STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application
for a Mined Land Reclamation Permit
pursuant to Environmental Conservation Law (ECL) Article 23 and Title 6 of the New York Code of Rules and Regulations (6 NYCRR) Part 420,

RULING ON ISSUES AND PARTY STATUS

DEC Application No. 9-1430-00014/00011

of

BUFFALO CRUSHED STONE, LLC,
Applicant

April 28, 2008

INTRODUCTION

This ruling addresses the requests for party status and issues proposed for adjudication regarding the application of Buffalo Crushed Stone, LLC (Applicant, BCS) to the Staff of the New York State Department of Environmental Conservation (DEC Staff) for the expansion of its quarry located in Cheektowaga, Erie County, New York (facility). The proposed expansion involves the mining of approximately 40 acres of land between the east and west basins of an existing hard rock (limestone) quarry. The current mining permit, which expires in May 2008, allows for the mining of limestone from the east and west basins at the facility. The proposed action would relocate asphalt and rock crushing plants and material stockpiles from ground level between the two basins to the bottom of the east basin, more than 100 feet below grade. Additionally, Applicant seeks to mine the area between the two basins known as the isthmus, and extend the life of the mine by about 20 years. The quarry has been in operation since 1929 and produces limestone products for use in local construction and maintenance projects.

DEC Staff has prepared a draft Mined Land Reclamation Permit for the proposed expansion which would allow for the mining of the isthmus, relocation of the processing and extend the life of the mine by about 20 years.

The permit hearing procedures under 6 NYCRR Part 624 govern the proceeding. The Applicant and DEC Staff are parties to the hearing under the DEC permit hearing procedures. Petitions for party status were received from Cheektowaga Citizen Coalition Inc. (CCC), the Town of Cheektowaga (Town) and the

Depew/Cheektowaga Taxpayers Association (TA), (collectively petitioners).

Upon review of the record in this matter, none of the proposed issues meets the standards for adjudication and, consequently, the petitions for party status are denied, as more fully addressed herein. A total of ten issues were proposed for adjudication in CCC's September 27, 2007 petition for party status. A total of seven issues were proposed in the petition of TA dated September 26, 2007. A total of fifteen issues were proposed in the Town's September 28, 2007 petition. All of the issues proposed by CCC and TA were also proposed by the Town. A total of fifteen issues were proposed by all three parties.

SEQRA

The Department is lead agency pursuant to the State Environmental Quality Review Act (SEQRA) (ECL Article 8). DEC Staff determined that this is a Type I action that may have a significant impact on the environment. Accordingly, the Department issued a positive declaration requiring BCS to prepare a Draft Environmental Impact Statement (DEIS). The Department noticed acceptance of the DEIS on August 29, 2007.

PROCEEDINGS

Legislative Hearing

DEC Staff requested that a public hearing be held. The matter was sent to the Department's Office of Hearings and Mediation Services (OHMS) and was assigned to Administrative Law Judge (ALJ) Molly T. McBride. By Notice dated August 29, 2007 DEC Staff noticed the legislative hearing and issues conference as well as the acceptance of the DEIS and the Notice of Complete Application. This Notice was published in the Department's internet publication, *Environmental Notice Bulletin* (ENB) as well as the *Buffalo News* on August 29, 2007. Copies of the Notice were also sent to: persons identified as interested parties; Erie County; and the Town of Cheektowaga (where the facility is located).

Pursuant to the Notice, a legislative public hearing was held on October 15, 2007. Two sessions of the legislative hearing were held at the Bellevue Fire Hall located at Como Park Boulevard, Cheektowaga, New York. The hearing site was across the street from the facility. DEC Staff appeared by the following Staff from the Department's Region 9 office: David Stever, Esq., Assistant Regional Attorney, Steven Doleski,

Regional Permit Administrator and David Denk, Deputy Regional Permit Administrator. Several other members of DEC Staff were in attendance. The Applicant was represented by Craig Slater, Esq. of Harter Secrest & Emery, LLP. In addition to Mr. Slater, several employees of Applicant attended the hearing as well as Applicant's consultants.

There were approximately 50 people in attendance at the afternoon session and eleven people spoke. The evening session had approximately 60 attendees with fourteen speakers. Both sessions of the legislative hearing began with a brief presentation of the project by Rob Napieralski of TVGA Consultants, Applicant's consultants. Mr. Napieralski outlined the permit application and the quarry operation. After Mr. Napieralski's presentation, Stephen Doleski, Regional Permit Administrator for the Department's Region 9 office spoke. Mr. Doleski advised those in attendance that the purpose of the hearing was to receive information and comments on the permit application, the draft permit issued by the Department and the DEIS.

The speakers at the afternoon session included Cheektowaga Town Councilman Thomas Johnson, Jr. Mr. Johnson stated that the Town is opposed to the permit being issued by the Department. He outlined numerous complaints that the Town has received over the years from residents regarding the quarry and its operations. The complaints have been related to many facets of the quarry's operation, including blasting, odors, diesel fumes from truck traffic entering and exiting the facility, and the plume visible after blasting. He noted that the Town does not believe that the reclamation plan submitted with the permit application is adequate or provides sufficient detail as to what will happen to the land when mining ends. He questioned the SEQR process and stated that he believes that the Town should have been appointed lead agency for the SEQR process. Kevin Schenk, Town attorney also spoke against the project on behalf of the Town. Both he and Mr. Johnson referred to an action pending in New York State Supreme Court wherein BCS had sued the Town with respect to a zoning dispute. BCS sought to mine 150 acres on their property and the Town prohibited the mining of a portion of the site claiming that local zoning laws prohibit mining in those areas. New York State Supreme Court Justice Joseph Glownia ruled in favor of the Town with respect to one parcel identified as 11-b. The Glownia decision has been appealed and the appeal is still pending before the NYS Appellate Division, Fourth Department. Area 11-b is included in the pending permit application and the Town wants the permit application amended to withdraw that parcel.

Mr. Schenk also spoke about various complaints from Town residents that the Town receives related to the quarry. He also noted that a new bike trail is being constructed on Como Park Boulevard, the main truck route to/from the quarry. He voiced concern for the safety of those using the bike trail with the truck traffic on the road.

The last Town representative to speak at the afternoon session was Dan Ulatowski, zoning inspector for the Town. Mr. Ulatowski noted some questions he had with respect to the accuracy of documents that are part of the DEIS. He believes that some of the maps contain inaccuracies and he also believes that the DEIS fails to address the exact stack height of the batch plant that will be in place should the permit be issued. He also believes that the air issues are not being properly examined, specifically, plume dispersion in this area where the large depression from the mine has created a micro climatic condition.

Several members of the public spoke as well. All spoke against the permit being issued. The complaints were related to threats to the health of neighbors, pollution, noise and damage from blasting and the harmful nature of the diesel exhaust and asphalt fumes as the trucks drive through the community after leaving the facility.

The evening session had representatives from the Town of Cheektowaga repeat their concerns as well as attorney David Seeger summarize the lawsuit that BCS brought against the Town. Mr. Seeger has been representing the Town in the lawsuit. Of the fourteen speakers, thirteen opposed the project and one spoke in favor of the permit being issued. Concerns related to safety, noise and pollution were all discussed in the evening session as well.

Issues Conference

The issues conference was convened at 9:00 a.m. on October 16, 2007 at the Bellevue Fire Hall. Part 624 at 6 NYCRR allows for participation at the issues conference by DEC Staff and the Applicant as parties to the proceeding. 6 NYCRR 624.5(a). Also, those seeking party or amicus status pursuant to 6 NYCRR 624.4 may participate. The Notice of Public Hearing directed that those seeking party or amicus status file a written request to ALJ McBride by September 28, 2007. Three petitions for party status were filed, as identified above.

DEC Staff appeared at the issues conference by David J.

Stever, Esq. Assistant Regional Attorney, as well several members of staff from the Department's Region 9 office. BCS appeared by Craig Slater, Esq. of Harter, Secrest & Emery, LLP, several representatives from BCS and representatives of TVGA Consultants, Vibra-Tech, a noise consultant and Shaw Environmental who conducted air modeling for the Applicant. The Town appeared by Council member Johnson, Town Attorney Schenk, Zoning Inspector Ulatowski and Alison Odojewski, Esq. from Mr. Seeger's office. TA appeared by Jane Wiercioch and Frank Sikorski and CCC appeared by Donna M. Hosmer and John Stonefield.

The issues conference was concluded on October 16, 2007. The parties made written submissions on several outstanding issues. The record for the issues conference closed on November 16, 2007.

Standards for identifying issues for adjudication

In cases such as this where the applicant has accepted all terms and conditions in the DEC Staff's draft permit, the purpose of the issues conference is to obtain sufficient information to determine who should be afforded party status and whether substantive and significant issues exist which require adjudication. The terms "substantive" and "significant" are defined at 6 NYCRR 624.4(c)(2) & (3). An issue is substantive if there is sufficient doubt about the Applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. To make this determination, the ALJ must consider "the proposed issue in light of the application and related documents, the draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ" (6 NYCRR 624.4[c][2]). *Matter of Dynegy Northeast Generation, Inc., 2005 WL 2252719, 7 (May 13, 2005).*

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

> In order to establish that an adjudicable issue exists, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony

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

Petitions for Party Status

The Town filed a petition dated September 28, 2007 seeking party status pursuant to 6 NYCRR 624.5(b) and proposing fifteen issues for adjudication. The Cheektowaga Citizen's Coalition Inc. filed a petition for party status dated September 27, 2007 proposing ten issues for adjudication, and the Depew/Cheektowaga Taxpayers Association, Inc. field a petition dated September 26, 2007 proposing eight issues for adjudication. Each of the issues raised by CCC and TA were also proposed by the Town in its petition.

Two issues proposed by the Town for adjudication were resolved by agreement at the start of the issues conference. Those issues are: 1) the Applicant may not meet all local zoning laws; and 2) the permit, as applied for, contradicted a New York State Supreme Court decision of Justice Joseph Glownia dated April 19, 2007. The first issue was resolved by DEC Staff's confirmation that a general permit condition is included in all mining permits that the applicant must obtain all local approvals for the project. The Town was satisfied with that language and withdrew that issue. The second issue concerned what areas the Applicant is seeking to mine. As noted, there is a pending action between the Town and the Applicant related to areas to be mined. The parties agreed that the decision of Justice Glownia with regards to areas that can not be mined pursuant to local zoning laws is controlling and the Department will not permit any mining in areas specifically excluded by the Glownia order or any subsequent Appellate Court decision. DEC Staff agreed that if a permit is issued it will reflect Judge Glownia's decision and any subsequent decision of the Appellate Court that is issued before the permit. The parties also agreed that the Town will have input in the final EIS language regarding this issue. Consequently, the Town withdrew the two issues.

There are thirteen remaining issues proposed by the Town, CCC and TA. Of those thirteen, I have consolidated them into

eight issues because some are a restatement of the same issue or are related. I have identified those issues that were proposed by more than one intervenor.

ISSUE ONE: Air Impacts

The first issue raised by all three petitioners seeking party status relates to air pollution impacts from the proposed expansion. The petitions for party status of the Town and TA only listed "air pollution" with no further detail, while the CCC petition listed subcategories as follows: very large mining vehicles emissions; primary, secondary and tertiary rock crushers; three asphalt plant emissions; diesel truck emissions coming from and going into the site; hydrogen sulfide releases during pumping of groundwater from the mines; dust containing a high concentration of the "deadly crystalline silica" released from blasting; and asphalt recycling emissions.

1(a) Air Emissions

The Town, CCC and TA all argued that the proposed mining would result in unsafe and/or nuisance air emissions. The DEIS, prepared by TVGA Consultants, Inc., includes air studies conducted in the area of the quarry. The air studies are: a five-year PM_{10}[1] study from 2000-2005, a 1996 DEC study, a 1998 Clough Harbor study and two air modeling studies from January 2006 and December 2006 that project expected emissions if the draft permit were issued. All studies concluded that air contaminants and dust emitted during current quarry operations are not above regulatory limits. The two studies done in 2006, estimating emissions if the processing is moved into the east basin and the isthmus is mined, also concluded that all regulatory criteria will be met. Applicant's consultant Scott Miller of Shaw Environmental was present at the issues conference and discussed the two studies done in 2006 that addressed the permit application. The 2006 Shaw studies, exhibits to the DEIS, identify stack height of the processing equipment once the equipment is moved. (The Town stated several times during the issues conference that it did not know the proposed stack height). The Shaw studies examined impacts of mining the isthmus as well as impacts from moving the processing equipment into the east basin. The reports concluded that neither action would result in a violation of applicable air standards

[1] PM_{10} refers to particulate matter with a diameter of less than 10 microns.

The Town acknowledges the air studies submitted by the Applicant but argued that those studies are not representative of the conditions in existence at the facility now and the conditions that will exist if the permit is issued. Specifically, the Town argued that because of the depression at the site as result of the mining over the years, a micro climate has been created. Therefore, that specific climatic condition must be used when conducting air modeling to determine impacts at the site. The Town stated that this micro climate may result in suppressed plumes hovering over the roadways near the facility and may exasperate the nuisance factor with "aromas" and the "pure nuisance in and around the homes" (T. 96)[2]. The Town also asserts that the DEIS fails to provide particulars as to what processing equipment will be used at the batch plant and does not give specifics of the stack height when it is relocated 150 feet below grade. The Town "assumes" that the stack height will be 70 feet below existing grade and that there will not be any dispersion of the emissions and, if the emissions are not dispersed, they will concentrate in and around the local neighborhoods creating a nuisance. The Town "assumes" this information because it did not see the height of the stack that was detailed in the DEIS at exhibit DD, "Air Quality Modeling Analysis" dated January 2006. The stack height was identified as between 25 and 31 feet.

The Town makes no offer of proof to support the proposition that a micro climate exists at the facility. No witnesses were identified by the Town who would testify at a hearing that there will not be adequate dispersion if the processing equipment is moved below grade. As noted above, BCS did present its consultants TVGA Consultants and Shaw Environmental who appeared at the issues conference to discuss the air studies that are exhibits to the DEIS. The modeling done in January 2006 and December 2006 were "completed in compliance with the DEC air modeling rules and regulations and protocol at that time" (T.101). DEC Staff worked with the consultants while the studies were being conducted. Also, the 2006 air modeling concluded that no applicable regulatory standards would be violated.

The Town argued that while it may be true that no air standards will be violated if the permit application is granted, their objection relates to nuisance as well as air quality (T. 104). The Town is concerned about the public health, safety and

---

[2] Numbers in parenthesis represent pages in the transcript from the October 16, 2007 issues conference.

welfare on nearby roadways if the plume fails to disperse. When questioned as to what offer of proof it had with respect to the proposed issue related to air quality, the Town representative responded "I have no evidence" (T. 106).

The other two petitioners, CCC and TA were also given an opportunity to address this proposed issue as they also raised it in their petitions for party status. They had no argument different from the Town's and had no offer of proof either, although they talked about possible witnesses. Jane Wiercioch, the TA representative did say she has asked an attorney to research New York's nuisance law and she noted that the Town of Cheektowaga has no nuisance law but she hoped that they would enact one.

CCC identified Dr. Joseph Gardella, Jr. from the State University of New York (SUNY) at Buffalo as a possible witness on the air issue. Donna Hosmer, representing CCC stated that Dr. Gardella might testify at a hearing in relation to air monitoring he has done in the area of the facility that would address ongoing health issues in the community and violations of the State and Federal air regulations. Ms. Hosmer was unable to identify what Dr. Gardella would testify about specifically. Instead, she referred to a September 27, 2007 letter as an offer of what he would testify about at an adjudicatory hearing. Dr Gardella, professor of chemistry at SUNY Buffalo wrote a letter dated September 27, 2007 to Stephen Doleski, David Denk, and Abby M. Snyder, DEC Region 9 Regional Director asking for an extension of the public comment period for the DEIS. He asked for an extension from 45 days to 90 days. Neither Applicant nor DEC Staff objected and a Notice was published on October 3, 2007 in the *Environmental Notice Bulletin* and sent to all interested parties extending the public comment on the DEIS to November 9, 2007. The letter does not state that Dr. Gardella would testify on behalf of the intervenors, nor did he identify what he would testify about if he did testify.

Dr. Gardella sent a second letter to Abby M. Snyder and Steven Doleski dated November 9, 2007. He stated that the letter served as his comments on the DEIS. Mr. Doleski forwarded a copy to my office. Dr. Gardella addressed air quality issues in the DEIS, specifically diesel truck emissions and hydrogen sulfide. He asked that all trucks that use the facility be retrofitted with either new engines or filter systems to cut diesel particulate emissions. (His comments on hydrogen sulfide emissions will be addressed below). Dr. Gardella made no offer of proof to support the argument that the trucks be retrofitted or to support any of the arguments made by the three petitioners

related to air issues. Moreover, he never indicated that he would testify at an adjudicatory hearing on behalf of the petitioners, if one were held in this matter.

Ms. Hosmer also stated that Dr. Lwebuga-Mukasa, who performed an asthma study in the community might, testify in support of the air issue proposed by CCC. However, when asked, Ms. Hosmer stated that she did not know what he would say if he was called to testify and could not say that he would testify that applicable air standards are not being met at the facility. The doctor was not present at the issues conference. Ms. Hosmer did produce a document authored by Dr. Lwebuga-Mukasa entitled "Cheektowaga Project Report." This report concluded, in part, that it does not "establish the cause of high prevalence rate of asthma in the community; two does not address the apparent high rate of cancer and autoimmune disease reported by the residents; three does not provide direct measurements of groundwater level in the study area."[3] The report focuses on information gathered from questionnaires sent home to local school children and two days of breathing tests conducted at a local hall. The report makes recommendations for further testing and studies. The Cheektowaga Project Report does not offer any support for the arguments made by the petitioners at the issues conference regarding air emissions at the facility.

1(b) Hydrogen Sulfide

CCC argued that hydrogen sulfide emissions at the facility are exceeding statutory limits. Hydrogen sulfide emissions occur during the release of groundwater pumped at the quarry. The source of hydrogen sulfide is camillus shale that is found 60 feet below the base of the quarry. As part of the quarry operations, groundwater must be pumped from the quarry. According to Michael J. Meyers, DEC Mined Land Reclamation Specialist 2, pumping groundwater creates a sink that draws water into the quarry. Some of the water drawn in comes in contact with the camillus shale and hydrogen sulfide gas is created.

The New York State Ambient Air Quality Standard (NYS AAQS) for hydrogen sulfide is found at 6 NYCRR 257-10.3. Section 257-10.3 states that the average concentration for hydrogen sulfide in any one hour period shall not exceed 0.01 parts per million (ppm). The Occupational Safety and Health Administration (OSHA) standard for hydrogen sulfide is 20 ppm as identified in the Code of Federal Rules (CFR) at 1910.1000. The Environmental

[3]Cheektowaga Project Report dated March 29, 2001.

Protection Agency has not set a National Ambient Air Quality Standard (NAAQS) for hydrogen sulfide.

CCC collected an air sample from property adjoining the facility in February 2004. The sample collectors had undergone training on collecting such samples prior to taking the sample. The sample was sent to a lab in California for analysis. According to CCC the sample results showed that the hydrogen sulfide level was 72 times over the NYS AAQS limit of 0.01 ppm. The test results showed hydrogen sulfide to be present at 0.0519 ppm and 0.048 ppm.

BCS performs daily monitoring of hydrogen sulfide at the location where the quarry's dewatering system discharges to a pipe that conveys the water off-site. The sampling data is collected in a logbook and provided to DEC Staff. BCS Superintendent Ron Hope is responsible for air emissions monitoring at the quarry. Mr. Hope testified at the issues conference that BCS voluntarily takes a daily hydrogen sulfide sample and collects the results in a logbook that is provided to the DEC.

Mr. Hope stated that to his recollection, he is not aware of any reading for hydrogen sulfide over the regulatory limit. Applicant noted at the issues conference that the test results from the February 2004 sample, if accepted as accurate, show that the hydrogen sulfide level was below the OSHA standard of 20 ppm.

DEC Staff, Applicant and the petitioners were all given an opportunity to submit further argument on this issue in a post issues conference submittal. DEC Staff and Applicant submitted further information. The petitioners did not.

DEC Staff stated in its post issues conference submittal that it does not consider the sample taken in 2004 to constitute an enforceable violation. Section 257-10.3 at 6 NYCRR states that the 0.01 ppm concentration of hydrogen sulfide shall not be exceeded in any one hour. DEC Staff notes that the sample was not over the course of one hour but only two samples taken three minutes apart. Also, DEC Staff has interpreted the hydrogen sulfide regulation to be extremely conservative, reflecting the level that the most sensitive receptors might react to it. Both DEC Staff and Applicant's consultants noted that they are not aware of any equipment that could measure down to the 0.01 ppm standard. DEC Staff has stated that "staff has approached the implementation of the hydrogen sulfide standard from a nuisance perspective" (Stever post issues conference submittal). DEC Staff noted that approximately ten years ago the Department was

receiving a lot of odor complaints that indicated a hydrogen sulfide problem at the facility. DEC Staff then helped initiate a 1998 study by SUNY at Buffalo Center for Integrated Waste Management. Recommendations were made by the Center and implemented by BCS and, as a result, odor complaints decreased. Also, the Department investigated after receiving the February 2004 sampling report. The investigation found that the odor problem was related to ice formation on the water surface which interfered with aeration and caused the odor problem. The problem was corrected by BCS and then pumping resumed. DEC Staff noted that due to the steps taken by BCS at the facility, odor problems have been reduced to just one complaint to DEC Staff in the last four years as noted in the DEIS. Based on these facts, DEC Staff has concluded that the February 2004 incident was not representative of the day to day emissions and no further changes are needed to assure compliance with legal and regulatory requirements for hydrogen sulfide

BCS submitted post issues conference comments as well on the hydrogen sulfide issue. Those comments included a brief from TVGA Consultants and a report from Eric D. Winegar, PhD of Applied Measurement Science, Fair Oaks California. Dr. Winegar concludes that his review of the lab analysis and other documentation regarding the hydrogen sulfide sample taken in February 2004 suggests that the data is unreliable and unusable. Dr. Winegar provided a detailed report on the lab which conducted the testing and analysis of the February 2004 sample. He stated that he is familiar with their testing methods, has visited the lab, and has known their main technical person for years. He then details why the sample and testing method are unreliable, mainly because the sample's hold time is not documented. He contends that sampling and analysis of hydrogen sulfide is one of the most difficult air samples to do. He states that hydrogen sulfide is extremely reactive and the collection, storage and handling of the sample is very important. In his opinion the best method of testing is immediate onsite analysis. The sampling results furnished by CCC do not indicate when the sample was analyzed. He did state that such a well respected lab as the one who completed the analysis would be expected to meet the hold times for such a sample but the report does not state that. He identified many factors that could cause the hold time to not be met, such as equipment failure and failure to notify the lab that the sample was coming in by overnight mail so that they could be prepared to test it upon arrival.

The TVGA brief noted that the OSHA standard was not violated and the USEPA has not set a NAAQS for hydrogen sulfide. TVGA also included the USEPA Interim Acute Exposure Guideline Levels

(AEGLs) for short term exposure to hydrogen sulfide. The interim AEGLs for hydrogen sulfide are:

10 minutes: 0.75 ppm
30 minutes 0.60 ppm
60 minutes 0.51 ppm
4 hours 0.36 ppm
8 hours 0.33 ppm

Looking at the AEGLs, the CCC samples were below all levels.

TVGA also stated that the method followed by the CCC sample takers did not follow the sampling method outlined in 6 NYCRR 257-10.4. A detailed method of testing is provided at 6 NYCRR 257-10.4 and that method was not followed by CCC.

As noted above, at an issues conference, a group seeking party status and proposing issues for adjudication has a burden to show how the issue is substantive and significant, as defined in the regulations. Where the DEC Staff and an Applicant are not in disagreement over the terms and conditions of the proposed permits, the burden of persuasion is on the party proposing an issue to demonstrate that the issue is both "substantive" and "significant." Only such issues as are found to be both substantive and significant will be adjudicated (see 6 NYCRR 624.4(c)). While an intervenor's offer of proof at the issues conference need not necessarily be so convincing as to prevail on the merits, its offer must amount to more than mere assertions or conclusions. "The degree of proof necessary to meet an intervenor's burden may vary depending on the nature of the matter under consideration, and whether the applicant attempts to rebut the intervenor's offer of proof. However, after the question has been joined, an adjudicable issue exists only where there are sufficient doubts about the applicant's ability to meet all statutory and regulatory criteria such that reasonable minds would inquire further. Requiring a greater showing would effect an unfair burden on intervening parties; requiring a lesser showing would over-burden the adjudicatory system with issues of dubious merit" (*Matter of Hydra-Co. Generations, Inc.*, Interim Decision of the Commissioner, April 1, 1988). *Matter of AKZO Nobel Salt Inc.*, 1996 WL 172632.

With respect to the air issues raised, all three petitioners failed to present a substantive and significant issue fir the following reasons: (1) The sampling method outlined at 6 NYCRR 257-10.4 was not followed; (2) no offer of proof was presented to establish that a micro climate exists; (3) no offer of proof was presented to support any of the arguments made as to air quality.

RULING: No adjudicable issue exists with respect to air emissions.

ISSUE TWO: Traffic Impacts

The second issue raised is traffic impacts. The Town contends that if BCS moves its entrance/exit onto Union Road, further away from the residential neighborhoods "it will reduce the conflicts in the localized neighborhoods" (T. 185). BCS argued that the Department does not have the authority to direct moving the entrance/exit and DEC Staff agreed at the issues conference. DEC Staff contends that the traffic issue is a SEQR issue and the comments of the Town, CCC and TA will be considered comments on the DEIS in its preparation of the final EIS.

The Town is intending to construct a bike path along Como Park Boulevard, along the same route that trucks enter and exit the facility. The Town and the citizens groups contend that moving the entrance/exit will alleviate most of the nuisance issues and will help with public safety, mitigating hazards to motorists and pedestrians. When asked, neither the Town, CCC nor TA had an offer of proof on this proposed issue.

The issue of traffic was addressed briefly in the DEIS. A 1997 traffic study is referenced and there is one paragraph that states that the volume of production will not change and therefore traffic volume will not change. It concludes that because there will be no change, there will be no adverse impacts. The 1997 study did not identify any problems with the current route. The study found: (1) the road used is a County road and truck traffic is allowed on the route; and (2) site and stopping distances were adequate and accidents were below state-wide averages. Mr. Ulatowski stated that since that study was done, pursuant to a Town ordinance, trucks from the facility have all been directed to use one route, Como Park Boulevard where in the past they used two routes. No details were provided as to how many trucks used the second route before all moved to Como Park Boulevard.

Petitioners provided no traffic counts or studies, they did not identify any witnesses they would call to challenge the route used by the truck traffic from the facility and the impact they contend it has on pedestrian and vehicular traffic. The petitioners did not question the specifics of the traffic study done in 1997 or object to the methods used in the 1997 study.

As noted above, a petitioner's offer of proof at the issues conference need not necessarily be so convincing as to prevail on the merits, but its offer must amount to more than mere assertions or conclusions. As decided by the Commissioner in *Matter of Dailey, Inc.,* 1995 WL 394546 (June 20, 1995), the impacts of truck traffic on highway safety or on the integrity of the roadway itself should be examined during the SEQR process. The DEIS addresses traffic and referenced the 1997 traffic study. None of the petitioners made any offer of proof that the traffic study was flawed. Mr. Ulatowski noted that the Town changed the Town's truck routes after the 1997 study, however, he and the Town did not provide any detail as to how that may have changed traffic flow or what impact that might have had on Como Park Boulevard.

RULING: No adjudicable issue has been presented with respect to traffic impacts.

ISSUE THREE: Blasting Impacts

The Town and the two citizens groups have objected to the blasting that occurs at the mine at this time. None of the proposed intervenors offered any proof that the blasting violates applicable standards or that the current permit, which has blasting restrictions, is being violated. The Applicant produced a 2001 study done by Vibra-Tech to document the fact that all standards are being met with respect to vibrations from blasting. A representative of Vibra-Tech, Douglas Rudenko, was present at the issues conference. Mr. Rudenko outlined the 2001 study and noted that 165 seisometers were deployed in the community within a one mile radius of the mine to monitor ground vibration levels and air over pressure levels from five blasting events at the mine. The study concluded that all vibration levels were within permit limits. He also stated that the study was done to assist BCS in finding ways to mitigate the blasting and all of the mitigation measures recommended were implemented by BCS. Also, BCS stated that the company has further mitigation measures outlined in the DEIS that it agrees to implement if a permit is issued.

BCS noted that two permanent seismometers and two mobile seismometers are in use in the community to monitor the blasting that takes place. The monitoring is also done by Vibra-Tech, not by the Applicant. The reports are furnished to the DEC regularly and according to Mr. Stever, all results have been within regulatory standards. Also, the draft permit contains the condition that Applicant follow all recommendations of Vibra-Tech.

Complaints were made at the legislative hearing that the blasting can be discomforting. Some residents complained about damage to their property that they attribute to the blasting. However, no offer of proof was made by any of the petitioners that the Applicant could not meet applicable standards under the terms of the draft permit. Although the Town spoke of complaints received from residents regarding blasting, when questioned further, the Town acknowledged that it was not raising blasting as an issue for adjudication but asking that additional mitigation measures be included in the permit to help minimize the effects of blasting on the Town residents (T. 209). The Town acknowledged that BCS might be meeting applicable standards but compliance does not necessarily absolve anyone "from the nuisance value that is experienced" (T. 221). CCC and TA echoed the position of the Town with respect to blasting, that it is a nuisance issue.

RULING: No adjudicable issue has been presented with respect to blasting impacts.

ISSUE FOUR: Reclamation

The Town has objected to the reclamation plan included in the permit application. The Town as well as the citizens groups have indicated what they would like to see happen to the property at the conclusion of mining at the site. The Town also wanted to include in the reclamation of the site the decommissioning of all processing equipment and buildings and the Town wants to have more specific input on how certain portions of the site should be reclaimed. DEC Staff acknowledged the comments of the Town and noted that the comment period was still open for the DEIS and those comments would be considered in preparing the FEIS.

ECL 23-2713(1)(b) details the requirements of the reclamation plan. DEC Staff confirmed at the issues conference that BCS did include the required plan in the permit application submittals.

The Town, CCC and TA argued against the current plan that calls for the quarry to be allowed to fill with water and a lake to be formed. They questioned the quality of the water and whether it will pollute nearby Cayuga Creek. Both the BCS consultant on the water issue and DEC Staff concurred that the water that will make up the lake once the quarry is allowed to fill in will not be polluted as feared by the petitioners. The Town stated that currently hydrogen sulfide arises from the quarrying process due to sulfur deposits that are present in the

bedrock. The Town argued that once those native sulfur deposits are exposed to water when the quarry is allowed to fill, the water will be contaminated from the sulfur. When asked to present an offer of proof to support the claim that this sulfur contamination will occur, the Town could not. Both citizens groups stated that they joined in the Town's argument but also had no offer of proof to support the argument.

BCS, through its water consultant, Robert Napieralski from TVGA, stated that the Applicant is relying on a 1987 United States Geological Survey study which concluded that the water in this area would be of suitable quality. The only known undesirable characteristic, according to Mr. Napieralski, "is that it is relatively hard and commonly requires softening for domestic uses" (T. 245).

DEC Staff noted they did consider the issue of contamination and concluded after investigation and review that such would not be the case. Mike Meyers, DEC mining specialist, indicated that hydrogen sulfide will not be an issue once mining ceases. Once the pumping stops, when the mining ends, the water that accumulates in the quarry will prevent "the hydrogen sulfide laden water from the camillus shale from migrating upwards" (T. 247). Also, the reclamation plan calls for all hydrogen sulfide laden water that occurs in the present sump of the quarry to be removed from the site prior to the quarry being allowed to fill. (T. 248)

CCC also questioned the potential contamination of the quarry water by leachate from nearby closed landfills once it is allowed to fill with water. Mr. Meyers noted that the groundwater at the nearby landfills flows south and the quarry is located to the east, hence there would be no possible contamination from the landfills. Also, the BCS consultant stated water from the quarry sumps has tested negative for the landfill contaminants in the past (T. 253).

Petitioners questioned the issue of the reclamation bond. The comment period on the DEIS was still open at the time of the issue conference and DEC Staff agreed to consider this comment to the DEIS. Pursuant to ECL Article 23, BCS will be required to secure a bond to cover the cost of reclaiming the site after mining ceases. DEC Staff determines the appropriate amount of the bond by calculating the cost of reclamation at the time that reclamation will take place. DEC Staff confirmed that the bond must be in place before the permit will be issued.

DEC Staff noted none of the petitioners made any offer of

proof with respect to the questions raised regarding the reclamation plan. Questions have been raised and comments made but no offer of proof presented.

RULING: No adjudicable issue has been presented with respect to the reclamation plan.

ISSUE FIVE: Future Devaluing of Neighboring Properties

The Town, TA and CCC proposed an issue for adjudication related to the quarry operation continuing and its effect on devaluing neighboring properties. The petitioners stated that the continued operation of the mine will have a negative impact on property values in the area. However, no offer of proof was made, merely assertions that if the mine continues then property will be less valuable in the area. That assertion is not sufficient to meet the standards for an adjudicable issue for the reasons stated herein. Although CCC and TA talked of what they "think" will or could happen, no offer of proof was presented that the mine operation causes a decrease in property values.

Included in the DEIS is a 2005 appraisal report prepared for BCS which concluded that the residential properties in the area of the quarry had no diminished value due to their location near the quarry (T. 273 & 274). The petitioners did not question or challenge this appraisal.

The purpose of review under SEQRA is to avoid or mitigate adverse environmental not economic impacts. "Neither the Mined Land Reclamation Law nor its implementing regulations permit consideration of the diminution of property values in the surrounding community as a criteria by which to judge a mining application. Accordingly, if authority exists to consider such an effect, it must be founded under SEQRA. To the extent that the underlying causes of potential property value changes may be related to the environmental impacts of the project, they are reviewable under SEQRA. Impacts of this type that are routinely treated in environmental impact statements include aesthetics, noise, dust, traffic and effects on community character. The reduction of property values, considered in isolation, cannot, however, be considered an environmental impact even under the broad definition of 'environment' contained in ECL Article 8." *Matter of the Application of Red Wing Properties, Inc. 1989 WL 97001 (January 20, 1989).* DEC Staff and Applicant have identified measures that have been implemented and/or will be implemented to mitigate the impacts of mining. As noted by DEC Commissioner Jorling in *Matter of Red Wing Properties, Inc.*, local authorities can impose additional restrictions on mining to

preserve property values, if deemed necessary.

RULING: No adjudicable issue exists with respect to future devaluing of neighboring property.

ISSUE SIX: Noise Impacts

The representative of CCC stated that her son who lives near the quarry has complained to her of a grinding noise he has heard after midnight. He attributes the noise to quarry operations but no offer pf proof was made to establish the connection. BCS stated that all operations cease at the facility at 6:00 p.m. every night, with no exception. No other argument was presented with respect to noise and after BCS stated its operating hours, no one argued that BCS operates after 6:00 p.m.

RULING: No adjudicable issue exists with respect to noise impacts.

ISSUE SEVEN: Conflict with the 2003 Permit

The Town objected to the draft permit not addressing the cleaning of the trucks after they are loaded and before they leave the facility. This issue has been resolved by agreement of the parties. It was agreed that a permit condition would be added to the permit, if issued, requiring BCS to have all trucks washed before leaving the BCS facility. It was also agreed that BCS will have all truck loads covered with a tarp when they exit the facility. The Town was satisfied with this agreement and the issue was resolved.

RULING: No ruling is necessary as this issue has been resolved by agreement.

ISSUE EIGHT: Impermissible Segmentation

Impermissible segmentation, which is the dividing for environmental review of an action in such a way that the various segments are addressed as though they were independent and unrelated activities, is contrary to the intent of SEQRA and is disfavored. *See 6 NYCRR 617.3(k)(1).* The Applicant has applied for a mining permit. There is an existing air permit for the quarry and that permit is not up for renewal. The Town questions why the two are not being examined together. DEC Staff acknowledged that the two permits are not being issued together, but that the SEQRA review encompassed all of the impacts, including air impacts. DEC Staff says that there is not impermissible segmentation. The DEIS does address the air impacts in detail as noted herein.

The Town also questioned whether the SEQRA review adequately addressed all water discharges. The Department responded by confirming that the SEQRA review did examine all water quality issues as well. After a brief discussion, the Town acknowledged this and accepted this position of the Department (T. 296).

The Town requested that the State Pollutant Discharge Elimination System (SPDES) permit for the quarry be examined during this proceeding even though it is not up for renewal at this time. DEC Staff confirmed for the Town that while the SPDES permit is not up for renewal at this time, the environmental impact statement did address water impacts. Water impacts were examined and addressed in the DEIS. The Town accepted "that as a rationale to support a non-segmentation" (T. 296).

RULING: No ruling is necessary because this issue has been resolved.

All issues proposed by the Town, CCC and TA have been addressed above and no issues have been found to be adjudicable.

POST ISSUES CONFERENCE SUBMISSIONS

Requests were made to supplement arguments made at the issues conference. Michael Hanchak asked to make an offer of proof to support his argument on behalf of TA and CCC that relocating the batch plant to 150 feet below grade was inadequately addressed in the DEIS. While he argued against moving the operations 150 feet below grade, he had no offer of proof at the issues conference that the relocation would violate applicable regulations. He requested an opportunity to research it and present additional argument. DEC Staff and BCS objected to the request. The request was denied.

CCC and TA, through Mr. Hanchak, also requested an opportunity to submit further argument on CCC's and TA's position that hydrogen sulfide emissions at the discharge pipe at the quarry sump were in violation of the applicable regulations. As noted above, the parties were given five (5) days to submit further argument and nothing was received from TA or CCC. Applicant and DEC Staff submitted further argument that was addressed above.

MOTION

Applicant moved at the issues conference to dismiss the three petitions seeking party status pursuant to 6 NYCRR Part

624. Applicant has argued that the petitions of TA, CCC and the Town failed to meet the requirement of a petition for party status as detailed in 6 NYCRR Part 624. Since the petitions fail to identify an issue for adjudication, this motion is moot.

RULING

For the reasons stated above, no issues are found to be adjudicable. The petitions for party status are denied. I hereby remand the application to Staff for further processing.

APPEALS

Pursuant to 6 NYCRR subdivisions 624.6(e) and 624.8(d)(2)(i), these rulings on party status and issues may be appealed in writing to the Commissioner. Appeals are due by May 12, 2008.

Any appeal must be received at the office of the Commissioner no later than 4:00 P.M. on the date specified, at the following address: Commissioner Alexander B. Grannis (attn: Louis A. Alexander, Assistant Commissioner for Hearings), NYS Department of Environmental Conservation, 625 Broadway, Albany, New York 12233-1010.

The parties are to transmit copies of any appeals to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner. One copy should be served on the Administrative Law Judge and the Chief Administrative Law Judge and two copies should be served on the Commissioner. Service by fax or electronic mail is not authorized.

Appeals should address these rulings directly, rather than merely restating a party's contentions.

/s/

_____

Molly T. McBride
Administrative Law Judge

To: Service List, attached