). In addition to these specific instances in the record, DOT has attended meetings and provided comments (t. 2217). Finally, DPS Staff provided copies of its testimony to DOT (t. 2230). Nothing in the record indicates that DOT is aware of or has reviewed the Applicant's most recent mitigation proposals (as incorporated in Exh. 114, revised). Other evidence in the record regarding the position of DOT appears in the form of recollections about statements made by DOT officials at the various meetings with the parties. This evidence is unreliable, as it is vague and hearsay as well (see, e.g., t. 2226).

DOT's letter supports neither party's position. The letter does indicate a detailed review of traffic impacts by DOT as they relate to the two facilities under its jurisdiction, the intersection of Routes 9&20 and South Street and the timing of traffic signals along Routes 9&20. This review led DOT to reject one of the Applicant's proposed traffic mitigation measures - the use of an all-way stop at the intersection of South Street and Routes 9&20 northbound. Thus, the letter does indicate a review and approval, but this approval does not appear to be made on the

basis of reviewing the project against the SEQRA standards. Rather, DOT appears only to be using some other standard, not identified, that it employs when it is an "interested agency," as that term is defined under SEQRA (6 NYCRR 617.2(t)), to evaluate traffic impacts. DOT has no decision-making function in the approval of the project (however, DOT does maintain jurisdiction over both the Route 9&20 corridor and the intersections with it). The letter does not state that DOT had concluded that traffic impacts had been minimized to the maximum extent practicable nor that DOT deferred certain mitigation decisions to other agencies. Based on this, it is reasonable to conclude that DOT has neither approved the traffic mitigation measures using a SEQRA standard, nor has it deferred its entire regulatory jurisdiction and adopted a position of neutrality.

Thus, because DOT did not use SEQRA standards in its approval, it would be improper for the Commissioner to base her SEQRA findings on traffic impacts solely on the May 28, 2003 letter. Given the evolving nature of the traffic issue since this letter was issued and the fact that DOT does not state that, in its opinion, traffic impacts had been minimized to the maximum extent practicable, the Commissioner should not adopt DEC Staff's view that DOT's review is adequate to rely upon in this case. Rather, the record evidence as it relates to traffic impacts is sufficient (with the minor exception noted later) for the Commissioner to make her own, independent SEQRA findings. The Commissioner should give due deference and serious consideration to DOT's position, since it is the state agency with particular expertise in this case, but the final decision is independent and must be supported by evidence in the record. In this case, the record regarding these impacts, with the one exception noted, is robust and more than adequate for the Commissioner to make SEQRA findings.

Recommendation T-1: The Commissioner should not rely exclusively on the position of DOT in making SEQRA findings regarding the traffic impacts of the proposed project.

DEC must take into account the City's legitimate concerns

The City argues that, because DEC Staff did not offer evidence or cross-examine witnesses during the adjudicatory hearing, DEC Staff essentially abdicated its role as SEQRA lead agency and jeopardized the combined and cumulative review of traffic impacts (City's Initial Brief, p. 3). The City contends that unless the record is expanded to include "further

development of meaningful and feasible mitigation measures for traffic" that the City, "as an 'involved' agency, may not be able to make its own independent SEQRA findings on traffic issues" forcing the City to deny the project if DEC does not require this additional information that the City seeks. According to the City, DEC will have failed in its duty as lead agency to take the legitimate concerns of an involved agency (the City) into account and, thus, violated SEQRA.

In this case, the DEC adjudicatory hearing is the vehicle for the City to supplement the environmental record before decision-making. The City has offered testimony and other evidence on the issue of traffic impacts at the hearing and the alleged deficiencies in the record are addressed later in this report. DEC has made reasonable efforts to involve the City (as required by 6 NYCRR 617.3(d)). The City's references to regulations relating to legislative hearings and supplemental environmental impact statements (6 NYCRR 617.9(a)(4) and 617.9(a)(7), respectively) do not appear relevant (City's Initial Brief, p.5). Of course, the City still bears its responsibility to make an independent review of the FEIS and to issue its own finding statements.

Recommendation T-2: The City's legitimate concerns have been raised in the hearing and the record developed. For the reasons set forth below, the record is adequate to make SEQRA findings.

Failure to Further Specify Mitigation Violates SEQRA

The City argues that the failure to detail the traffic mitigation measures which the Applicant plans to submit after permit issuance is a violation of the lead agency's duty to comply with SEQRA before any significant authorization is granted. The City argues that more detail is necessary so that the City can determine the sufficiency of each improvement or traffic control strategy to ensure that adequate resources are available to implement them, and that there are adequate mechanisms for the City to review, modify and enforce the mitigation plan (t. 2126)

The Applicant responds that the record is sufficient for the Commissioner to make the required SEQRA findings. DEC Staff asserts that it is not uncommon to allow details to be submitted after permit issuance. As discussed above, there are over 30 separate items that the Applicant plans to submit after permit issuance.

In determining whether it is appropriate to allow post-approval submissions regarding proposed mitigation, a rule of reason must be employed. In this case, with the exception of the missing information noted below, the traffic impacts have been identified and studied. As a result, the Applicant proposed seventeen traffic mitigation measures (Exh. 114, revised) to address the identified concerns. As discussed in detail throughout this section, the claims by the City that additional information regarding these mitigation measures is necessary before permits can be issued is rejected. The record demonstrates that the requirement of post-approval submissions does not violate SEQRA.

Recommendation T-3: The Commissioner should reject the City's argument that SEQRA requires that additional information on traffic mitigation measures be provided before permit issuance.

DEC Should Defer to the City on Traffic Impacts

The City argues that DEC Staff has abdicated its responsibility under SEQRA and that the Commissioner should defer to the City regarding traffic impacts. The City asserts that DOT has explicitly deferred to the City on traffic issues (for the RNMP) and the Board (for the power plant). The City relies upon the language in DOT's May 28, 2003 letter which reads the "details of any TDM plan and the monitoring and enforcement of the plan are best addressed by an agency having a direct regulatory approval over the project such as the Public Service Commission. The Department of Transportation is not currently structured to monitor such a plan nor does it have any regulatory authority to enforce the plan" (Exh. 23, p. 2).

DEC Staff strongly disagrees with the City's assertion that it abdicated its SEQRA responsibility. DEC Staff asserts it conducted a comprehensive review of all environmental impacts associated with the proposed project. The Applicant responds that the Commissioner cannot abdicate her SEQRA responsibility and delegate her authority to the City.

As SEQRA lead agency, DEC must take a hard look at the traffic impacts from the proposed facility and cannot defer to any other agency. The City's assertion that DOT deferred to it regarding traffic impacts of the RNMP is not correct. As a SEQRA interested agency, DOT has no authority over the proposed project or the proposed mitigation measures (DOT retains authority over facilities under its jurisdiction). DOT's letter merely states

the law - that it has no authority and those agencies with authority should implement, monitor and enforce traffic mitigation measures.

Recommendation T-4: The Commissioner should not defer on traffic impacts to the City.

Enforcement of Proposed Traffic Mitigation Measures

Both DPS Staff and the City assert that many of the proposed mitigation measures are not enforceable, as proposed. These claims are made in a general way. This report makes recommendations relating to the enforcement of specific mitigation measures, discussed below. Regarding the general issue of enforceability of the traffic mitigation measures, the ALJ makes two recommendations, not suggested by any party that are intended to increase the enforceability of the traffic mitigation measures.

First, the ALJ suggests that the Commissioner explore the possibility that these mitigation measures be included as conditions in the DEC permits to be issued. Currently, the Applicant proposes to have the traffic mitigation measures included as SEQRA conditions. It is more difficult to enforce and modify SEQRA conditions than permit conditions. If the traffic mitigation is made a permit condition any violations can be dealt with as permit violations through DEC's existing enforcement mechanisms. In addition, should the predictions regarding traffic impacts be incorrect and the actual traffic impacts be greater, DEC Staff could then seek to modify the permit to include additional mitigation measures. This could be done using the existing permit modification proceedings. Further, DPS Staff or the City could petition the Commissioner to modify the permit at any time to address any concern that might arise.

Second, the ALJ also recommends that the Commissioner consider the inclusion of a permit condition requiring a part-time environmental monitor. This monitor, a DEC employee or third-party contractor paid for by the Applicant, would be employed during the thirty-month construction phase of the project to provide oversight of the implementation of the traffic mitigation measures and to monitor their success (see, In the Matter of Waste Management of New York, LLC, Decision of the Commissioner and SEQRA Findings Statement, February 10, 2003). In addition, the monitor could coordinate concerns about traffic with both DPS Staff and the City. Some of the specific tasks

this monitor might be charged with are detailed below. Given the sensitivity of the intersections near the proposed project and the detailed mitigation measures, it is not unreasonable to use a DEC monitor to ensure that traffic mitigation measures are enforced. If a third-party monitor were used, DEC could ensure that the monitor had experience in traffic issues.

Recommendation T-5: The Commissioner should incorporate the proposed traffic mitigation measures as DEC permit conditions. In addition, the Commissioner should require the use of a part-time environmental monitor during the construction phase of the proposed project to monitor compliance with these permit conditions.

WHETHER SIGNIFICANT UNACCEPTABLE OR UNMITIGATED IMPACTS REMAIN

Both the City and DPS Staff assert that the record demonstrates that three unacceptable or unmitigated traffic impacts will occur as a result of the proposed project. These three impacts all involve the intersection of South Street and Routes 9&20 northbound, and are described below.

Truck Traffic from South Street onto Routes 9&20 Northbound

The first traffic movement issue related to the intersection of Routes 9&20 and South Street involves the ramp from South Street to RouteS 9&20 northbound (Exh. 129). Specifically, both DPS Staff and the City are concerned about safety because larger trucks entering Routes 9&20 northbound from the on-ramp often make a wide turn from the on-ramp and encroach into left-hand westbound lane, before completing their turn into the right-hand northbound lane. The on-ramp leading to Routes 9&20 southbound also has this existing problem, but traffic from the proposed plant through this intersection is not at issue (t. 2124).

The parties agree that one cause of these wide turns is a series of signs and vegetation that block the view from the on-ramp (t. 2014, 2134, 2180). The signs are at such a height that car drivers can see beneath them, however, truck drivers (who are higher from the ground) cannot (Exh. 130). This causes truck drivers to pull farther forward to assess oncoming traffic which, in turn, forces the trucks to make wider turns.

The parties agree that a second cause of these wide turns is the design of the ramp, specifically, the geometric configuration of the intersection (t. 2012, 2134, 2179). This is an existing

condition and not caused by the Applicant's proposed project (t. 2208, 2155). Nonetheless, the City's traffic expert asserted in his pre-filed rebuttal testimony that the additional truck traffic from the proposed facility will exacerbate these conditions. Consequently, he maintained that alternatives to mitigate this serious condition must be identified (t. 2155).

Possible modifications to the ramp were discussed at a meeting on July 8, 2003, between DOT Staff, DPS Staff, the City and the Applicant (t. 2178). DPS Staff requested that the Applicant analyze possible widening of the west side of the westbound ramp to address trucks swinging wide when entering westbound Routes 9&20 (t. 2179). The Applicant did this and submitted a sketch recommending widening the ramp by a maximum of six feet at the apex of the curve (Exh. 113) which, according to the Applicant's traffic expert, would allow large trucks to better complete the right turn without encroaching on the left westbound lane (t. 2012).

In addition, the Applicant has agreed to the following recommended certificate conditions, which would also become SEQRA (or permit) conditions (Exh. 114):

- "V. The Certificate Holder shall join any request to NYSDOT by New York State Department of Public Service Staff and the City of Rensselaer to:
 - (i) remove obstructions to the lines-of-sight for drivers of vehicles entering Route 9/20 westbound via the on-ramp from Route 9J/South Street by removal of existing vegetation adjacent to and on the east side of the Route 9/20 bridge over Route 9J; and/or
 - (ii) remove obstructions to the lines-of Sight for drivers of vehicles entering Route 9/20 westbound via the on-ramp from Route 9J/South Street by relocation of or adjustment to heights of City of Rensselaer and NYSDOT signs at the west end of the Route 9/20 bridge over Route 9J.

- W. Should the New York State Department of Public Service Staff and the City of Rensselaer request evaluation by NYSDOT

of ramp widening at the Route 9/20 westbound on-ramp from Route 9J/South Street, the Certificate Holder shall join the request. Should a ramp widening project at the specified on-ramp be implemented as part of a permanent Route 9/20 corridor improvement program, the Certificate Holder shall contribute 20% of the project cost, up to a maximum of \$20,000, for funding of design and/or construction of ramp improvements."

The City appears to be satisfied with this resolution and does not mention this issue in its briefs. DPS continues to assert that this proposed mitigation is not sufficient (DPS Staff's Initial Brief, p. 9) and that the Applicant should commit to making some form of (unspecified) highway improvement (DPS Staff's Reply Brief, p. 3). The Applicant contends that the record supports a conclusion that this mitigation is the most they can do under the circumstances and, therefore, this issue has been addressed.

The on-ramp in question is under the jurisdiction of DOT and the land upon which the vegetation grows and the signs are placed is owned and/or controlled by DOT. Any change to the on-ramp would require a permit from DOT pursuant to section 52 of the state's Highway Law. The Route 9&20 corridor through the City is being studied by an advisory committee and one of the improvements identified addresses this intersection (Exh. 121 p. 3). The Draft Report on the Route 20 Corridor Study, City of Rensselaer, prepared by the Capital District Transportation Committee, dated September 17, 2003, suggests rebuilding the overpasses near in the junction of Route 9J and Route 20 and installing an acceleration and deceleration lane along Routes 9&20 westbound at the intersection, among other improvements (Exh. 126, p. 31). These suggestions are long-term improvements and are not likely to be implemented before the proposed project is constructed. It is not clear from the record that the widening of the ramp could be done as an independent project, before the other improvements identified in the Draft Report are implemented or whether such widening is feasible or prudent in light of other plans for the intersection.

The Applicant's traffic analyses do not predict any safety problems at this intersection, however, the record does include testimony from both DPS Staff's expert and the City's expert that

this current condition can create a queue that would be exacerbated by the proposed project.

Because this is an existing problem, known to DOT, and there are plans to address it in due course, the mitigation measures proposed by the Applicant are adequate for the Commissioner to make her SEQRA findings.

Recommendation T-6: The Commissioner should find that the traffic impacts have been appropriately mitigated for this turn movement. However, the Applicant should be required to make a contribution to the ramp widening project whether or not the project is part of a permanent Route 9/20 corridor improvement program.

*Traffic from Routes 9&20 Turning North on South Street:
Evening Peak Hour during Construction.*

The second traffic movement at issue involves traffic from the proposed project in the evening peak hour during construction. The specific traffic movement of concern is northbound traffic exiting Routes 9&20 on to the South Street off-ramp and then turning north on South Street. If unmitigated, the traffic impacts of vehicles leaving between 4:30 p.m. and 5:30 p.m. would include a queue of vehicles along South Street waiting to turn onto the on-ramp and Routes 9&20 northbound (toward Albany). This queue would significantly interfere with traffic exiting Routes 9&20 westbound from turning north from the off-ramp on South Street (there is a stop sign for this traffic, only). In fact, this interference, if unmitigated, causes a projected LOS of F (LOS or Level of Service is a scaled index, from A - F, A being the best, which is used to describe the quality of traffic operations. A LOS of D is an acceptable condition (t. 2118, 2025)). In addition, since the off-ramp only holds five cars (t. 2122), it is possible that the queue of vehicles seeking to turn north on South Street could back up into the travel lanes of Routes 9&20 northbound. This is a significant safety issue.

The Applicant has proposed a series of measures to mitigate this significant adverse impact. The disputes between the Applicant, on the one hand, and DPS Staff and the City, on the other, involve the sufficiency of the Applicant's traffic analyses and of the proposed mitigation. The specific mitigation measures proposed by the Applicant to address this traffic impact include: 1) contracting for traffic control officers to direct traffic at the intersection during the evening peak hours, 3:30

p.m. to 6:00 p.m., and at other times as needed when the construction workforce exceeds 550 workers; and 2) limiting the number of vehicles that can leave the site of the proposed project between 4:30 p.m. and 5:30 p.m. on weekdays to 157 vehicles.

Police Officer Control: The Applicant has proposed the following language as SEQRA conditions relating to this issue:

- J. The Certificate Holder shall contract, at the Certificate Holder's expense, for traffic control officer(s) from either the City of Rensselaer Police, the Rensselaer County Sheriff, or other local or state law enforcement agencies, at the intersection of South Street/9J with the Route 9/20 northbound on/off ramps during the evening (3:30 to 6:00PM) peak hours or otherwise as needed for purposed of public safety for the construction period at any time when the total construction labor force working on the same shift exceeds 550 workers. The contract shall also address the requirements of condition X.K. A copy of the contract for police officer control shall be provided as a Compliance Filing prior to start of construction. No construction authorized by this Certificate shall commence until the traffic control officer contract is executed.

- K. During periods of traffic officer control required by condition X.J., the Certificate Holder shall also monitor the intersection of South Street/Route 9J with the Port Access Highway to determine the need for additional traffic control at the intersection. If monitoring reveals a need for additional traffic officer control to maintain safe operations at the intersection the Certificate Holder shall provide for an officer at the intersection during the evening hours as defined in condition X.J or as otherwise needed for purposed of public safety. Monitoring shall be

coordinated by the Certificate Holder's Transportation Coordinator (see condition X.T), but the Certificate Holder's contract with the law enforcement agency providing traffic officer control (see condition X.J) shall vest authority for the decision to implement additional officer control at the South Street/Route 9J/Port Access Highway intersection with that agency."

Three issues relating to this proposed mitigation were adjudicated: 1) did the Applicant accurately model the impact of police officer control; 2) will the use of a traffic control officer be sufficient, in combination with the other traffic mitigation steps, to minimize traffic impacts; and 3) is it necessary for the Applicant to enter into the contract with the law enforcement agency before final approvals are issued.

The first issue involves the accuracy of the model used to predict the traffic impacts of police officer control at the intersection. The parties agree that there is no generally accepted method for modeling police officer control at an intersection (t. 2008, 2127). Originally, the Applicant had proposed using all way stop signs at the intersection. When this was proposed to DOT in April 2003, DOT stated that it did "not agree with the conclusion of the [Applicant's] traffic impact study that an all way stop is appropriate for this intersection. The provision of police to provide traffic control during peak periods of construction traffic has proven effective during the construction of the Athens Generating Project on Route 9W in Green County and the Bethlehem Energy Project on Route 144 in Albany County" (Exh. 23, p.1). In response, the Applicant modified its traffic mitigation strategy to include police officer control at the intersection during times of maximum traffic.

After being asked to predict the effect of this proposed mitigation by DPS Staff at the July 8, 2003 meeting, the Applicant's traffic expert testified he contacted the Supervisor of Traffic Studies at DOT headquarters and was told that using an all-way stop control model would be a reasonable approximation and the closest match (t. 2010). This is hearsay, but uncontroverted in the record. The Applicant had already modeled for an all-way stop but revised these analyses to incorporate expected traffic from the SUNY East expansion and to include additional mitigation (Exh. 112).

In direct testimony filed August 12, 2003, both DPS Staff's traffic expert and the City's traffic expert discussed the absence of modeling for police officer control in the application materials (t. 2125, 2187) . However, on cross-examination DPS Staff's expert acknowledged that the all-way stop analysis provided the basic information (t. 2255). The Applicant's expert did not address this issue on cross examination. This issue may be resolved because neither DPS Staff nor the City mention it in their briefs. However, if this is still at issue, the Commissioner should find that sufficient analysis of the effect of police officer control exists in the record.

Recommendation T-7: The Commissioner should conclude that the use of police officer control at the intersection has been properly modeled.

The second issue relating to police officer controls involves whether or not this proposed mitigation will be effective. DPS Staff argues that there is no evidence in the record that police officer control will be sufficient (DPS Staff's Reply Brief, p. 3) and the City argues that in fact the record evidence shows that there will be significant, unacceptable traffic impacts during construction (City's Initial Brief, p.10).

The results of the Applicant's modeling of this traffic movement show an LOS of F during periods of construction activities (Exh. 131, p.21 and 23) without the additional mitigation of releasing only 157 vehicles from the site during the evening peak hour during the entire construction period (Applicant's Reply Brief, p. 23). With this additional mitigation, the traffic analyses predict an LOS of D (Exh. 112, table 16 revised). Further, queuing analyses demonstrate that queuing during this hour either on the off-ramp or along South Street will not present a safety issue (Exh. 115).

Based upon these analyses, the record supports the Applicant's position that the use of police officer control, in conjunction with the other mitigation measures described, addresses concerns raised about the expected traffic impacts at this intersection during the evening peak hour. The analyses show an LOS during this hour of D (Exh. 112, table 16 revised), which is acceptable. The queuing analyses predict queues that will not impact public safety (Exh. 115).

Recommendation T-8: The Commissioner should conclude that the record contains adequate information to make her SEQRA findings.

The third issue related to police officer control is whether the Applicant should be required to execute a contract with an appropriate police agency before the Commissioner makes her SEQRA findings or whether the contract could be submitted afterwards, pursuant to a permit condition. DPS Staff and the City assert that the Applicant must enter into a contract for police officer control before final approvals are issued so that the Applicant can demonstrate that enough police officers exist to control traffic (t.2141). Similarly, the City argues that the proposed use of police officers is purely theoretical, since the Applicant has not contacted police agencies to determine if police officers are available. I agree with the Applicant that it is proper to allow execution of the contract and its submission to DEC Staff after the permits are issued, subject to my recommendations below. If the execution of a police officer contract is an explicit permit condition, then commencement of construction without such a contract would be a violation, subject to enforcement and penalty. The material terms of the contract are included in the record and it does not matter which police agency provides traffic control.

Recommendation T-9: The Commissioner should conclude that the execution of a contract for police control be allowed after permit issuance. The permit language based upon paragraph X.J (reproduced above) should require that the contract be approved by DEC Staff, after consultation with DPS Staff and the City, prior to the commencement of construction; this will ensure the contract contains the required provisions. The recommended environmental monitor also should be given responsibility to monitor the intersection at all times during construction. If, in his or her judgment, additional traffic control officers are needed, the monitor should be empowered to make a recommendation to the contracting police agency, which would retain ultimate decision-making authority.

Staggered Release of Construction Workers. The second specific mitigation measure proposed by the Applicant related to the construction evening rush hour traffic impacts is to allow no more than 157 vehicles to leave at this time. The draft RCC paragraph X.P reads:

- P. Construction shall be scheduled to start not later than 7:30 AM. The Certificate Holder shall limit the number of construction worker vehicles released from the site between 4:30 PM and 5:30 PM on weekdays to 157.

DPS Staff and the City raise two sub-issues relating to this proposed mitigation: first, how will the Applicant limit the number of vehicles released, and second, what will be the impact of releasing the rest of the construction workers either before or after this hour.

DPS Staff questions how the Applicant will ensure that only 157 construction worker vehicles exit during this hour (Reply Brief, p. 3). The Applicant's traffic expert testified on cross-examination that it was the Applicant's intent to create a separate parking area for the vehicles that will have the preferential status to be able to leave during the p.m. peak period. This would be monitored and controlled by the Applicant's transportation coordinator on site (t. 2061). The Applicant's intention should be reflected in any permit condition on this point and should address DPS Staff's concern.

Recommendation T-10: The Commissioner should include language in any permit condition related to the staggered release of construction worker vehicles, that the Applicant establish a separate parking lot for vehicles that are allowed to leave between 4:30 p.m. and 5:30 p.m. and that the environmental monitor also monitor the Applicant's compliance with this provision.

The second issue relates to the impact of staggering the release of worker vehicles on traffic before and after the evening peak hour. Both DPS Staff and the City assert that the lack of analysis on this point is an information deficit that prevents the assessment of this proposed mitigation measure (City's Initial Brief, p.18). The on-site parking capacity for construction workers is 550 spaces (RCC, paragraph N). As the Applicant's traffic expert testified, currently the Applicant proposes no restrictions on when the other 393 construction worker vehicles can leave the site. They could all leave between 3:30 p.m. and 4:30 p.m. or between 5:30 p.m. and 6:30 p.m., and no analysis of this traffic and its impact on this intersection has been conducted (t. 2062). The Applicant does not address this issue in its briefs.

The City and DPS Staff are correct that an analysis of the impacts of this proposed mitigation measure on traffic before and after the evening peak hour is necessary. The release of an additional 393 cars into this intersection either immediately before or after the evening peak hour may reasonably be expected to have a significant impact. This impact being identified needs

to be evaluated by the Applicant so that the Commissioner can make her required SEQRA findings.

Recommendation T-11: Based upon the record as it now stands, the Commissioner should not make the required SEQRA findings without the analysis identified above. The Applicant should notify the ALJ by January 20, 2003 if it plans to undertake this analysis. If the Applicant opts not to produce this analysis, a briefing schedule will be set immediately. If the Applicant chooses to produce the analysis, it shall notify the ALJ as to when the analysis shall be distributed. After the other parties have had an opportunity to review this new information, a conference call will be held with the ALJ to discuss whether or not the hearing needs to be reconvened.

*Traffic from Routes 9&20 Turning North on South Street:
Morning Peak Hour during Operation.*

The third traffic movement at issue is the same as described above, except that instead of the issue relating to construction evening peak hour traffic, it involves morning peak hour traffic once the proposed facility is operating. The Applicant's traffic study predicts an LOS of F for traffic turning north on South Street at the intersection during weekday mornings, whether the proposed project is built or not. If the plant is built the expected delay at the intersection is 115.0 seconds, compared to 73.0 seconds if the proposed project is not built (Exh. 22, table 3). The Applicant's unchallenged traffic analysis predicts 37 cars would be expected to make this traffic movement during this hour (Exh. 115). The analysis also predicts a queue of 0.4 cars at this time (Exh. 115). Thus, even if one accepts the City's contention that actual impacts could be three times greater than those predicted by a computer, the queue would only be 1.2 cars on a ramp with a capacity of five cars (City's initial brief, p.8). The City's traffic expert points out that the Applicant's traffic study predicts a delay of 14.4 seconds per vehicle at the intersection under current conditions (Exh.22, table 7 on page 11) while the Applicant's own field observations indicated an actual delay of 45.01 seconds per vehicle (Exh. 22, p.5), a delay approximately three times greater (t. 2120).

Since the traffic movement in question leads in a direction away from the proposed project, it is very unlikely that any vehicle making this turn would be headed toward the proposed project. Thus, none of the traffic making this movement is

attributable to the Applicant (t. 2085). Some traffic from the site will be leaving (the overnight shift) and this traffic will interfere with vehicles attempting the movement in question, but the number of vehicles associated with night shift is small and the impact of traffic leaving the proposed project during the morning peak hour is expected to be insignificant.

The Applicant asserts that SEQRA requires mitigation of significant impacts, that the impact of the proposed project on this traffic movement is not significant and, therefore, does not warrant mitigation. Even if this were considered a significant impact, mitigating the problem would be expensive (i.e. arranging for police officer control) given the minor impact. In addition, the long term plans for this intersection include the creation of a deceleration lane from Routes 9&20 which would presumably lengthen the queue that could safely wait to make this turn.

Recommendation T-12: The Commissioner should find that the record is adequate to issue findings on this point because the traffic impact is so minor; the problem relates to an existing condition; no mitigation has been proposed by the interveners; and long-term solutions to problems at this intersection are already being considered by responsible agencies.

WHETHER SIGNIFICANT INFORMATION IS MISSING FROM THE RECORD

Both DPS Staff and the City contend that significant information is missing from the record regarding the traffic impacts of the proposed project. They argue that without this information, it is impossible to complete the environmental review and issue final approvals. The missing information includes:

Analyses of Traffic from the RNMP (alone) is Missing

Both the RNMP and the power plant generate traffic during their construction and operation. Since both plants are part of the same proposed project, are being proposed by the same Applicant, on the same parcel, and will be constructed at the same time, it was appropriate that the traffic studies considered the traffic impacts from the entire proposed project. Both the Article X and SEQRA environmental review processes require analysis of cumulative impacts. In my September 27, 2003 Ruling which advanced traffic impacts to adjudication, I stated at the adjudicatory hearing, "the impacts of traffic from each component

of this project will not be examined in isolation of the other" (p. 10). This ruling was not appealed. Accordingly, the Applicant prepared the traffic analyses considering all traffic impacts from both parts of the proposed project.

DPS Staff now argues in the companion case that the record is deficient because the Applicant has structured its traffic studies in such a way that the "nature of the impacts of the Article X Facility alone cannot be gleaned from the information provided without the provision of additional data and the opportunity to test that additional data through discovery and the hearing process" (DPS Staff's Initial Brief, p.7). Presumably, DPS Staff has a similar complaint about the record because the impacts of the RNMP cannot be alone be isolated in the record.

DPS Staff's argument fails for two reasons. First, the traffic impacts of the individual components are not relevant to ensuring that the traffic impacts from the entire project have been minimized to the maximum extent practicable. By definition, if the impacts and safety concerns from the entire project have been addressed, then the impacts and safety concerns of part of the proposed project have also been addressed. Second, the appropriate time to challenge this presentation of the analyses was after the issues ruling, and since DPS Staff made no challenge at that time, it has waived its right to make this challenge. It would be unfair to require the Applicant to now produce new analyses, and possibly reconvene the hearing, for information which is irrelevant.

Recommendation T-13: The Commissioner should find that the lack of traffic analysis of the individual components of the entire project is not relevant.

Travel Demand Management ("TDM") Strategies.

Both the City and DPS Staff argue that the Applicant should be required to specify its construction TDM strategies in a plan before the permits are issued. RCC paragraph Q. reads as follows:

- Q. The Certificate Holder shall implement travel demand management ("TDM") strategies to reduce the overall number of vehicles traveling to and from the site during construction. TDM measures shall be specified in a Compliance

Filing to be provided no later than two months prior to start of construction.

The City argues that reducing the traffic impacts of the proposed project is critical and that the other mitigation measures will work better if TDM strategies reduce vehicle traffic to and from the plant. Therefore, these TDM strategies need to be identified before the permits are issued (City's Initial Brief, p. 19).

In its pre-filed direct testimony, DPS Staff's traffic expert is more detailed and identifies eight specific items that must be included in a TDM plan. Two of these items, the notification of municipal officials when construction workforce exceeds 550 and the inclusion of traffic control measures on drawings appear to be resolved (Exh. 114, revised, Paragraphs M & U, respectively) and are discussed below. Two other items, identification of satellite parking facilities and staggered work hours for construction workers, are addressed in the Recommended Certificate Conditions but are contested and discussed above.

The remaining four items that DPS Staff asserts in its direct testimony need to be addressed before final approvals are given are: 1) development and implementation of TDM implementation protocol; 2) contract requirements for compliance with any proposed transportation mitigation; 3) plans for mass transit, car pooling and any other encouragement incentives; and 4) the routes to be used by shuttle buses and any signage or other mitigation needed at these locations (t. 2193).

DPS Staff's first item, the development and implementation of TDM implementation protocol, appears to require a plan to implement the traffic mitigation measures, but it is not entirely clear. If the traffic mitigation measures are included as permit conditions, it is difficult to see why a plan is necessary.

DPS Staff's second item, contract requirements for compliance with any proposed transportation mitigation, is also unclear. It may be referring to Paragraph A (Exh. 114, revised) which requires that the Certificate Conditions be made contract requirements for construction contractors, in which case this sub-issue appears to be settled.

DPS Staff's third item, requiring the Applicant to prepare plans for mass transit, car pooling and any other encouragement incentives before permit issuance, is the only one not addressed elsewhere.

DPS Staff's fourth item, requiring the Applicant to specify the routes to be used by shuttle buses and any signage or other mitigation needed at these locations, is necessarily contingent upon whether the Commissioner agrees with the recommendation to allow the identification of the specific location of the satellite parking lots, provided they meet the criteria in the permit condition.

The City's traffic expert identified three other measures not specified in the proposed permit conditions: plans for ride-sharing, the need to schedule shift changes to avoid a.m. peak and the need to define a reduction in traffic volume for the TDM plan (t. 2126).

Thus, from the record it seems that there are four TDM measures that the City and DPS Staff argue should be specified now: the use of car pooling, the use of mass transit, scheduling shift changes to avoid morning peak hour (although this may be addressed by requiring the morning shift to begin before 7:30 a.m. and discussed later), and establishing a defined reduction in traffic volume.

The Applicant asserts that it is appropriate for these details to be determined later, after permit issuance, because the TDM strategies set forth as permit conditions will mitigate traffic impacts adequately. In addition, the Applicant asserts that similar conditions have been required in two other Article X cases (Bethlehem Energy Center, Case 97-F-2162 and Wawayanda, Case 00-F-1256). The Applicant's traffic expert testified that the level of specificity of construction traffic mitigation strategies was beyond anything in his experience (t. 2064).

Recommendation T-14: The Commissioner should find that the traffic demand management strategies set forth in the permit conditions are sufficient to make the required findings. It is appropriate for further strategies, including the use of mass transportation and car pooling, to be detailed after permit issuance. The Commissioner should also insert a permit condition that would require approval of the TDM plan by DEC Staff, after consultation with DPS Staff and the City, before it becomes final.

Satellite Parking.

Both DPS Staff and the City assert that the Applicant must identify off-site parking areas and execute contracts with the

owners of such areas prior to issuance of DEC permits (and the Certificate). RCC paragraphs N & O read as follows:

XXIII. The Certificate Holder shall limit on-site construction worker parking to a maximum of 550 spaces for workers on the same shift, and prior to construction shall provide satellite parking and transportation from satellite lots during periods when the need for construction worker parking exceeds 550 spaces.

XXIV. The Certificate Holder shall identify selected satellite parking locations as soon as possible after Certification, and shall specify satellite parking locations in a Compliance Filing no later than 2 months prior to start of construction. The following criteria shall be applied in selecting satellite parking locations:

- (i) Preference will be given to:
 - I. Locations at a signalized intersection(s) to minimize congestion associated with site access and departure;
 - II. Locations south/east of the City of Rensselaer, in close proximity to the Project site, to minimize traffic impacts at the intersection of South Street and Route 9/20;
 - III. Locations currently used or which have previously been used for satellite parking purposes.
- (ii) Satellite parking locations shall be in commercial and/or industrial areas, and shall not be located in residential areas.
- (iii) Traffic conditions at key intersections and roads near proposed satellite parking locations will be assessed to assure that a significant

- decrease in service will not occur due to Project traffic.
- (iv) Shuttle buses or other similar transportation, provided at the Certificate Holder's expense, will be provided to transport construction workers to and from the satellite parking location(s) and the Project site. (Exh. 114, RCC, paragraph X.N&O).

The City and DPS Staff argue that executed contracts are needed to demonstrate that parking is available that will meet the criteria (t. 2139). The Applicant responds that because the proposed criteria for satellite parking are so well developed, and because it will be some time before such parking is needed, it is appropriate to allow the contracts to be executed after the permits are issued. The Applicant is correct that the information in the record and the proposed permit language allow the Commissioner to make the required SEQRA findings. Determining the exact location(s) where the additional 313 worker vehicles will park is does not create an unacceptable gap in the record.

Assuming a 15-passenger van transports workers to the satellite lots, that would result in 21 van trips at the end of a shift, under maximum employment conditions. These 21 trips should be included in the restriction (157 max.) on construction worker vehicles leaving during the evening peak hour.

Recommendation T-15: The Commissioner should include in the final permits a provision substantially similar to RCC paragraphs N & O. Nonetheless, permit language should be included that would require DEC to approve the satellite parking plan, after consultations with DPS Staff and the City, to ensure it meets the permit conditions. The part-time environmental monitor should be given responsibility to monitor the process of selecting the satellite parking lots and their use during construction.

Routes for Delivery of Fill.

The City argues that the Applicant needs to provide more specificity regarding which routes will be used by vehicles moving fill to and from the site and what mitigation measures

will be implemented before the permits are issued (City's Initial Brief, p. 15). RCC paragraph X.Q reads:

- Q. The Certificate Holder shall give preference to fill supplied from locations south of the project site for procurement of fill, provided that the appropriate grade of fill for the project is i) available from those suppliers, and ii) offered at a delivered price no higher than by other suppliers. The Certificate Holder shall identify in a Compliance Filing which route will be used to convey fill to the Site. Significant impacts on the roadway conditions or safety along this route shall be identified and appropriate mitigation described.

The City argues that more specificity is needed and that the appropriate mitigation needs to be described now. However, information regarding routes to be taken and mitigation measures to be employed can only be reasonably developed after bids have been received and contracts have been executed.

Recommendation T-16: The Commissioner should adopt a permit condition substantially similar to the one above. However, the language should be changed to allow for DEC approval of the fill route, after consultation with the City and DPS Staff. Similarly, before any fill transportation can begin, a mitigation plan for this route should be submitted to DEC for approval, following consultations with the City and DPS Staff.

Final Traffic Mitigation Plan.

The City argues that the submission by Applicant of a final traffic mitigation plan after permit issuance should not be allowed (City's Initial Brief, p.15). RCC paragraph X.S reads:

- S. The traffic mitigation measures provided for these Certificate Conditions shall be summarized by the Certificate Holder in a final Traffic Mitigation Plan ("Traffic Plan") for construction and operation to be submitted as a Compliance Filing.

The City argues that this final plan should be submitted before permit issuance. However, this final plan is merely a compilation of all the traffic mitigation measures specified or identified elsewhere. Accordingly, if the components of the plan are sufficient for the Commissioner to make her findings then the plan itself would be, as well. Thus, there is no reason to provide the final plan before permit issuance.

Recommendation T-17: The Commissioner should not require the final traffic mitigation plan be filed before permit issuance. The final plan should be approved by DEC Staff, after consultation with DPS Staff and the City.

SETTLED ISSUES

Nine sub-issues were raised by parties in their direct testimony that now appear to be resolved. The parties should review this list and comment in their briefs if any aspect of these sub-issues remains unresolved.

Inclusion of traffic from SUNY East in Models

In their pre-filed direct testimony, both DPS Staff and the City raised the issue of the need for the Applicant to include projected traffic from the anticipated expansion of the SUNY East Campus, East Greenbush. This expansion is expected to increase traffic on Routes 9&20. This expansion will not be completed until 2011 (t. 2205). Therefore, the expansion will not interfere with the construction phase of the proposed project, when the traffic impacts will be the greatest.

During the meeting on September 18, 2003 among the parties regarding traffic, the Applicant informed the parties that final plans for the expansion were less extensive than originally proposed. A copy of the SUNY traffic report was provided by the Applicant following this meeting. Subsequently, the Applicant revised relevant traffic analyses to include the impacts of the SUNY expansion (t. 2155). Thus, no issue remains regarding the inclusion of this information.

In its initial brief, the City does take issue with a statement by the Applicant's expert that the proposed project would provide mitigation for the impacts of the SUNY expansion (t. 2008). This comment by City is not relevant because the

statement by the expert in question is not relied upon for any of my conclusions.

Signal Timing

In its initial pre-filed testimony, DPS Staff also raised concerns about the timing of traffic lights along the Route 9&20 corridor, which are under the jurisdiction of DOT. Specifically, apparent conflict exists between the Applicant's request for adjustments to the timing to allow for greater traffic flow and the Route 9&20 Corridor Study which proposed greater time for pedestrians to cross the road (t. 2186). The revised proposed Certificate Conditions contains the following paragraph:

- L. Prior to start of construction, the Certificate Holder shall arrange with NYSDOT to monitor and adjust as necessary the signal timing plan at the signalized intersections of Route 9/20 with Aiken Avenue, Washington Street, and Broadway to maintain acceptable Levels of Service ("LOS").

DOT is aware of the signal timing issues and commented on them in its May 28, 2003 letter and Exh. 127. When the exhibits regarding signal timing were introduced (Exhs. 125, 126 and 127), the City's counsel explained that his only purpose in submitting the exhibits was to make the decision makers aware that the parties were discussing this issue with DOT (t. 2147). Neither DPS Staff nor the City addressed this issue in its brief. According, this sub-issue appears to be resolved (t.2023).

Redirecting Truck Traffic from Fort Crailo Neighborhood

In its initial pre-filed testimony, DPS Staff asserted that a problem remained with the Applicant's proposed traffic mitigation measures relating to truck traffic through the Fort Crailo Neighborhood (t. 2174). On cross-examination, DPS Staff's expert acknowledged that this problem had been addressed (t. 2207) (JSA, p. 60 2(a)(1)). It appears that this sub-issue is settled.

Heavy Hauls and Alternative Methods for Deliveries

In its initial pre-filed testimony, DPS Staff argued that it was necessary to include traffic impact mitigation measures

related to heavy hauls and other deliveries (t.2185, 2190). The revised proposed Certificate Conditions contain the following paragraph:

- G. Heavy haul during project construction shall be scheduled to occur during non-peak traffic hours to the extent practicable. The Certificate Holder shall provide advance notification to ...[City of Rensselaer Mayor's Office and Planning Office, the City's Police Department, the County Sheriff's Department, any other law enforcement agency providing traffic officer control and the City's School District] prior to heavy hauls and shall coordinate heavy hauls with local officials.

On cross-examination DPS Staff's expert stated that this provision addressed the recommendation (t.2218). DPS Staff did not discuss this issue in its brief. According, this sub-issue appears to be resolved.

Distribution of Routing Instructions

In its initial pre-filed testimony, DPS Staff argues that an enforcement mechanism is necessary to ensure that construction workers and truckers use the routes designated by the Applicant (t. 2188). The revised proposed Certificate Conditions contain the following paragraph:

- B. The Certificate Holder shall distribute instructions to all construction contractors, including trucking companies delivering fill, equipment, and supplies to and from the site, to utilize Route 9/20 and the Port Access Highway and to avoid use of Riverside Avenue or other local streets in the Fort Crailo neighborhood north of the project site. The Certificate Holder shall also distribute instructions to trucking companies serving the facility during the operation phase to avoid use of route 9J access to the site to and from the south.

On cross examination, DPS Staff's expert acknowledged this condition but did not state if it addressed his concerns. DPS Staff did not address this in its closing brief, therefore it is possible that it has been resolved. Certainly, if the Commissioner accepts the recommendation to require an environmental monitor, this person could monitor compliance with this provision and ascertain whether truck traffic to or from the proposed project was not moving through the Fort Crailo neighborhood.

No Mitigation to Control Truck Traffic during Commuting Periods

In his pre-filed direct testimony, DPS Staff's expert testified that there was no mitigation to control truck traffic during commuting periods, specifically during the morning and evening peak hours (t. 2189). The revised proposed Certificate Conditions contain the following paragraphs:

- F. The Certificate Holder shall include in its contracts with construction suppliers a requirement to avoid scheduling deliveries during the hours of 7:30AM - 8:30AM and 4:30 PM - 5:30 PM.
- P. Construction shall be scheduled to start not later than 7:30 AM.

On cross-examination, DPS Staff's expert acknowledged these sections and the matter appears to be settled. However, on redirect, DPS Staff counsel asked a question indicating that DPS Staff may be seeking a requirement that all construction workers be on the site before 7:30AM (t. 2224).

Trailblazer Signage

In its initial pre-filed testimony, DPS Staff argued that it was necessary to include traffic impact mitigation measures related to "trailblazer" signage to guide traffic to and from the project (t. 2191). The revised proposed Certificate Conditions contain the following paragraph:

- D. Subject to receipt of required permits from NYSDOT, the Certificate Holder shall install prior to start of construction, and shall maintain in

place during the project operation, "trailblazer" signage guiding construction and operation traffic to and from the project via the preferred arrival and departure routes. Subject to NYSDOT approval, trailblazer signs shall be located at: [a list of ten locations]. The design and final approval of locations of trailblazer signs shall be provided in a compliance filing.

On cross-examination, DPS Staff's expert acknowledged this recommendation was accounted for in this permit condition. DPS Staff did not address this issue in its brief. According, this sub-issue appears to be settled.

Construction Warning Signs and Message Boards

In its initial pre-filed testimony, DPS Staff argued that it was necessary to include traffic impact mitigation measures related to construction warning signs and message boards around the proposed project (t. 2191). The revised proposed Certificate Conditions contains the following paragraph:

- H. Appropriate warning signs, as required by NYSDOT, will be placed as required on Riverside Avenue in advance of the entrance during the period of Site construction. Subject to NYSDOT approval, warning signs and message boards shall also be placed [list of 3 locations]. Warning signs and message boards shall be removed once the construction is complete.

On cross-examination, DPS Staff's expert stated that the permit condition spoke to his concerns (t. 2221). DPS Staff did not address this issue in its brief. According, this sub-issue appears to be settled.

Drawings of Control Turn Design for Entrances/Exits

In its initial pre-filed testimony, DPS Staff argued that it was necessary to include traffic impact mitigation measures related to the inclusion of traffic controls at the entrance and

exit to the proposed project (t. 2194). The revised proposed Certificate Conditions contains the following paragraph:

- U. Control turns in and out of all Cogeneration Plant driveways shall be reflected in drawings to be included in a Compliance Filing, which will depict alignment, curbing, signage, lane markings, or other features that preclude turns onto Riverside Avenue northbound when exiting the Cogeneration Plant main entrance or emergency accessways.

Obviously this condition only applies to the portion of the proposed facility under review by the Siting Board. DPS Staff did not address this issue in its brief. According, this sub-issue appears to be settled. However, the parties may wish to address in their briefs whether this should be made a DEC permit condition and whether a similar provision needs to be drafted to address the RNMP.

Recommendation T-18: Assuming that no party identifies a remaining disagreement regarding these settled issues, the Commissioner can conclude that the record is sufficient for her to issue her findings statement.

Requesting DOT's Formal Involvement

In the companion case, DPS Staff has asked the Siting Board to formally request the cooperation of DOT in resolving the transportation issues in this proceeding, pursuant to PSL 167(1)(B). For reasons discussed in the recommended decision in the companion case, both ALJ Harrison and I recommend that the Siting Board reject this request. The rationale for this request is the claim by DPS Staff that DOT has not formally participated in reviewing traffic impacts. The only way to get DOT to give this request the proper recognition is for the Siting Board to make this request (t. 2230). However, DPS Staff's expert stated that the DOT involvement did not have to occur before final approval of the proposed project (t. 2235). Since there is no similar authority in the ECL for the Commissioner to request the formal involvement of DOT, the request is not relevant to the DEC case.

VISUAL IMPACTS

INTRODUCTION

The issue of visual impacts was proposed for adjudication by the RC Greens, DPS Staff, the City and the Sierra Club. The issue was advanced to adjudication and no appeals were taken. During the settlement process, the Applicant agreed to undertake additional mitigation measures to reduce the visual impacts from both components of the proposed facility. These mitigation measures are included in Section VIII of the Recommended Certificate Conditions (Exh. 46, Appendix JS-I). Following the settlement process, DEC Staff, DPS Staff, the City and the Sierra Club all signed the JSA.

Unlike traffic impacts, the visual impacts of the two components of the proposed project can be evaluated separately because the two components are physically separate. The cogeneration plant will be located farther from the Fort Crailo neighborhood, across the street from the existing, smaller Coastal power plant. The RNMP will be closer to both the Fort Crailo neighborhood and the Hudson River and presumably will have greater visual impacts. While it is necessary to evaluate each part of the proposed project in the context of its respective environmental review process (SEQRA for the RNMP, Article X for the cogeneration plant), it is also necessary for the decision makers in each process to consider the cumulative visual impacts from both parts of the proposed project. In this case, the Applicant performed a single visual impact analysis for the entire proposed project that allows the respective decision makers to evaluate each component separately as well as to consider the cumulative impacts of both.

There is no question that the visual impacts are an important factor in the Commissioner's decision whether to approve a proposed project under SEQRA. Unacceptable visual impacts have been grounds for permit denial (Matter of Lane Construction, Decision of Deputy Commissioner, June 26, 1998). In Lane, permits for a proposed mine were denied in part because the proposed mine was deemed to have an unacceptable visual impact. The proposed site of the mine in Lane was in Rensselaer County, just a few miles from the site of the proposed project in this case.

Positions of the Parties

DEC Staff and the Applicant executed the JSA and take the position that the Applicant's visual analyses are adequate, and that the mitigation measures proposed are sufficient to allow the Commissioner to make SEQRA findings.

The RC Greens, who withdrew from the settlement negotiations early in the process, assert that the record is inadequate for the Commissioner to make SEQRA findings, or alternatively, that the record supports a conclusion that the visual impacts from the proposed project are too great and the project must be denied.

DPS Staff, the City and Sierra Club all signed the JSA. The City and Sierra Club raised no issues relating to visual impacts at the hearing. DPS Staff did not condition its signature on the JSA regarding visual impacts. Nevertheless, DPS Staff did cross-examine on visual impacts of the cogeneration plant (t. 1727-42). DPS Staff did not raise any visual issues in its briefs and took no position with regard to the visual impacts of the RNMP.

THE RECORD REGARDING VISUAL IMPACTS

In September 2001, the Applicant, DEC Staff, DPS Staff and other governmental parties set forth the process by which the Applicant would analyze the visual impacts of the proposed facility, in a document entitled "Article X Stipulations/DEIS Scoping Document" (Exh. 1, Appendix B-1, p. 30). It was agreed that the methodology to be used to conduct the Visual Impact Assessment ("VIA") would follow DEC's Program Policy entitled Assessing and Mitigating Visual Impacts ("DEC Policy") and the Visual Resources Assessment Procedure for US Army Corps of Engineers ("VRAP") (Exh. 100). The VRAP was published in 1988 and its principal author, Richard Smardon, testified at the hearing as one of the Applicant's visual experts.

The Applicant's VIA

The Applicant's assessment began with a review of the existing land uses within five miles of the site of the proposed project, which include agriculture, industrial, commercial, transportation, historical, residential and recreational uses. The proposed site itself is located along a section of the Hudson river front. The site is bounded by the Organichem facility to the north; railroad tracks and the Port Access Highway to the east; various industrial sites to the south; and Riverside

Avenue, the Coastal Cogeneration Facility and the Hudson River to the west.

Following the procedures set forth in the VRAP, the Applicant's expert then divided the area around the proposed project into nine similarity zones, which are geographic areas with common characteristics. These Similarity Zones are: Major Transportation Corridor; Hudson River Corridor; Large City, Urban; Residential and Commercial, Suburban; Government Centers; Industrial and Commercially Mixed; Bluffs Overlooking the Hudson River; Open Uplands, Mostly Undeveloped; and Rolling Hills with Mixed Forest, Agriculture and Villages.

On April 9, 2001, the Applicant's visual experts took digital photos of the site of the proposed project from 41 different locations, identified as sensitive by the Applicant (Exh. 1, Table 10-2). These photos were taken with a 35 mm lens.

A panel of visual impact professionals and a quasi-public panel of local reviewers then rated photos of the site from each zone (Exh. 1, Table 10-1). The rating system for Similarity Zones in the VRAP provides three possible scores, which are in descending order: distinct, average, or minimal. Using these scores, a "Management Classification System" ("MCS") was then developed to numerically evaluate each zone. The VRAP manual provides five "management classifications" that are indicative of the visual sensitivity of a zone, and suggestive of the need for mitigation of projects proposed for these zones. In descending order these classifications are: Preservation, Retention, Partial Retention, Modification, and Rehabilitation. The professional panel's scores were then compared with the results of a similar rating done by a quasi-public panel, and the final results are summarized below.

Similarity Zone Classifications

Major Transportation Corridor	Rehabilitation
Hudson River Corridor	Partial Retention
Large City, Urban	Partial Retention
Res. & Comm., Suburban	Partial Retention
Government Centers	Retention
Ind. & Comm. Mixed	Modification
Bluffs Overlooking H.R.	Partial Retention
Open Uplands, Mostly Undev.	Not classified, no view
Rolling Hills	Partial Retention

After consultation with DPS and DEC Staff members (and other state and local government officials), 11 of these viewpoints were selected as representative of the Similarity Zones with views of the site (Exh. 1, Table 10-3). The Applicant's expert then prepared two photo simulations of each of the eleven photos, one simulation which only included the structures of the proposed project and one that added the plumes from the proposed plant. These simulations were then scored by a professional panel and the quasi-public panel described above.

The difference in scores between photos without the proposed project and the photosimulations was then computed and compared with the thresholds of visual significance established in the VRAP. The results showed only a minimal impact for the proposed structures only. However, when simulations including plumes were rated, six of the viewpoints scored significantly higher, although the VRAP thresholds were only exceeded for one zone, the Government Center Zone. Since this rating was done, the Applicant has agreed to numerous additional visual mitigation measures including the construction a 20E F alternate hybrid plume abatement cooling tower at the cogeneration plant which will reduce visible plumes. These simulations did not include plumes from the existing Coastal power plant, across the street from the proposed project. This smaller power plant does not have similar plume abatement technology and when it is cold, plumes can be quite large (Exh. 87, 88, 89).

In the December 2001 DEIS, the Applicant submitted its visual impact analysis and other information with its application (Exh. 1, section 10). Included in these materials were the photo simulations from the eleven viewpoints, with and without plumes (Exh. 1, Figures 10-5 through 10-18). The photo simulations included in the Application are approximately 3.5" x 5".

Information Produced After Filing the DEIS

During March 2002, the Applicant was asked by DEC and DPS Staff to expand its visual impact assessment to include analyses from the Albany Heritage Area, Revolutionary Trail Scenic Byway and the Aiken House (Exh. 2, S1-10-A). The Applicant also submitted supplemental information regarding: proposed architectural details (Exh. 2, S1-10-B); expected impacts to residential areas north of the proposed project (Exh. 2, S1-10-C); the presence of non-historic aesthetic resources (Exh. 2, S1-10-D); and additional photo simulations (Exh. 2, S1-10-E). These additional photo simulations were done to reflect engineering design modifications to mitigate visual impacts including replacing the numerous short stacks and vents on the paper and deinking buildings with a 50 foot above roof level stack on the deinking building, the addition of a 213 foot above ground level stack to be located adjacent to the northwest corner of the receiving warehouse, and the addition of covers to the primary clarifier and aeration basin at the wastewater treatment plant. Five existing photos were used and a sixth simulation was developed from a new photo taken at Island Creek Park, in Albany (Exh. 2, Figure 10-19).

In October 2002, at the request of the Office of Parks, Recreation and Historic Preservation (Exh. 32), the Applicant produced simulations from seven additional viewpoints of concern to OPRHP, viewpoints ##16, 27, 29, 30, 33, 34 & 40 (t. 1604).

Following the formal negotiation process, in April 2003, the Applicant agreed to changes to the layout of the proposed project and other measures to further mitigate visual impacts. Four simulations using the revised layout were produced from viewpoints 1, 17, 28 and the Rensselaer Train Station, which had been completed after the Application was filed (Exh. 42 & 43).

In addition to the Applicant's photo simulations, the RC Greens produced their own set of simulations. They began by visiting the viewpoints selected by the Applicant and determining if they thought a better viewpoint was available. Then using a camera with a longer lens (either 50 mm or 70 mm), and higher

resolution film, the RC Greens photographer took a series of photographs. The RC Greens created their own computer simulations and superimposed them on their photos (t. 1384). Many of these simulations were introduced into the record at the hearing, as well as larger prints of the Applicant's photos and simulations.

DEC's PROGRAM POLICY

The DEC Commissioner issued the DEC Policy "Assessing and Mitigating Visual Impacts" on July 31, 2000. This policy requires DEC Staff to evaluate the potential for adverse visual and aesthetic impacts on receptors outside the facility or property (p. 2). While not explicit, the references to DEC Staff can be reasonably inferred to mean a DEC Staff visual expert. It would be of little use to have a DEC Staff member unqualified as an expert in visual analyses reviewing visual impacts.

Specifically, the policy requires DEC Staff's visual expert to take four basic steps to assure that visual concerns have been fully addressed in each application. The steps that DEC Staff must take are:

1. Verify the applicant's inventory of aesthetic resources.
2. Verify the applicant's visual assessment.
3. Verify the applicant's assessment of the potential significance of the impact.
4. Confirm that the applicant's mitigation strategies are reasonable and are likely to be effective, or assure mitigation by requiring the applicant to submit a design that includes the required mitigation, or, impose permit conditions consistent with those mitigation requirements.

It is not clear from the record whether these steps were followed. The record does contain an April 26, 2002 letter from the Applicant to the City's Mayor indicating that additional simulations and other information had been requested by the DEC visual expert (Exh. 2, S1-10-E, last page), but I find nothing that states that he ever reviewed this information. In its initial brief, DEC Staff disclosed that it did not have an expert on visual impacts on staff (footnote 12). In its reply brief, DEC Staff explains that its sole visual expert retired over a year ago, but before he did he reviewed the Applicant's proposal in order to ensure that all visual and aesthetic areas of concern had been addressed in conformity with DEC's visual policy.

However, this claim is in the form of an unsworn assertion of fact by an attorney, submitted after the opportunity to introduce evidence at the hearing has passed.

Compounding this problem is the fact that the proposed project, including the layout of the RNMP, changed significantly during settlement negotiations and these negotiations occurred after DEC Staff's visual expert retired. Thus, a DEC Staff visual expert never evaluated the final plans for the RNMP, the final visual simulations prepared by the Applicant, the final proposed mitigation measures, the visual simulations produced by the RC Greens or any of the testimony offered at the hearing.

DEC's visual policy has the force of law. The Legislature has authorized DEC's establishment of these types of policy documents and provided a mechanism for instituting them (see ECL 3-0301(z)). In this case, the record is unclear whether the law was followed. A question remains whether the DEC Commissioner can issue a final approval for this project until the record demonstrates that this legal requirement has been met.

SIZE OF SIMULATIONS IN THE APPLICATION

The RC Greens assert that the inclusion in the Application and subsequent submissions of small, 3.5" x 5" photo simulations of the proposed project are inadequate to assess the visual impacts of the plant (t. 1352). They contend that the size of the proposed project in the Applicant's simulations could fit on a postage stamp. At a minimum, the RC Greens argue that the Applicant should have provided 11" x 17" photos from the most sensitive viewpoints. However, they cite no authority requiring this size.

The RC Greens reason that the purpose of a photo simulation is to provide an accurate sense of what the proposed project will look like. One way to do this is to hold it up at the viewpoint where it was taken and determine how far away it must be held to represent the true scale (t. 1302). Following the adjudicatory hearing, during the official visit, I held one of the Applicant's simulations next to the actual view. In order to get an approximation of the actual scale of the proposed project, the simulation needed to be held approximately 2 inches from my eyes.

The RC Greens argue that the use of small simulations in the Application was a deliberate attempt by the Applicant to underestimate the visual impacts of the proposed project. Had the simulations been larger, greater public opposition to the

project would have materialized, say the RC Greens. In addition, the RC Greens contend that the Applicant's simulations are inadequate for the Commissioner to assess the visual impact of the proposed project.

The Applicant disavows any intent to be misleading, and points out that larger photos were provided to both the professional (t. 2864) and quasi-public panels (t. 2759) for scoring purposes. The Applicant adds that the smaller simulations were provided in response to discovery demands and no interested State agency indicated that they were unacceptable.

The RC Greens argument fails because these small photo simulations are not the only ones in the record. Larger versions of the Applicant's simulations were introduced at the hearing as well as larger versions of photo simulations produced by the RC Greens. All this information can be relied upon by the Commissioner in making SEQRA findings.

Recommendation V-1: The RC Greens are correct that the size of the photo simulations in the Application are too small to get a sense of the scale of the project. However, there are no standards requiring larger simulations and perhaps DEC's visual policy should be amended to include a minimum size. Nevertheless, the small size of the simulations in the Application does not prevent the Commissioner from making the required findings because there are other simulations and information in the record upon which SEQRA findings may be made.

PHOTO SIMULATION QUALITY

The RC Greens assert that Applicant's evaluation of visual impacts is flawed and fails to identify all potential significant adverse visual impacts. This is because of the poor quality of the Applicant's photographs and because they are taken from unrepresentative viewpoints. These poor photos, the RC Greens argue, lead to poor simulations of the proposed project.

Quality of the Applicant's Photographs

According to the RC Greens, a fundamental problem with the Applicant's visual analysis is the poor quality of the original photographs used to analyze the visual impacts of the proposed project. Since these photographs are not what the naked eye would see today, the computer generated photo simulations which superimposed the proposed project onto these photos are also of

poor quality such that it is impossible for the Commissioner to accurately assess the true visual impact of the project.

The problems cited with the Applicant's photographs include: the use of low-resolution digital photography; poor lighting in some photos; and the use of inappropriate lenses. The RC Greens assert that the poor quality of the photos are part of the Applicant's efforts to deliberately mislead the public regarding the visual impacts of the proposed project. According to the RC Greens, the Applicant's decision to use low-resolution digital photography resulted in grainy images that make it difficult for the viewer in distinguishing foreground from background. Compounding this problem, they assert, is that poor lighting conditions are present in a number of the Applicant's photographs. The RC Greens assert that these photos are of such poor quality as to render invalid the results of the VIA.

The RC Greens criticize the Applicant's use of a 35 mm lens instead of a 50-100 mm lens which they say is more representative of what the human eye would see (t. 1302). According to the RC Greens, in order to capture the true representation of the scale of the proposed project, different lenses should have been used from different viewpoints. The Applicant's expert replies that no single lens can duplicate what the human eye sees and that a judgment was made to use a 35 mm lens which approximates the 110 degree human field of vision (t. 1553). The RC Greens' expert counters that it is more commonly accepted to use a 50 mm lens (t. 1339), but cites no authority for this statement. The RC Greens acknowledge that neither the DEC Policy nor VRAP specify the appropriate camera lens for visual simulations. Rather, both documents seem to leave this decision to the professional's best judgment.

The Applicant's expert counters that the smaller lens allows for a wider angle of view, similar to what the human eye would see (t. 2854) and for this reason, its photos are a better representation (t. 1637). Using a longer lens distorts scale and brings the image forward, toward the viewer. The Applicant's expert argues that the photos that it used for its visual impact analysis are representative of views of the site of the proposed project (t. 1530). The Applicant's expert states that the reason all 41 of its original photos were taken using a 35 mm lens, on the same day, during leaf-off conditions, was to maximize the consistency of the photos and eliminate subjectivity (t. 1535). The Applicant criticizes the RC Greens' photographs for being taken at different times of the year and with longer lenses creating distortion (increasing visual impact) and being contrary to the goal of consistency.

There are no standards set forth in either DEC's visual guidance or the VRAP manual regarding what type of lens should be used, how much resolution is appropriate or any other issue related to photo quality. Thus, it is left to the discretion of the individual professional to use his or her best judgment when taking photos of a site to be used as the basis for visual simulations. Both the Applicant's expert's and the RC Greens' expert's arguments have merit. As the Applicant's expert asserts, photos taken with the smaller lens provide a sense of what one sees from a viewpoint as one scans the site of the proposed project, and these photos provide a sense of the site's context. As the RC Greens' expert asserts, photos taken with the longer lens provide a sense of the site as one focuses and concentrates. At its core, this dispute is a difference of opinion between experts.

Some of the Applicant's photos lack some structural details as to distant structures and some photos show areas of darkness. However, using photographs as representations of actual visual impressions is a complex and subjective matter. There is natural contrast between shadowed and sunlit areas in nature, and details (such as windows in buildings) are also naturally less noticeable as distance from the viewer increases. There was room for improvement in the quality of some of the Applicant's photos, however, it is reasonable to conclude that these photos provide a reasonable basis for visual assessment.

Recommendation V-2: In the absence of a regulatory standard or some generally accepted rule used by professional photographers regarding photo quality which can be shown to have been violated, there is no reasonable basis to conclude that the Applicant's photographs are not acceptable. The Commissioner should find that these photos provide a reasonable basis for visual assessment.

Viewpoint Selection

The RC Greens challenge the choice of viewpoints from which many of the Applicant's photos were taken, claiming that better, less obstructed viewpoints were often available nearby (t. 1300). The RC Greens claim several viewpoints have no line of sight of the proposed project (e.g., viewpoints #11 & #22). The Applicant acknowledges that not all of its viewpoints provide a direct line of view, but notes that others do, and contends that in the aggregate, its photos accurately represent the most significant viewpoints. Some of the photos without views of the proposed

project are taken from historical sites and other sensitive receptors, to demonstrate the visual impact of the project from these sensitive receptors.

The VRAP does discuss the selection of viewpoints, stating that it is important to choose viewpoints that are representative of typical viewer locations, viewer activities and potential project visibility (Exh. 100. p. 48). The Application states that the viewpoints were selected based upon five criteria: the significance of the viewpoint for the public; the number of viewers from that spot; the most direct, unobstructed view; the degree to which a viewpoint offers a representative view; and the anticipated future land use (Exh. 1, p. 10-9). In a number of instances, the RC Greens assert that these selection criteria were improperly applied by the Applicant when selecting viewpoints (t. 1347).

The RC Greens also criticize the choice of 11 photos used to create simulations, which were chosen from the 41 original photos taken. The Applicant responds that these 11 viewpoints were not chosen by the Applicant, but rather they were selected in consultation with DPS Staff, DEC Staff, staff of the Department of State, local government organizations and local non-government organizations. Only after this consultation was concluded were the 11 photos selected as the basis of the photo simulations (Exh. 1, 10.4.2.1).

The RC Greens make specific criticisms regarding individual viewpoints. These are discussed below:

Viewpoint #1. The RC Greens criticize the viewpoint selected for the view from the Fort Crailo historic site. Fort Crailo is a two-story structure on Riverside Avenue, facing the Hudson River. It sits shoulder to shoulder with other two story buildings, and consequently there is no view of the proposed project from the Fort itself. The historic site includes a lawn area on the west side of Riverside Avenue to the banks of the Hudson River. Viewpoint #1 is in the center of this lawn area and the photo was taken through a series of tree limbs, in leaf-off conditions. The RC Greens criticize this choice and argue that the viewpoint should be closer to Riverside Avenue where the view of the proposed project is less obstructed (Exh. 37, RCG PD#4, photo #P1000236.jpg). According to the RC Greens, the Applicant's choice of the viewpoint was not selected according to the criteria found in the Application because an unobstructed view was available, but not chosen. The Applicant responds that its photo was taken at the centroid of the lawn area and that this view represents the typical view from the historic site (t.

2840), which is another of the criteria for selecting viewpoints. The Applicant challenges the RC Greens' choice of viewpoint because it is taken from the side of Riverside Avenue, where there is no sidewalk, which is not a representative view and one from which fewer people would view the proposed project.

The choice of viewpoint is a subjective matter which relies on interpretation of the criteria found in the VRAP and the application as well as an individual expert's professional judgment. The RC Greens argue that the criteria requiring a clear line of sight should trump the criteria that the view be representative of a location where more people are likely to view the site. However, there is no hierarchy among the criteria and the individual expert is left to make the decisions regarding viewpoint selection, weighing the selection criteria. Thus, it is to be expected that different experts will have different opinions regarding viewpoint selection. The Applicant's expert selected the viewpoints giving more weight to representative views and views where more people are likely to see the proposed project. The RC Greens' expert emphasized the best view, even if only a few people would view the project from that viewpoint. Both interpretations can be supported by the criteria and neither is wrong. The Applicant's explanation of its choice of viewpoint is reasonable and not contrary to the selection criteria.

Viewpoint #16. According to the RC Greens, the photo taken at the intersection of Routes 9&20 and Route 9J is partially obscured by trees (Exh. 32). If viewer position had been adjusted, it would have resulted in an unobstructed view (t. 1333). The RC Greens assert that the Applicant's photographer misdirected the camera and missed most of the project site. In addition, the RC Greens claim that this is not a representative view from Routes 9&20, and should have been taken facing west. This again is a difference of opinion between experts. The viewpoint selected by the Applicant's expert is reasonable and does not violate the selection criteria.

Viewpoint #22. The RC Greens also criticize where the Applicant's photo was taken to represent the view from the Albany bluffs (Exh. 1, fig 10-10). According to the RC Greens, the photograph was actually taken at the bottom of the hill at a point obstructed by trees and telephone poles and was shot at a point to include the tank farm in the foreground, an atypical view from the bluffs (t. 1341). The Applicant's expert concedes that this view may not be representative of a view from the hill, but that he had gone up the hill (toward the Doane Stuart School) and not been able to find any representative views available to

the public, so the photo was taken at the base of the hill (t. 2845).

Viewpoint #24. The RC Greens assert that the view from the corner of McCarty and Nutgrove Avenues does not provide a clear line of sight of the project and that a more accurate photo could have been taken from further up the hill. The Applicant's photo shows an obstructed view of the proposed project (t.1331) while those alternatives proposed by the RC Greens do not (t. 2824). On cross-examination, the Applicant's expert stated that viewpoint 24 was a typical view from the Albany bluffs (t. 2828). This is another dispute between the experts. The selection criteria have not been violated.

Viewpoint #25. The RC Greens assert that the photo taken from the State Museum also does not provide an unobstructed view of the site (Exh. 101, 102). Rather, they maintain that the site can barely be seen above a line of trees and buildings. Their expert concludes that a change of viewer position would have provided a different perspective (t. 1332) and if the viewer had moved to the northeast corner of the terrace, a clearer, less obstructed view was available (t. 1343). Again, the RC Greens' expert favors unobstructed views, even if a person has to travel to the far corner of the terrace, while the Applicant's expert selected the viewpoint at a point where more people are likely to be. The selection criteria have not been violated.

Viewpoint #28. The RC Greens claim the Applicant's photo from Island Creek Park across the Hudson toward the site distorts the view of the site. If the camera had been pointed in a more northward direction (Exh. 58), the photo would not have included the tank farms to the south and would have included more of residential Fort Crailo. Again, the experts disagree, but the selection criteria have not been violated.

Viewpoint #35. The RC Greens also criticize the viewpoint selected to represent the Major Transportation Corridor Zone because it also has an atypical view, which includes a tank farm in the foreground (Exh.1, Figure 10-15). Had the photo been taken farther north on I-787, a better view could have been found without the tanks in the foreground (t. 1334). The Applicant's expert responds that I-787 curves and that the only place where a driver or passenger has a direct line of sight to the proposed project is where the tank farm is in the foreground (t. 2830). The other views, such as those suggested by the RC Greens, require the driver to take his or her eyes off the road (t. 1483). This again is a question of the application of the

viewpoint selection criteria. The Applicant chose a view that a driver would have without turning which it claims is representative, while the RC Greens advocate for a viewpoint with a more direct line of sight that requires a driver to take his or her eyes off the road.

Missed Viewpoints. The RC Greens also assert that the Applicant should have considered the view from the Dunn Memorial Bridge, a seven-lane bridge that carries traffic over the Hudson River on Routes 9&20 (t. 1334). The RC Greens' photographer took a photo from the bridge to demonstrate the view (Exh. 76). Apparently he stopped his car in a travel lane, got out of his car and stood on the bridge to take this photo (t. 1422). The Applicant's expert stated that the view captured from the Dunn Memorial bridge is not typical and that there is no direct line of sight from the bridge (t. 2833). The guard rail on the side of the bridge partially obscures the view, especially from cars, and a driver would have to take his or her eyes off the road to see this view. In addition, the pedestrian lane on the bridge is on the north side and, according to the Applicant's expert, offers no view of the site of the proposed project, which is to the south (t. 2838) (Exh. 99). This is another disagreement between experts. Moreover, the RC Greens' photographer had to make an illegal stop on a bridge to capture the viewpoint, one that very few people would ever see.

The RC Greens also criticize the Applicant's analysis of the visual impacts of the proposed project on the Fort Crailo neighborhood arguing that the Applicant did not evaluate this impact. The RC Greens assert that their simulations do truly represent the view (Exh. 84, 85, 94 & 95). The Applicant responds that these photos were taken at the very edge of the neighborhood and do not represent the visual impact on the neighborhood (t. 1615). The viewpoint selected by the RC Greens was taken at a point where the neighborhood transitions to an industrial area (t. 1615). In this instance the experts disagree on where a representative viewpoint is located for Fort Crailo, and again the selection criteria have not been violated.

Recommendation V-3: The Commissioner should conclude that the viewpoints selected by the Applicant and used as a basis for its visual analysis were properly selected, and that important viewpoints were included. The fact that the RC Greens' expert would have chosen different ones, while useful for the record, is not enough to deny this project or conclude that necessary information is lacking from the record.

THE VRAP PROCESS

The RC Greens allege problems at every step of the VRAP. The Applicant counters that its expert, the author of the procedure, completed the VRAP correctly and that the criticisms of the results are either without merit or really criticisms of the VRAP process itself (t. 1546). Each of the RC Greens' criticisms is discussed below.

The Establishment of Similarity Zones

As described above, in completing the VRAP, the Applicant divided the area around the proposed project into nine Similarity Zones. The RC Greens assert that the Applicant made a number of errors. Specifically, the Hudson River Corridor should not have been characterized as an Industrial & Commercial Mixed Zone because there is current and planned residential and tourist development in the zone. The RC Greens assert it should have been characterized as Large City, Urban Zone (t. 1321). However, the Applicant's expert testified that current land use patterns and those likely to occur were taken into account when establishing Similarity Zones (t. 1531). Even if some of the proposed developments (some of which are in the preliminary planning stages) cited by the RC Greens were to be built, it would not change the aggregate visual character of this area, which remains a commercial and industrial landscape (t. 1532). The Applicant's expert continues that even if the Similarity Zones were delineated differently, the scores would not have changed.

The RC Green's visual expert also argued that the Applicant used too many zones and some should have been dropped (t. 1324). However, the Applicant's expert states that this argument is based upon a misunderstanding of the VRAP process on the part of the RC Greens' expert (t. 1533). This argument seems to have been dropped by the RC Greens.

The RC Greens have failed to show how changing the name of one of the Similarity Zones would have affected the management classification score or the outcome of the VIA in any way. The fact that their expert would have used a different term for a zone is just a difference of opinion between two experts. In the absence of evidence that some standard for the establishment of zones had been violated, the Commissioner should find there is no problem with the characterization of the zones by the Applicant.

Recommendation V-4: The Commissioner should find that the Similarity Zones established in the VRAP process are adequate.

Management Classification System Scores

The RC Greens assert that the MCS scores included in the VRAP were manipulated by the Applicant to reduce the measured visual impact of the proposed project. (Green's brief, p. 14). The RC Green's expert expressed surprise at the scores given by the professional panel during the MCS process. Specifically, he disagreed with the Applicant's experts and believed the scores for the Hudson River Corridor, the Government Centers Zone, the Large City, Urban Zone and the Major Transportation Corridor Zone were all too low. On cross-examination, he stated that these were his opinions and that he had never scored zones in the VRAP process before (t. 1458). The Applicant's expert responded that the scores were accurate and could be explained by a series of factors, including public inaccessibility and low visual quality of the views (t. 1534).

The RC Greens' expert attributed the low score by the professional panel to the poor quality of the Applicant's photos and the viewpoints selected (t. 1335). According to the expert, had better photos been used, the scores for the proposed project would have exceeded the thresholds for these zones (t. 1345). On cross-examination he stated he had no evidence of this, but that this was simply his opinion.

Again, the RC Greens' challenge is in the nature of a difference of opinion. The fact that the RC Greens' expert would have scored the zones differently is not an adequate basis to conclude that the scoring process was done incorrectly, nor does it warrant permit denial. As discussed above, the Commissioner should conclude that the Applicant's photos provide an adequate basis for the VRAP and there is no evidence that different photos would have led to different scoring.

Recommendation V-5: The Commissioner should conclude that the MCS scoring was appropriate.

Relevancy of VRAP Results

The RC Greens assert that the Applicant's VRAP results are outdated and have been made irrelevant by the fact that the layout of both the cogeneration plant and the RNMP has changed as

a result of settlement negotiations. "Instead of only one stack at the Cogeneration Plant there are now three; two 250 ft stacks for the Cogeneration Plant and a 212-ft stack for the RNMP. Instead of buildings 45-ft in height facing the Hudson River along Riverside Ave., we now have 85-ft tall buildings and instead of two surge tanks concealed from view at the eastern end of the RNMP we now have three, prominently displayed along Riverside Ave., only 400 ft from the River" (RC Greens, Initial Brief, p. 10). The RC Greens assert that if the VRAP were repeated with simulations of the proposed project, as it is planned today, the VRAP would show a greater negative visual impact.

The Applicant rejects this view and counters that the changes to the proposed facility were all done to reduce visual impacts at the request of the other parties. Specifically, the number of stacks at the power plant were increased to reduce the width, and therefore the visual impact, of the one originally proposed. The layout of the RNMP was changed to move the truck loading area farther away from the Fort Crailo neighborhood, which moved the large RNMP building closer to the neighborhood. The overall result of these modifications was to reduce the overall visual impact, according to the Applicant. As evidence, the Applicant points to the fact that the other parties interested in visual impacts signed the JSA following the adoption of these additional mitigation measures, arguing that this demonstrates that these changes did in fact lessen visual impacts of the proposed facility.

Recommendation V-6: The revised layout was developed during settlement negotiations to lessen the visual and other impacts of the proposed project. It is reasonable to conclude that as a result of this effort that the visual impacts of the proposed project are now less than when the original VRAP was done, given the participation of visual experts from DPS Staff and other parties. Accordingly, the Commissioner can reasonably conclude that the VRAP score does not underestimate the visual impact.

The Reliability of VRAP Scores

The RC Greens assert that the Applicant's VRAP scores underestimate the true visual impact of the proposed project and that these lower scores are the direct result of deliberate manipulation of the process by the Applicant. Specifically, the RC Greens allege that the Applicant used poor quality photographs

from unrepresentative viewpoints to lower the VRAP scores and underestimate the visual impacts of the proposed project. As an example, the RC Greens claim that had a viewpoint been selected in Island Creek Park (viewpoint #28) instead of the Dutch Apple River Cruise, USS Slater summer dock (viewpoint #26) to represent the Hudson River Corridor in the VRAP process, the VRAP would show greater visual impacts (t.1329). The Applicant counters that viewpoint #28 includes the industrial context of the proposed facility, including the chemical manufacturing plant to the north and the existing power plant and scrap metal yard to the south. Based upon this context, the Applicant argues that had this viewpoint been used, that the VRAP scores might have revealed a lesser visual impact.

The Applicant rejects the RC Greens' assertion that the low VRAP scores were achieved by manipulating the process. Rather, according to the Applicant, the low scores that the Hudson River Corridor Zone received can be explained by the visual components of the landscape around the site of the proposed project. The Applicant's expert witness testified that the segment of the Hudson River where the plant is proposed is developed (with many industrial uses nearby), has only limited public access, is vegetated with non-native species and is the area where a number of combined sewer overflows discharge into the River (t. 2789).

This again is a difference of opinion. The RC Greens again claim that they believe VRAP scores underestimate the true visual impacts of the proposed project. The Applicant asserts that the process was done correctly and accurately measures the visual impact of the proposed project.

Recommendation V-7: The Commissioner should find that the VRAP scores are reliable.

VRAP Professional Panel Scores

The RC Greens assert that the VRAP scores are unreliable because of the four members on the Professional Panel used to score the simulations were consultants to the Applicant (t. 1346). According to the Applicant, a fifth (independent) expert was used to check the scores of the other four and since his scores did not vary substantially from those of the others, the professional panel's scores are valid (t. 1544, 2695). The RC Greens assert that because most of these professionals were employed by the Applicant, they had a conflict of interest which casts doubt on their objectivity.

The RC Greens claim a second problem with the professional panel, specifically that the fifth expert was given smaller simulations of poorer quality than were the other four members of the panel. The simulations provided to the fifth expert were 5" x 6 5/8" (Exh. 150, 152 and 154, t. 2725)). These smaller simulations prevented the independent expert from assessing the true visual impacts of the proposed project. The Applicant counters that the size of the simulations was adequate and the fifth expert was familiar with the Capital District and site of the proposed project (t. 1574). The fifth expert did not testify at the hearing and so these representations are hearsay.

The fact that four of these experts were consultants to the Applicant does not automatically mean that they were not objective. It is routine in DEC hearings to have expert consultants prepare materials on behalf of Applicants. The RC Greens provide no other evidence of bias, only the inference that retaining the consultant leads to bias. This is insufficient to challenge the panel's conclusions. Similarly, the RC Greens infer that because the fifth expert was given smaller photo simulations, this would automatically lead to lower than expected scores, without any other proof. This argument should also be rejected.

Recommendation V-8: The Commissioner should find that the scores of the professional panel are reliable.

VRAP Public Panel Scores

Following the scoring of the visual impacts by the professional panel, the Applicant arranged for the quasi-public panel to do a similar scoring. This was done, in part, to verify the results of the professional panel. The panel members were shown simulations projected on a screen (approximately eighteen inches by eighteen inches) and asked to rate the visual impact (t. 2759). No other public input was sought for the VRAP process (t. 2779).

The RC Greens challenge the results reached by the quasi-public panel, because the panel was not selected according to standards established in the VRAP manual (t. 1346). The VRAP manual states that panel members should be from "civic and other public groups in the study area, provided that the participants represent the general public" (Exh. 100, p.30). Groups to be asked to participate include governmental officials and members of local social organizations including the Kiwanis, Garden Clubs, Sierra Club, and Lions. The RC Greens assert that of the

twenty organizations invited to participate on the panel by the Applicant only three were non-governmental and none of these organizations responded. No explanation was ever provided by the Applicant as to why so few non-governmental organizations were contacted (t. 2730). The Applicant's expert testified that he only conducted the workshop and did not select the panel members. He also stated the composition of the public panel was not ideal, from a representative perspective (t. 2736).

The RC Greens assert that makeup of this panel violated the VRAP guidelines which state these panels should include a representative sample of people (Exh. 100, p.30). The Applicant responds that the public panel is not required by the VRAP, but rather was requested by DPS and DEC Staffs (t. 2780). The Applicant's expert, and principal author of the VRAP manual, stated that the type of public panel used in this case had never been used in this fashion before and was experimental (t. 2745). There is no explanation as to why this type of public involvement was selected by agency staffs.

The RC Greens assert that the final composition of the panel is so biased that its results cannot be trusted. Of the six representatives of various governmental bodies that agreed to participate on the panel, the RC Greens allege that three had stated their support for the proposed project publicly (t. 2735). These three included the then-Mayor of the City, the then-Director of the Rensselaer County Environmental Management Council and the then-Chair of the City's Planning Commission. A fourth member of the panel was the ex-Director of the Office of Planning and Development for the City and presumably served at the Mayor's pleasure. A fifth member worked for an engineering firm doing business with a neighboring town (t. 2740) and perhaps the City. The sixth member worked for the Planning Commission in the closest neighboring town. The alleged public statements in support of the proposed project are not in the record, but cited in the RC Greens' brief (p. 18).

The Applicant apparently acknowledges that members of this panel had supported the reuse of the site of the proposed project, but argues that this is not a reason to bar their participation on the panel to evaluate visual impacts (Applicant's Reply Brief, p. 11). Since these individuals were public servants, the Applicant contends that they were concerned about safeguarding the interests of their constituents and were not biased. Given the complexity of the VRAP process, the Applicant argues, it was appropriate to use panel members who were familiar with land use issues. In addition, since the results of the public panel closely agreed with those of the

professional panel, those results confirmed the reliability of this information (t. 1545).

In addition to problems with the composition of the public panel, the RC Greens assert that the panel was confused by the rating process, which led to lower scores. This confusion was acknowledged in the application (Exh. 1, p. 10-20) and by the Applicant's expert (t. 1545), and is apparent in the score sheets of at least two and perhaps three of the panel members (t. 2771).

The RC Greens are correct that there are numerous problems with the public panel that lead to the conclusion that the scores of this panel are unreliable. The use of a public panel is not required by the VRAP or the DEC visual policy, but was required by agency staffs in the scoping document. There seems little point in requiring the Applicant to conduct another public panel to correct the mistakes made in the first one because this panel was an experiment (and perhaps one not worth repeating). The scores from this panel did not materially affect the overall scoring of the proposed project, and those scores should be discarded.

Recommendation V-9: The Commissioner should disregard the scoring of the public panel.

THE RC GREENS' PHOTO SIMULATIONS

To show what they believe are the true visual impacts of the proposed facility, the RC Greens created their own photo simulations. The underlying photos were taken using a different camera, with longer lenses, at different times of the year. The Applicant contends that these photos lack consistency and introduce bias (t. 1612) because using a longer lens increases visual impact by making the simulated structures appear larger and more dominant. In addition, the Applicant's expert reported two major concerns with the RC Greens photos: that all the images have a blue hue to them and they have washed out skies (t. 1624), both of which increase the visual impact of the proposed facility.

The RC Greens' expert created his own computer simulations of the proposed project that were then superimposed upon these photos to produce, what the RC Greens assert are accurate simulations of what the proposed project will look like. The RC Greens conclude that had their simulations (or other accurate ones) been used, the visual impact assessment would have revealed

greater visual impacts and led to the conclusion that the proposed project should be denied.

The Applicant challenges the quality of the photo simulations prepared by the RC Greens. The Applicant contends there are a number of problems with the RC Greens' simulations. First, the Applicant claims that the RC Greens' experts did not place the simulations accurately in the photographs which leads a viewer to perceive the proposed project as floating. It also makes the structures more pronounced and the contrast with existing conditions is exaggerated. Second, this effect is compounded by incorrect coloring of the buildings in these simulations which makes them seem larger than planned (t. 1615). Third, the RC Greens incorrectly set the ambient lighting in their computer program, making the facilities appear brighter (t. 1624). According to the Applicant, these errors, combined with the blue hue and washed out skies in the photos, artificially increases the visual impacts of the proposed facility. Finally, the Applicant's expert states that the light band around the top of each building in the RC Greens' simulations is not an element of the proposed project (Exh 68, 78). The RC Greens acknowledge that their simulations lack a true three-dimensional quality, but state that this is a fault of the Applicant's simulations as well.

The RC Greens assert that the plume from the proposed cogeneration plant, when combined with the plume from the smaller Coastal power plant across the road and the emissions from the RNMP, will create a large curtain of smoke, visible for miles (Exh. 153). The Applicant challenges the accuracy of the plumes in the photo simulations produced by the RC Green's experts. Specifically, the Applicant maintains that the plumes greatly exaggerate plume height, width and opacity (t. 1543). Both parties to this dispute agree that there is no accepted computer model available to predict the plume from a 20E hybrid cooling tower. The Applicant bases its conclusion that the RC Green's photo simulations are inaccurate on the fact that the RC Green's expert acknowledged he had never observed such a plume (t. 1502) but rather studied photos of other plumes from other types of cooling towers (t. 1343). In contrast, the Applicant's expert used engineering data and consulted with engineers familiar with this type of cooling tower in order to more accurately model the expected plume (t. 1620, 1666). The RC Greens contend that their simulations with plumes are more accurate than the Applicant's because the underlying photos are better (t. 1343).

The RC Greens argue that their simulations accurately predict what the proposed project will look like (Exh. 71, 71 and

75). According to the RC Greens, the proposed power plant will dwarf the existing one across the road, its 100 foot tall buildings would dominate the landscape, and its two stacks would be 100 feet taller than those at the existing power plant. According to the RC Greens, the RNMP would be the equivalent in size to nine football fields and would have a 212 foot tall stack and buildings as tall as 85 feet along Riverside Avenue. The Applicant also challenges the RC Greens' assertion that the RNMP building would be equivalent in size to nine football fields. The Applicant states this is misleading because the plant is comprised of at least five different buildings, some with different roof heights.

While the RC Greens' simulations do not underestimate the visual impact of the proposed project, they probably overestimate it. After review, many of the Applicant's criticisms appear valid and it is likely that the RC Greens' simulations do overstate the visual impacts of the proposed project. For example, the RC Greens' simulation from Island Creek Park has a strong blue hue which makes the brightly colored buildings more visible and the plume is represented as a nearly unbroken field of white (Exh. 73). Also, the RC Greens' simulation from the edge of the Fort Crailo neighborhood obliterates all view of the sky with its simulated plume (Exh. 81). Both the Applicant's simulations and the RC Greens' simulations are in the record and by their very nature, are just approximations of what the proposed project might look like. However, it is reasonable to conclude that the Applicant's simulations better represent what the proposed project would look like.

Recommendation V-10: The record is adequate for the Commissioner to make her findings. Both sets of simulations are available for review. It is likely that the RC Greens' simulations overstate the visual impact, while the Applicant's simulations perhaps underestimate the impact. Thus, the true visual impact is probably somewhere between the two sets of simulations, and probably closer to that portrayed by the Applicant.

Removal of Existing Trees Along the Hudson

The RC Greens assert that some or all of the existing 30-35 foot tall trees along the Hudson River's edge which are represented in the Applicant's simulations and serve as visual screening for the proposed project will have to be cut down. To support this claim, they cite the Record of Decision (for the RNMP site) issued by DEC on September 12, 2003 (Exh. 104) which

the RC Greens claim requires the removal of these trees in order to install groundwater collection trenches or wells (Fig. 7). It is undisputed that if these trees were removed it would increase the visual impact of the proposed project and increase the nighttime visual impact because exterior lighting on the riverside structures will not be screened. In addition, if these trees are removed, the RC Greens argue, it may be impossible to plant new trees if the area is covered with asphalt as part of the remediation of the RNMP site. If trees can be planted in this area, the RC Greens contend, it will take 30 years for any newly planted trees to fully screen the proposed project.

The Applicant counters that the ROD is not a final design but rather only a conceptual drawing and it is not certain these trees would have to be removed. The area in question is being remediated pursuant to DEC's regulations (6 NYCRR part 375) and this process does not allow a specific possible future reuse of the site to be taken into consideration, such as the proposed project. However, the Applicant stated that it had consulted with DEC remedial staff who indicated that plantings called for in this proceeding would likely be approved. It is unclear whether this means the trees along the Hudson River will remain undisturbed or not. It would be helpful if the parties specifically addressed this issue in their briefs to the Commissioner.

Recommendation V-11: The parties need to provide additional information in their briefs regarding the future status of the trees along the Hudson. These trees are an element for screening the proposed project and their status needs to be clarified.

WHETHER IMPORTANT INFORMATION IS MISSING FROM THE RECORD

Final Lighting Plan

The RC Green's visual expert stated that while the Applicant's Revised Conceptual Area Lighting (Exh. 41) did include improvements, it did not provide enough information to properly evaluate the adverse visual impacts of the exterior lighting (t. 1395). Among the additional mitigation measures included in the JSA are a reduction in the number of lights mounted at 40 feet or higher, a reduction in the number of 400 watt fixtures, a reduction in the number and height of wall mounted fixtures and a reduction in the total light load at the entire site.

One omission cited by the RC Greens relates to site illumination levels, which the Applicant argues can be determined using information provided (t. 1752). The Applicant proposes a lighting level of 2 footcandles ("fc") on average for the entire site (t. 1753) in the conceptual lighting plan, which is consistent with the 1-5 fc standard set by the Illumination Engineering Society of North America ("IESNA") for facilities such as the proposed project (t. 1750). Exact illumination levels will be determined in the final lighting plan, which the Applicant proposes to submit as a compliance filing to DPS Staff.

A second alleged omission relates to the type of fixture which is to be used (t. 1396). The RC Greens contend that unless full cut-off fixtures are used exclusively, light will be directed upward and illuminate the plant's plume, increasing visual impacts. The Applicant proposes to use prismatic refractors on some of its fixtures, which the RC Greens allege will create unnecessary glare (t. 1391). The Applicant concedes that prismatic refractors can cause glare, however, they provide a more even and uniform light than do full cut-off fixtures (t. 1756). The Applicant asserts that it has maximized the use of full cut-off fixtures, which the Applicant's expert stated will prevent illumination of the plume, even if mounted on 40 foot poles (t. 1762).

The RC Greens' expert also states that the Applicant should be required to use metal halide lamps which provide better illumination at lower light levels (t.1389). If the Applicant does use high pressure sodium lamps, as planned, it will make the site more visible than is necessary, for safety and security. The Applicant's expert counters that high pressure sodium lamps are an economical light source used in areas where color rendering is not important and that metal halide lamps are not necessary for this proposed project (t. 1753). In fact the Applicant's expert stated that the metallic white light from metal halide lamps would make the proposed project more visible (t. 1767). The RC Greens expert did not respond regarding the increased visibility from metal halide lamps.

The RC Greens' visual expert also states that the Applicant should refrain from mounting fixtures on the sides of buildings (t. 1392). Even though the proposed project will have a smooth, non-reflective metal cladding facade, any wall mounted light fixtures will increase the structures' visibility. The Applicant's expert notes that the revised conceptual lighting plan substantially reduces the number of wall mounted fixtures and the proposed mounting height for these fixtures, which should be sufficient (t. 1757).

The Applicant contends that there is no need to produce a final lighting plan before project approval and that the current conceptual lighting plan, which responds to comments of the RC Greens, is adequate. The Applicant argues that it has committed to meeting industry standards set by the IESNA (t. 1509) and that this will minimize the impacts of exterior lighting. Finally, the Applicant notes that there are no established standards to measure off-site visual impacts of project lighting.

The RC Greens also criticize the proposed Certificate Condition that requires the final lighting plan to be submitted as a compliance filing for the power plant. No similar provision exists regarding the filing of a final lighting plan with DEC as a SEQRA condition.

Recommendation V-12: The Commissioner should allow the submission of the final lighting plan after permit issuance because the record is adequate to make SEQRA findings. The Applicant has committed to meeting IESNA standards and the visual impact of the exterior lighting can be evaluated based upon these standards. The final lighting plan should be subject to DEC Staff review and approval. Before approving the final plan, DEC Staff should share it with the RC Greens for comment, including input on lights mounted on the sides of buildings and the final placement of fixtures. The RC Greens' argument regarding the use of metal halide fixtures should be rejected because the Applicant's claim that such lighting will increase visual impacts remains unchallenged.

FAA Lighting

The RC Greens assert that the lighting required by the Federal Aviation Administration ("FAA") on the stacks will likely create adverse visual impacts, especially when combined with the plumes (t.1372) and at times create dramatic pulsating red clouds (t. 1374). Regarding proposed FAA lighting, the Applicant's expert responds that it would only be in abnormal conditions that the FAA lighting would be expected to create a visual impact (t.1769). Of course, the whole purpose of placing lights upon the stacks is to make them visible to aviators.

The Applicant has agreed to use the lowest intensity lights allowable by the FAA, to mount these lights at the lowest elevations allowable, and to use dual lighting systems (if permissible) which switch from white lights during the day and

red lights at night (Exh. 48, Appendix JS-I, paragraph VIII(F)). The RC Greens suggest no additional mitigation measures.

Recommendation V-13: The Commissioner should reject the RC Greens' arguments regarding FAA lighting because it is necessary for public safety, subject to federal government approval, and the record shows the Applicant will minimize impacts to the maximum extent practicable.

Final Landscape Plan

For the RNMP, the Applicant plans on finalizing the details of the landscaping plan as it completes the City's Site Plan Review process. The RC Greens assert that since the landscaping plan is still at a preliminary stage, the Commissioner cannot rely on it in making findings. The Applicant counters that the RNMP site is not heavily vegetated, except along the Hudson River, and that where practicable, existing vegetation will be preserved (Exh. 39). The Applicant argues that there is no need to provide the final landscape plan before permit issuance because the preliminary plan contains an inventory of species from which plantings will be selected. The exact location of new plantings will be done in the field, after assessing the extent and quality of existing vegetation. In addition, the Applicant has agreed to provide a Tree Protection Plan, that among other things, requires that mature trees be preserved to the extent practicable.

Recommendation V-14: The Commissioner should allow the Applicant to submit its final landscaping plan after permit issuance. The preliminary plan and other information in the record are adequate to make findings.

Architectural Details

The RC Greens take issue with the Applicant's plan to provide architectural details for the RNMP after the permits are issued, in plans to be submitted later to the City's Planning Department. Since these details are not known now, the RC Greens contend that the Commissioner will be unable to take a hard look at them before she decides whether or not to issue the permits. The RC Greens' visual expert testified that there were few opportunities to enhance the proposed project, architecturally. (T. 1356-7). The Applicant's expert testified that architectural details, such as choice of fenestration, placement of glass

bricks and building materials selection are usually made during the final design phase, after permits are issued (t. 1671).

The record contains a great deal of information regarding size, color, location and other details of the proposed project. Both the Applicant and the RC Greens have used this information to produce their simulations. Because the mitigative effects of the architectural details are not yet finalized, the simulations do not include them. Thus, the visual impact of the proposed project is overstated in the simulations. These simulations provide an adequate basis for the Commissioner to make her SEQRA findings and therefore the architectural detail can be provided after permit issuance, but should be subject to DEC Staff review and approval.

Recommendation V-15: The Commissioner should not require that the final architectural details be provided before permit issuance because the record contains enough information to make the required SEQRA findings. However, a permit condition should be drafted to require DEC Staff review and approval of these architectural details before construction.

Visual Impacts of Truck Traffic

The RC Greens assert that there will be a significant impact from the increased truck traffic (as many as 508 per day) on Columbia Turnpike, along the edge of the Fort Crailo neighborhood. The visual impact of these additional trucks was not assessed by the Applicant and therefore, the RC Greens contend that the project should be denied. On cross-examination the RC Greens' visual expert stated that he did not know of any way to measure the visual impacts of truck traffic (t.1482).

The Applicant asserts that claims by the RC Greens that the visual impact of the truck traffic to and from the proposed project is unacceptable is unsupported by any technical analysis (t. 2865). The truck traffic to and from the project is not different from the type of traffic on the roads today nor are there any established standards or guidelines by which the off-site visual impacts of truck traffic can be assessed.

Recommendation V-16: The Commissioner should reject the RC Greens' claim that the project should be denied because there is no analysis of the visual impacts of increased truck traffic from the proposed project.

Other Alleged Problems with the Record

Limited Number of Revised Simulations

The RC Greens assert that because the Applicant only prepared four new simulations depicting the revised layout of the proposed project, the record is insufficient for the Commissioner to make her findings. The RC Greens maintain that the Applicant should have also produced simulations from photos it took from a ballfield in the neighborhood which has a direct view of the site (Exh. 2, figure 10-20, 1S-1 and 1S-2). On one of these four simulations, the one from the train station (Exh. 43), the RC Greens claim the buildings are inexplicably dark, which underestimates the visual impacts of the proposed project (t. 1351).

While there are only four simulations reflecting the final layout of the proposed project, the record contains ample other evidence regarding visual impacts such that the Commissioner can make SEQRA findings.

Recommendation V-17: The Commissioner should reject the RC Greens' argument. There is ample evidence in the record regarding the visual impacts of the proposed project.

Conflicts with Land Use Trends along the Hudson River

The RC Greens assert that approval of the proposed project would conflict with a land-use trend away from new industrial uses that is occurring along the Hudson River. The RC Greens point to the revitalization of Broadway in Albany, the new DEC Headquarters, and a new pedestrian bridge to the Waterfront park and the Corning Preserve, as well as the revitalization of the Palace Theater, and a proposed convention center. This trend is also occurring on the Rensselaer side of the Hudson as evidenced by the new Amtrak station, renewed interest in the waterfront, and new proposed mixed use development and the permanent summer dock for the Sloop Clearwater. According to the RC Greens, this trend is accelerating because of renewed economic activity in the area and the existing industrial zoning, was implemented 15 years ago, does not reflect current economic trends.

The Applicant responds that the site is zoned industrial by the City and the City's Local Waterfront Revitalization Program identifies the site of the RNMP as existing industry. The Applicant points out that the site of the cogeneration plant is

listed as appropriate for potential industrial expansion (t. 1450).

The fact that different types of development are occurring in the area should be noted by the Commissioner. However, it should not compel the Commissioner to deny the project.

Recommendation V-18: The record does not support the assertion that approval of this project would conflict with any land use trend. This is a proposed industrial re-use of a contaminated property in an industrial area.

CONCLUSION

There is no debate that the proposed project will be visible from the Hudson River and at a number of locations in the City of Albany. The RC Greens contend that the proposed project will dominate the River and obstruct the scenic view of the Rensselaer bluffs and point to their simulations as proof (Exh. 71, 72, and 75). According to the RC Greens, the view from the bluffs on the Albany side of the River will show that the RNMP will be bigger than the Fort Crailo neighborhood and the immense flat roof will dominate the landscape, dwarfing other landscape features (Exh. 68 and 69). From downtown Albany, the proposed project will be visible from the Empire State Plaza, the Governor's Mansion and even the Commissioner's office. The project will also be visible from portions of Interstates 90 and 787. The RC Greens assert that these impacts are so great, even with the proposed mitigation measures, that permit denial is warranted.

The Applicant disputes this claim and points to the JSA which incorporates mitigation measures for visual impacts. For the RNMP, the building footprint has been reduced to minimize its apparent mass (it is 100,000 sq. ft. smaller than when originally proposed); the layout has been changed to move truck loading and unloading activities away from the Fort Crailo neighborhood; the hydrogen peroxide bleaching process is no longer proposed, resulting in the elimination of a 135 foot tall stack and plume associated with the process; the RNMP will incorporate architectural details such as brick, glass block or fenestration in the facades; a screen will be constructed to minimize views of the truck parking area; slatting or other material will be installed to minimize truck headlight shine to the southeast; and masonry walls will be constructed between the RNMP and Riverside Avenue (t. 1606). For the cogeneration plant the JSA calls for the use of two smaller stacks (20 feet wide) instead of one

larger stack (50 feet wide), the use of a 20E F plume abatement cooling tower which will reduce visible plumes during daytime hours to 234 annually, the use of a low pressure economizer bypass when visible plumes are expected, and matching the exterior appearance of the existing waterfront pump house building to the proposed project. In addition, the Applicant proposes three mitigation measures which affect both parts of the proposed project: landscaping to partially screen the proposed project; the development of additional criteria for exterior lighting to reduce impacts; and the creation of a \$200,000 revolving loan fund for the City's Historic Residential zoning district and a \$60,000 donation to the Natural Heritage Trust for local historical sites. With these mitigation measures agreed to during the settlement process as well as those originally proposed, the Applicant's visual expert asserts that the proposed project will not have a significant adverse impact on visual quality and that visual impacts have been mitigated to the maximum extent practicable (t. 1608).

Of the parties that raised visual impacts at the issues conference, only the RC Greens remain dissatisfied with these mitigation measures and contend that the visual impacts are too great for both portions of the proposed project. The RC Greens argue that in many cases the proposed mitigation will actually increase the visual impacts and that the proposed vegetative screening will be ineffective to soften visual impacts. It is important to note that the RC Greens offer no specific additional mitigation measures that are not already included. Thus, the Commissioner can reasonably conclude that visual impacts have been adequately assessed and have been minimized to the maximum extent practicable.

The final question of whether the visual impacts are acceptable and the whether the permits should be issued rests with the Commissioner alone. As discussed elsewhere in this document and in the Recommended Decision in the companion case, the RC Greens argue the Commissioner should deny the project because the visual impacts of the proposed project are too great. 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.

There is no denying that the proposed project is a large, industrial project that will be visible from many points around the site. However, the record is sufficient for the Commissioner

to make her SEQRA findings. The record supports a conclusion that the permits should be issued.

Recommendation V-19: The Commissioner can reasonably conclude that the requirements of SEQRA have been met and, once the Commissioner determines the requirements of DEC's Visual Policy have been met, that the permits for the proposed project can be issued. There is nothing in the record to suggest that the proposed project would obstruct the view from any historically or culturally significant site. The Commissioner can conclude that the facility minimizes adverse environmental impacts on visual resources consistent with the social, economic and other essential considerations from among the reasonable alternatives.

COMMUNITY CHARACTER

The issue of the impacts from the proposed facility on community character was proposed by both the FCNA and the RC Greens. This issue was advanced to adjudication and no appeals were taken. Only the FCNA offered testimony regarding this issue. FCNA proposed four sub-issues relating to the impact of the proposed facility on community character of the Fort Crailo neighborhood, all of which are related. The four are: 1) the DEIS was flawed and incomplete; 2) the Applicant failed to properly evaluate the cumulative impacts of the proposed project; 3) a separate analysis should have been conducted of the impacts on the Fort Crailo neighborhood; and 4) the Applicant failed to adequately analyze the impacts of the proposed project on property values in the Fort Crailo neighborhood.

As discussed earlier, the Fort Crailo neighborhood is a triangular area bordered by the Hudson River on the west, Columbia Turnpike on the east, and Rensselaer on the South. There are approximately 175 housing units and more than 425 residents in the neighborhood (t. 2631) and several businesses, primarily along Columbia Turnpike. The neighborhood takes its name from Fort Crailo, a historic home and museum located on Riverside Avenue that overlooks the Hudson River. It is the residential area closest to the proposed project.

FCNA does not seek to block the approval of the proposed project. Rather FCNA seeks additional mitigation to lessen the impacts of the proposed project. Specifically, FCNA seeks the creation of a \$7 million dollar trust fund for a "Fort Crailo Neighborhood Value Protection Program" to be managed by the FCNA

(Exh. 148). This fund would be used for three purposes in the Fort Craillo neighborhood: 1) air and environmental monitoring; 2) protecting market values of properties; and, 3) funding community enhancements, including parks, landscaping, and the creation of a low-interest loan program to help neighborhood residents purchase and rehabilitate residential properties.

The FCNA participated in the settlement discussion but did not sign the JSA. The FCNA claims that concessions offered by the Applicant during negotiations were withdrawn once the FCNA's financial ability to participate in the proceeding had been depleted. The Applicant claims that its substantial offers were rejected by the new leadership at the FCNA, and it is these individuals who are to blame.

DEIS is Flawed and Incomplete

In his pre-filed, direct testimony, FCNA's expert stated because of the flaws and incompleteness of the DEIS, the impacts of the proposed project are not fully understood and have not been quantified and that the Applicant should be directed to provide supplemental information (t. 2635).

One area where the DEIS is alleged to be incomplete involves the Applicant's analysis of alternatives. According to FCNA's expert, the DEIS fails to adequately weigh alternatives to the proposed project including alternative sites and size (t. 2636). The FCNA argues that Applicant also should have been required to analyze other alternatives, including the use of the site as a park or as mixed residential/commercial development, which FNCA's expert asserts will be more compatible with the adjacent historic residential neighborhood (t. 2636).

SEQRA requires an applicant to provide a description and evaluation of the range of reasonable alternatives that are feasible, considering the objectives and capabilities of the project sponsor (6 NYCRR 617.9(b)(5)(v)). Not every conceivable alternative need be considered in the DEIS, but rather a rule of reason and balance should be used in deciding which alternatives should be discussed. This discussion must provide enough information for a reasoned choice to be made.

In this case, the Applicant devoted a chapter of the DEIS to the evaluation of various alternatives (Exh. 1, Chapter 19). The Applicant considered alternative sites, production processes, project sizes, as well as the no action alternative. FCA's claim that the Applicant failed to consider alternative sites and sizes

is a conclusory statement and FCNA does not identify any specific alternative that should have been considered. FCNA cites no authority for its position that the Applicant should have considered using the site as a park, or should have developed residential/commercial uses. These uses are not consistent with the Applicant's desire to construct an industrial facility on the site. Accordingly, it is not reasonable to expect the Applicant to conduct such an analysis.

The second area where FCNA's expert claims the DEIS is deficient is that it does not contain information regarding the current negotiations between the city and the Applicant regarding the terms of a "Host Agreement" nor has it been disclosed how much money from this agreement will be dedicated to the Fort Crailo neighborhood. According to FCNA's expert, the DEIS must take into consideration how the impacts to the neighborhood are to be offset in lieu of mitigation (t. 2635). On cross examination, the FCNA's expert conceded that in his experience host community agreements are typically negotiated between a project sponsor and the host community and are not part of any state regulatory or permitting approvals (t. 2670).

The third area of alleged deficiency involves the property tax burden placed upon residents in the neighborhood. Specifically, the FCNA argues that DEIS is deficient because it fails to provide an adequate analysis of property tax impacts of the proposed project. FCNA's expert asserts that the Payment in Lieu of Taxes ("PILOT") agreement which was negotiated between the County Industrial Development Agency and the Applicant unfairly shifts the tax burden on to property owners within the Fort Crailo neighborhood. (t. 2637). On cross-examination, FCNA's expert admitted not knowing how much the current owner of the property paid in taxes. Rather, he argued that because the PILOT agreement lowered property taxes for the Applicant, that residents of the Fort Crailo neighborhood would pay a disproportionate share. However, he offered no analysis or support for this statement (t. 2671).

Recommendation CC-1: The Commissioner can reasonably conclude that the Applicant's analysis of alternatives is sufficient to make SEQRA findings. The FCNA's claims that the Applicant's alternatives analysis is lacking are broad, unsubstantiated, conclusory comments. FCNA claim that analysis of a host community agreement is necessary before regulatory approval can be given is without merit. Finally, FCNA's claim that the DEIS is incomplete because it does not analyze the impacts of the PILOT agreement upon the neighborhood also fails.

Proposed Project's Impact on Fort Crailo

The second and third sub-issues raised by the FCNA are closely related and allege flaws in the cumulative impact analysis and the Applicant's failure to evaluate the impacts of the proposed facility on the Fort Crailo neighborhood in a separate analysis. Specifically, FCNA's expert states that the DEIS "fails to provide an adequate analysis of environmental impacts which are specific to the Fort Crailo neighborhood. Rather, the DEIS provides a generalized analysis of the impacts upon the City of Rensselaer and the Capital District" (t. 2632). This alleged flaw resulted in an analysis which understated the impacts on the Fort Crailo neighborhood. FCNA asserts that this full analysis of the cumulative impacts on the Fort Crailo neighborhood is required by SEQRA (6 NYCRR 617.10(e)). The SEQRA regulations cited by FCNA relate to generic environmental impact statements and are not applicable here.

The FCNA cites no statutory or regulatory sections that require the type of neighborhood analysis it seeks. An EIS must describe the existing environment, any existing uses of the project site and affected adjacent areas, and discuss the potential significant environmental impacts. In this case the Applicant has done this for the area surrounding the proposed project and the impact on the Fort Crailo neighborhood can be discerned from this discussion. There is no requirement for a separate analysis and the Applicant's approach is reasonable. The FCNA has not shown that the impacts on the neighborhood will be different in any material way from the impacts on other areas around the proposed project.

Recommendation CC-2: There is no requirement that a separate analysis be prepared for each neighborhood around a proposed project. The Applicant's analysis of the impacts on the area surrounding the proposed project is reasonable and legally adequate.

Impacts on Property Values

The last sub-issue proposed by the FCNA is the impact of the proposed project on property values in the Fort Crailo neighborhood. Their expert states that "the properties in the neighborhood will without question be reduced in value" because they will be in the shadow of the proposed project, thus making them less attractive to future buyers (t. 2634).

As noted in the Issues Ruling, the issue of property value diminution is not an adjudicable issue in a DEC administrative

hearing (see Matter of Red Wing Properties, Interim Decision of the Commissioner, January 20, 1989). In this case, the issue was adjudicated on the joint record, however, this evidence can only be considered in the companion Article X case. As explained in the Recommended Decision in that case, the FCNA has failed to demonstrate at the hearing that the proposed project would have an impact on property values in the Fort Crailo neighborhood.

ECL ARTICLE 15 PERMITS

As currently proposed, DEC would issue two approvals pursuant to Article 15 of the ECL, a Water Quality Certification and a permit to allow the excavation and fill necessary to construct water intake and outfall structures in the Hudson River. A single draft permit relative to these two approvals is in the record (Exh. 4) and no issue related to this permit was adjudicated. However, this permit is properly issued by the Board, pursuant to its authority (see PSL §172(1), 16 NYCRR 1000.7).

The water withdrawn from and discharged to the Hudson through these water intake and outfall structures is necessary for the operation of the cogeneration plant, although most of the capacity will be used at the RNMP. Further, these permits are to be issued pursuant to state law and are not part of the federal delegations from EPA. Accordingly, the Legislature has granted the authority to issue these permits to the Board. Precedent for the Siting Board's authority to issue these approvals can be found in Athens Generating Company, L.P., Case # 97-F-1563, Recommended Decision, p. 137-140.

Having the Board issue the Article 15 permits will not require the reopening of the record. This matter is merely one of agency jurisdiction, and the environmental impacts of these permits has been fully evaluated and not disputed. Accordingly, the record need not be reopened.

CONCLUSION AND RECOMMENDATION

With respect to traffic impacts, the ALJ concludes that with one exception, the record is sufficient for the Commissioner to make the required SEQRA findings. The one missing piece of information, an analysis of the impacts of the release of construction workers vehicles before and after the evening peak hour, must be provided. The Applicant is directed to notify the ALJ by January 20, 2003 whether it will provide this analysis to all parties. If the Applicant opts not to produce this analysis,

a briefing schedule will be set immediately. If the Applicant chooses to produce the analysis, it will notify the ALJ as to when the analysis shall be distributed. After the other parties have had an opportunity to review this new information, a conference call will be held with the ALJ to discuss whether or not the hearing needs to be reconvened.

With respect to visual impacts, the ALJ concludes that the record is unclear as to whether DEC's Visual Impact Policy has been complied with. If the Commissioner determines that it has, the ALJ finds that the record demonstrates that visual impacts of the proposed facility have been minimized to the maximum extent practicable.

With respect to community character, the ALJ concludes that the sub-issues raised by the FCNA are without merit and should not prevent the Commissioner from approving the proposed project.

Finally, the ALJ concludes that the Commissioner does not have the authority to issue permits requested pursuant to ECL Article 15. These permits can only be issued by the Siting Board, which may delegate the authority to issue these permits to DEC.