

State of New York: Department of Environmental Conservation

In the Matter of the Application of
Cobleskill Stone Products, Inc.,
for a Mined Land Use Permit,
pursuant to Environmental Conser-
vation Law Article 23 and Title 6
of the Official Compilation of Codes,
Rules, and Regulations of the State
of New York, Parts 420 through 425,
and other required permits for oper-
ation of a Hard Rock Mine in the
Town of Schoharie, County of
Schoharie, State of New York

**Ruling
on
Issues
and
Party Status**

(07/23/2008)

DEC Project No. 4-4342-00001/000019

Summary of Ruling

This issues ruling, containing 32 rulings, grants full party status to the Town of Schoharie (the "Town"), Village of Schoharie (the "Village"), the citizen group Save Our Schoharie ("SOS") and the Northeastern Cave Conservancy, Inc. (the "Cave Conservancy"). Amicus status is granted to New York Construction Materials Association. Adjudicable issues include community character (rulings 4 and 7), visual impacts (rulings 4 and 26), draft permit conditions contested by Applicant (rulings 5 and 6), fugitive dust (rulings 4 and 21), noise (rulings 4 and 30), blasting (rulings 4 and 24) and historic resources (ruling 8).

Although the term "environmental interest" is not defined in the Department's permit hearing regulations or the Environmental Conservation Law ("ECL"), the Commissioner has applied the term broadly. The Administrative Law Judge ("ALJ") concludes that SOS and the Cave Conservancy have established sufficient environmental interest in this proceeding.

The ALJ concludes that renewal of the existing Mined Land Reclamation Law ("MLRL") permit in 2010 is a State Environmental Quality Review Act ("SEQRA" or "SEQR") Type 2 action. Therefore, permit renewal is a ministerial action requiring no SEQR review and no adjudicable issue exists regarding coordination of the existing permit's renewal and this permit application. (Note, however, that this issue is separate and distinct from the issue(s) presented in the joint petition for SEQR ungrandfathering of this project review.)

The ALJ determined that Department Staff's community character issues are adjudicable because community character is the basis of Department Staff's permit denial. Department Staff have identified six elements of community character in its permit denial: 1) that the proposed expansion is within a scenic rural agricultural area comprised of quiet open spaces; 2) that as compared to the existing operation, buffering effects will be lost because the expansion area would be approximately 1500 feet closer to village neighborhoods, and approximately 340 feet closer to Lasell Park; 3) noise impacts; 4) visual impacts; 5) blasting and vibration impacts; and 6) air and dust impacts. In sum, as between Applicant and Department Staff, the community character issue will be adjudicated, pursuant to 6 NYCRR 624.4(c)(1)(ii), because this issue relates to a matter cited by Department Staff as a basis to deny the permit and is contested by the Applicant.

The ALJ ruled that Department Staff erred in interpreting the Department's Visual Impact Assessment Policy, as applied in this case, by omitting to address SEQR visual impacts of local significance. Pursuant to 6 NYCRR 617.11(d)(2), the Department, as the SEQR lead agency, must make findings on all potential adverse visual impacts, not only those impacts of statewide significance. Department Staff must address visual impacts of local significance as a basis of permit denial, as a separate SEQRA issue from local visual impacts as a component of SEQRA community character. Consequently, pursuant to 6 NYCRR 621.8(b), as between Department Staff and Applicant, the ALJ finds that visual impacts of local significance are a substantive and significant issue requiring adjudication.

It is undisputed that no statutory or regulatory definition of "community character" is provided in SEQRA law or regulation. However, the ALJ finds that a standard for assessing a community's character has been articulated, pursuant to case law and agency precedent. The "definition" of community character is necessarily a case by case determination, dependent upon particular elements of community character of import to a particular permit review. The ALJ determined that in this case, the Town and Village have made their wishes regarding community character known through promulgation of the Town and Village Comprehensive Plan and the Town Zoning Law; community character, as defined in this proceeding includes the built and unbuilt environments, quality of life, and the unique character of the Town and Village of Schoharie, with high value on its scenic rural qualities.

In view of the offers of proof made by the Town, Village and SOS, the ALJ finds that those entities can make a meaningful contribution to the record regarding the adjudicable issue of community character. See, 6 NYCRR 624.5(d)(1)(ii) [The ALJ's ruling of entitlement to full party status will be based upon...(ii) a finding...that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party...].

The ALJ determined that where Applicant objects to conditions of the draft MLRL permit, those issues must be adjudicated. Conditions at issue include Special Conditions ("SCs") #6 (dust control), #8 (hours of operation), #11 (importation of outside materials), #15 (noise), #14 (setbacks and buffers) and #24 (tracked materials). The ALJ concludes that these issues must be adjudicated, pursuant to 6 NYCRR 624.4(c)(1)(i), because these issues relate to disputes between Applicant and Department staff over substantial terms or conditions of the draft permit.

The New York Office of Parks, Recreation and Historic Preservation ("OPRHP") has determined that the proposed project will have no adverse impacts upon properties on or eligible for inclusion on a state or national register of historic places, if certain conditions have been met. The ALJ ruled that no adjudicable issues exist regarding archaeological, cultural and historic resources, assuming that Applicant and the Town and Village establish and maintain a fund that will be dedicated to repair damage to historic buildings demonstrated, through a long term monitoring process, to have occurred as a direct or indirect result of vibration associated with the mining activity. OPRHP Staff and Department Staff have agreed that, in the event this MLRL permit were to be issued, establishment and maintenance of such a repair fund would be best arranged between the Town, Village and Applicant; Department Staff indicated that this is not an appropriate matter to be addressed in the MLRL permit, although it remains a necessary pre-condition to OPRHP approval. The ALJ recommends a MLRL permit condition to acknowledge this OPRHP requirement.

The ALJ rejected Intervenors' contention that the required SEQR review cannot occur, as a matter of law, when mining in the modification area will not commence until approximately 40 years hence.

No substantive and significant issues requiring adjudication have been identified concerning cumulative impacts, amount of the reclamation surety bond, type of soil to be used for overburden

or topsoil in reclamation, economic compensation for possible loss of real property values, or traffic impacts.

Regarding hydrogeologic impacts, the ALJ credits Department Staff's assertion that no water withdrawal or discharge would be required. Therefore, the ALJ ruled that Applicant was not required to perform a long-duration aquifer pump test, as Intervenors seek. No adjudicable issue is raised regarding the need for a long-duration aquifer pump test.

The Draft MLRL Permit, including Special Condition ("SC") #20(E), provides protection to any property owner's well water affected by the mining operation, without limitation. The ALJ ruled that no adjudicable issues exist regarding the well survey or arbitration agreement and no adjudicable issue exists regarding the location and monitoring periods of the onsite wells. In addition, the ALJ ruled that the Draft Environmental Impact Statement ("DEIS") provides sufficient information to support Department Staff's determination that further characterization via the proposed dye test is unnecessary; consequently no adjudicable issue exists regarding the need for dye tests for the surface waters at the site.

The ALJ ruled that no adjudicable issue has been identified regarding applicability of Commissioner's Policy 33 ("CP-33") to air modeling of dust emissions under the permit modification application. The ALJ concluded that Department Staff correctly applied CP-33 to determine that no air modeling is required for this MLRL permit modification application because the mining operations do not have the potential to produce more than 15 tons per year of particulate matter less than 10 microns ("PM₁₀").

Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b). The ALJ ruled that a substantive and significant adjudicable issue has been identified as to whether additional measures to reduce fugitive dust emissions attributable to blasting events and general mining operations are required to mitigate adverse fugitive dust impacts to the maximum extent practicable. In addition, the ALJ ruled that SOS, the Town and the Village have identified an adjudicable issue regarding visible fugitive dust emissions from the existing site as indicative of visible fugitive dust emissions to be expected if the permit modification is granted.

Regarding asserted omissions in Applicant's emissions inventory (DEIS Appendix G), the ALJ ruled that no adjudicable issue exists.

The ALJ found that SOS has not provided a qualified expert witness on the proposed issue of silicate content of fugitive dust; therefore, no adjudicable issue exists regarding silicate content of fugitive dust.

Regarding purported deficiencies in the fugitive dust control plan, the ALJ ruled that no adjudicable issue is presented.

Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b). Regarding blasting impacts, the ALJ ruled that whether the adverse impacts of blasting on Town and Village residents and structures have been minimized to the maximum extent practicable, is a substantive and significant SEQR issue requiring adjudication. SOS has identified residents who would testify as to blasting effects of the existing mine as predictive of effects of blasting in the modification area. The Town and Village and Cave Conservancy each provided expert offers of proof that would show adverse effects of blasting at the existing mine as predictive of effects of blasting in the modification area. The Town and Village also would provide residents to testify to these effects. However, no substantive and significant issue requiring adjudication has been identified regarding other proposed blasting issues.

Nonetheless, SOS contends that their noise monitoring data shows that the existing mine produces noise levels in excess of the decibel limits identified in SC #15, and this indicates that noise exceedences will occur at similar levels if mining is authorized to continue in the modification area. The ALJ ruled that based upon SOS's noise monitoring data, showing exceedences of SC #15, if it were applicable to the existing operation, it is reasonable to inquire further in the adjudicatory hearing as to whether, pursuant to SEQR (6 NYCRR 617.11), potential noise impacts have been mitigated to the maximum extent practicable¹;

¹ Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1).

this is a substantive and significant issue requiring adjudication.

However, because Department Staff state that Applicant's noise analysis is consistent with the Department's program policy, Assessing and Mitigating Noise Impacts (Department ID: DEP-00-1, revised February 2, 2001) and is acceptable to Department Staff, the ALJ rejected other proposed issues regarding Applicant's noise analysis.

I. Introduction

Cobleskill Stone Products, Inc. ("Applicant"), has applied to the New York State Department of Environmental Conservation ("the Department" or "NYSDEC") to modify its existing MLRL and related permits, pursuant to ECL Article 23, Title 27 and Parts 420 through 425 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").

Applicant proposes to increase the boundary at its existing 86 acre Schoharie Quarry by 69 acres. In addition to the current 119 acre site, Applicant owns 77 acres between Rickard Hill Road and Warner Hill Road and 14 acres south of Warner Hill Road. The proposed modification area will be located within the 77 acres between Rickard Hill Road and Warner Hill Road. Within the proposed 69-acre area, 49 acres will be affected. The proposed expansion extends southward across Rickard Hill Road, directly east of and adjacent to the Village of Schoharie limits. The proposed modification would include moving the primary crusher to the expansion area and the addition of a new tertiary crusher with a capacity of approximately 400 tons per hour. The new crusher is designed to produce different grades of stone products than currently processed at the quarry. This new crusher is proposed to operate on a single conveyor belt with currently permitted crushers, alternating feedstock onto the single conveyor belt. Therefore, Applicant contends that the new crusher will not increase the overall production capacity of the facility, which is limited by the output of the conveyor belt.

The Village and Town of Schoharie are located in the northeastern section of Schoharie County. The County of Schoharie has a population of approximately 32,000. The Town of Schoharie has a population of approximately 4,000 and the Village of Schoharie, adjacent to the existing mine and the modification area, has a population of approximately 1,000. The DEIS, in

See, 6 NYCRR 624.4(c)(6)(i)(b).

describing the Town of Schoharie and project area, states that "Schoharie's physical characteristics and natural resources play an important role in land use. Schoharie is a rural area dominated by farms, forests and rural residences. It has a great deal of natural beauty, but also has many environmental features that the community wishes to be treated sensitively with regard to consideration for future development. These features generally include steep slopes, fertile valleys, several waterways and wetlands, and significant limestone, or karst, features. Some, especially the karst features, play an important role in water quality in the Town and Village." DEIS, Appendix K, p. 15.

Portions of the existing quarry, including the processing plant, crushers, main office and asphalt plant are located in the Village. Portions of the proposed modification area are immediately adjacent to the Village.

Palatine Germans settled the area beginning in 1711, and Schoharie County was created in 1795. The Village architecture includes many buildings and homes that date to the colonial period. The Palatine House is representative of architecture of this period, and the Palatine House spring likely was a significant factor in settlement of the area known today as the Village of Schoharie, which was incorporated in 1867. The Schoharie Reformed Church congregation was formed in 1721, and in 1772 the congregation built the Old Stone Church, which served as a fort during the Revolution. By 1857, the Old Stone Fort was sold to the State of New York as an arsenal. Many other examples of 18th and 19th century architecture are located in the Town and Village, several of which are listed (or are eligible for listing) on the National Register of Historic Places. The Village of Schoharie Historic District is located along the NYS Route 30 corridor. DEIS 3.2.5.2.1, pg 51.

On August 15, 2005, the Town adopted new land use (zoning) laws. Pursuant to that zoning law, the Applicant's proposed modification area, extending southward across Rickard Hill Road, directly east of and adjacent to the Village of Schoharie limits, has been zoned "agricultural use" by the Town. Under this agricultural use, mining is not an authorized use. In a proceeding pursuant to the New York Civil Practice Laws and Rules, Article 78, Applicant is challenging the Town's promulgation of the zoning law; that matter is ongoing. *Cobleskill Stone Products, Inc., v Town of Schoharie, et al.*, New York Supreme Court, Schoharie County (Index No. 000594/2005).

The Department is the lead agency for purposes of SEQRA review. Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b). Department staff have determined that the proposed expansion will not meet applicable SEQRA statutory and regulatory requirements and, therefore, the application to modify the current MLRL Permit should be denied. Specifically, Department staff have determined that the proposed mine expansion and potential impacts represent a significant unacceptable adverse change in community character even after the incorporation of impact mitigation measures into the project. Therefore, Department Staff's position is that they cannot make required SEQRA findings that community character impacts have been mitigated to the maximum extent practicable.

Nonetheless, consistent with Departmental policy, Department Staff have prepared a draft permit with special permit conditions, which has been available for public review since June 4, 2007. Exhibit 5. Applicant has not accepted the draft permit, but instead contests several draft permit conditions, as discussed below. At a minimum, adjudicable issues exist between Applicant and Department Staff on community character and on Applicant's objections to the draft permit.

A. The Legislative Hearing

On June 12, 2007, a legislative hearing was held before Administrative Law Judge ("ALJ") Kevin J. Casutto, at the Holiday Inn Express, 160 Holiday Way, Schoharie, New York at 7:00 p.m. An issues conference was commenced on June 13, 2007 at 10:00 a.m. at the same location, and was continued on June 19, 20, 21, 25 and 26, 2007. In addition, on July 9, 2007, a site visit occurred, including stops at the existing facility, at local historical and cultural resources, and at several viewpoints.

Cobleskill Stone Products, Inc., ("CSP", or "Applicant") appeared at the legislative hearing and at the issues conference by Gilberti, Stinziano, Heinz & Smith, P.C., 555 East Genesee Street, Syracuse, New York 13202-2159, Adam J. Schultz, Esq., Member. Appearing with counsel at the legislative hearing and issues conference were Patricia S. Naughton, Esq., and Michael A. Fogel, Esq. Also present was John Holmes, Esq., Applicant's corporate counsel, and Paul H. Griggs, Griggs-Lang Consulting Geologists, Inc.

Department Staff ("Staff") appeared at the legislative hearing and at the issues conference sessions by Blaise Constantakes, Esq., Regional Attorney², New York State Department of Environmental Conservation ("NYSDEC") Region 4, 1150 North Westcott Road, Schenectady, New York 12306. Appearing with counsel at the issues conference were Regional Permit Administrator William Clarke and Mined Land Reclamation Specialists, Chris McKelvey and William Cooper, as well as David Pickett, from the Division of Air Resources.

At the legislative hearing, both written and oral comments were received. Forty-three members of the public commented on the project. Approximately 75% of the commentators were opposed to the project. The concerns expressed included potential impacts on air quality, dust impacts, water quality, noise, blasting, traffic, aesthetics, ecology, endangered species, cultural resources and community character.

B. The Issues Conference

The deadline for receipt of petitions for party status was June 4, 2007. Five timely applications for party status were received, as follows:

The Petition of Town of Schoharie (the "Town"), dated March 27, 2007.

The Petition of Village of Schoharie (the "Village"), dated March 27, 2007 and the Joint Supplemental Petition of the Town and Village of Schoharie, dated June 4, 2007. The Town of Schoharie and Village of Schoharie are joint party status Applicants.

The Petition of Save Our Schoharie ("SOS"), dated March 27, 2007, and the Supplemental Petition of SOS, dated June 4, 2007.

The Petition of Northeastern Cave Conservancy, Inc., dated June 4, 2007 (and previously submitted comment letter, dated March 24, 2007).

The Petition of New York Construction Materials Association, Inc., dated May 30, 2007.

² Mr. Constantakes has since been re-assigned to the Department's Office of General Counsel in Albany, New York. He no longer serves as Regional Attorney, but continues to represent Department Staff in this matter.

At the issues conference, the Town was represented by the law firm of Young, Sommer, Ward, Ritzenberg, Baker & Moore, L.L.C., David Brennan, Esq., member. Appearing with Mr. Brennan on the initial day of the issues conference was Jeffrey Baker, Esq., member. The Village was represented by Marc S. Gerstman, Esq., 313 Hamilton Street, Albany, New York 12210. SOS was represented by the law firm of Whiteman, Osterman & Hanna, One Commerce Plaza, Albany, New York 12260, Todd Mathes, Esq., of counsel. The Cave Conservancy appeared initially by its President, Robert P. Addis, and later, by Gary Bowitch, Esq., 744 Broadway, Albany, New York 12207. The New York Construction Materials Association ("CMA") appeared by its President and CEO, David S. Hamling.

CMA proposed no issues for adjudication. In its petition, CMA seeks full party status or in the alternative, amicus status, to support the application of Cobleskill Stone Products, Inc., and to address legal or policy issues that may be presented by this case. Specific legal or policy issues of concern to CMA include 1) NYSDEC's policy to process permit applications where local zoning law apparently prohibits the proposed project; and 2) SEQRA ungrandfathering.

The Cave Conservancy proposed issues related to potential blasting effects.

The Town, Village and SOS proposed several issues for adjudication for some areas of concern. Those proposed issues are addressed below.

C. Environmental Interest

An intervenor seeking full party status must demonstrate an environmental interest in the proceeding (6 NYCRR §624.5(b)(1)(ii)) and must show that a substantive and significant issue exists regarding the permit application (6 NYCRR §624.4(c)).

Applicant challenged the environmental interest of SOS and the Cave Conservancy. Specifically, Applicant challenged the overall interest of SOS in this proceeding. With respect to the Cave Conservancy, Applicant contends that the petition is speculative, that only one member resides in the local area of the project, that no members were identified within Schoharie County and that the Cave Conservancy's preservation and management interests do not extend to Beckers Cave (a geological feature of concern to the Cave Conservancy).

Northeastern Cave Conservancy President Robert Addis explained that the Cave Conservancy is a not-for-profit corporation. The Cave Conservancy is a member of the National Speleological Society; local groups are referred to as Chapters or Grottos. The local Chapter is the Helderberg-Hudson Grotto. The Cave Conservancy's mission statement includes the conservation, study, management and acquisition of caves and karst areas having significant geological, hydrological, biological, recreational, historical or aesthetic features. The Cave Conservancy owns five preserves, the nearest being approximately 12 miles from the project site. Approximately 200 members in the northeast visit this area, including Becker's Cave. Two Cave Conservancy members were identified who live in the Town of Schoharie and frequent Beckers Cave.

RULING #1: The Department's permit hearing regulations, 6 NYCRR Part 624, do not define the term "environmental interest," nor does the ECL. The Commissioner has applied the term broadly. SOS and Cave Conservancy each have established that members of their organizations reside in the local community and further that some Cave Conservancy members, including two Town of Schoharie residents, visit Beckers Cave at least annually. The Applicant's objections to the environmental interests of SOS and the Cave Conservancy are rejected. SOS and Cave Conservancy have established sufficient environmental interest in this proceeding. In addition, CMA is granted amicus status.

II. Preliminary Matters and Threshold issues

A. The 14-acre Parcel

During the issues conference an apparent inconsistency was identified as to whether 14-acre parcel located south of Warner Hill Road is part of the proposed modification area. Applicant clarified that the 14-acre parcel is separate from the 77-acre proposed modification area, and is not part of the proposed modification. Further, Applicant stated that the 14-acre parcel is not intended as noise or visual mitigation of the proposed modification.

Moreover, Applicant is in the process of selling the 14-acre parcel to an individual, to be used as a single-family residential housing site. After some discussion, Applicant stipulated on the record that as part of the subdivision approval for the 14-acre parcel, mining of any materials on this parcel

will be prohibited, and this prohibition will be binding upon the purchasers and heirs and assigns.

B. Zoning

The Town and Village assert that a presumption of validity exists regarding the local law, the Comprehensive Plan and Zoning law. At present, the modification area is zoned for "agricultural use," which allows for agricultural and residential uses, but prohibits mining. However, Applicant counters that from 1965 to 2005, agricultural districts included mining uses. Moreover, Applicant contends that the Comprehensive Plan is "performance zoning" while the Town zoning law is "Euclidian zoning."³

Regarding local zoning prohibition of mining, the Division of Mineral Resources issued Technical Guidance Memorandum 92-2 (the "TGM") on May 4, 1992, following 1991 amendments to the MLRL, to guide Department Staff in processing mining applications governed by the amended law. This TGM embodies a procedure to be followed by the Department Staff regarding local zoning prohibitions. See *In the Matter of Lane Constr. Co.*, Preliminary Rulings of ALJs, NYSDEC Case No. 4-3830-00046/0001-0, September 9, 1995, at 2. The TGM reflects the longstanding Division of Mineral Resources policy on processing mining permits in situations where local zoning arguably prohibits a mine and the

³ "Euclidian zoning", named after the seminal United States Supreme Court case, *Village of Euclid v. Ambler Realty Co.* (272 U.S. 365, 47 S.Ct. 114, 54 A.L.R. 1016, 71 L.Ed. 303 [November 22, 1926]) is pyramid-type zoning. Euclidian zoning is the type of zoning traditionally used in the United States, with the most restrictive district – single-family residential – at the top of the pyramid (a high land use) and the least restrictive district – industrial – at the bottom (a low land use). In between are multi-family and commercial use districts. Higher land use districts can occupy lower land use districts, but lower land use districts cannot occupy higher land use districts.

"Performance zoning" is an alternative to traditional land use zoning. Whereas traditional Euclidian land use zoning specifies what uses land can be put to within specified districts, performance zoning specifies the intensity of land use that is acceptable. In other words, it deals not with the use of a parcel, but the performance of a parcel and how it impacts surrounding areas.

applicant asserts that the project is allowed. *Id.* That policy, in sum, requires Department Staff to continue processing such a permit application, as is the case here. Benefits of the policy include removing the Department from making decisions or interpreting local government laws or ordinances and avoiding litigation that would otherwise result from the Department interpreting local land use laws.

C. SEQRA Ungrandfathering

SEQRA excludes or "grandfathers" from its requirements actions undertaken or finally approved prior to its effective date.⁴ However, SEQRA provides an opportunity for the Commissioner to "ungrandfather" an action which would otherwise be excluded from the statute. ECL 8-0111(5) provides authority to grandfather actions pre-dating SEQRA's effective date, and also authorizes removing actions from that provision so as to require preparation of an environmental impact statement.

ECL 8-0111(5) provides:

"5. Exclusions. The requirements of subdivision two of section 8-0109 of this article shall not apply to:

(a) Actions undertaken or approved prior to the effective date of this article [article effective 9/1/76], except:

(i) In the case of an action where it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative, in which case the commissioner may, at the request of any person or on his own motion, in a particular case, or generally in one or more classes of cases specified in the rules and regulations, require the preparation of an environmental impact statement pursuant to this article; or

(ii) In the case of an action where the responsible agency proposes a modification of the action and the modification may result in a significant adverse effect on the environment, in which case an environmental impact statement shall be prepared with respect to such modification."

⁴ Effective dates were phased in, depending upon the type of action at issue, in the mid- to late-1970s.

ECL 8-0111(5)(a)(i) and (ii).

The Town, the Village, and SOS argue that because the permit for the current site will be renewed shortly, in view of this modification proceeding, the current site should be "ungrandfathered" for SEQRA review. During the June 25, 2007 issues conference, Intervenors seeking ungrandfathering were directed to make that application in the first instance directly to the Commissioner as soon as practicable. See, *Matter of St. Lawrence Cement*, First Interim Decision, December 6, 2002, at 12.

On October 31, 2007, the Town, Village and SOS filed with the Commissioner a joint petition to ungrandfather the existing mine in this permit modification application, pursuant to ECL 8-0111(5). By letter dated November 23, 2007, Division of Environmental Permits SEQR Chief Betty Ann Hughes set a schedule for responses to the joint petition for ungrandfathering. On December 12, 2007, responses to the petition were filed by Applicant and Department Staff. In view of the Commissioner's review of the joint petition for ungrandfathering, by letter dated December 7, 2007, I advised the participants that this permit application would be held in abeyance until the Commissioner issues a determination on the petition.

On June 26, 2008, Commissioner Grannis issued a Determination Regarding an Excluded Action Under Article 8 of the Environmental Conservation Law (the "Ungrandfathering Determination"). The Commissioner noted that, pursuant to ECL 8-0111(5)(a), the Commissioner can, and should, respond affirmatively to a request to ungrandfather an action when, "it is still practicable either to modify the action in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative." ECL 8-0111(5)(a).

The Commissioner determined that there are not significant, unmitigated adverse impacts of ongoing operations within the original 45-acre mine site at the Schoharie Quarry. In 1995, the original 45-acre mine site was modified and expanded to the current 86-acre operation. The original 45-acre mine area, the Commissioner noted, has been exhausted of its extraction potential, and operations within the original 45-acre mine site are now generally limited to on-site processing and reclamation. The Commissioner determined that at least since 1995, the larger 86-acre mine area has been treated in SEQRA review and MLRL permitting as a single, integrated project - - not as two separate parcels.

The Commissioner denied the Petitioners' request for ungrandfathering, concluding that there are no potential adverse impacts associated with the originally grandfathered mine that have not been reviewed under SEQRA, and to the extent practicable, managed through MLRL permit conditions. In sum, the Commissioner determined that there is no basis under the applicable statutory provisions to require a new analysis under SEQRA of the original 45-acre Schoharie Quarry site.

D. SEQR Completeness, Coordinated Review and Segmentation

SOS, the Town and Village contend that the timing of this application for modification and the existing mining permit renewal, which is due for renewal in 2010, requires that the anticipated MLRL permit renewal review should occur in the context of this permit modification proceeding. These petitioners contend that renewal of the existing MLRL permit will have direct bearing on the cumulative impacts of this project.

However, Applicant asserts that the SEQR review for the existing MLRL permit was conducted for the entirety of the mining proposal; for the complete life-of-mine of the existing quarry. Renewal of the MLRL permit (normally for periods of five years) is a SEQR Type 2 action, a ministerial action requiring no SEQR review. Department Staff agree with Applicant on this point.

RULING #2: Applicant and Department Staff are correct that renewal of the permit is a SEQR Type 2 action. Renewal of this MLRL permit is a ministerial action requiring no SEQR review. No adjudicable issue exists regarding coordination of the existing permit renewal in 2010 and this permit application.

E. Motion to Reopen Issues Conference

At the same time the Town, Village and SOS filed the joint ungrandfathering petition, they also filed a Motion to Reopen the Issues Conference, dated October 31, 2007, and in support of the motion, SOS attached the Joint Comments on 1994 SEQRA Findings related to the previous Schoharie Quarry expansion in the mid-1990's. These Intervenor's contend that 1) circumstances surrounding the Schoharie Quarry have changed since 1994, 2) new information regarding potential impacts of fugitive dust at Schoharie Central School have not been sufficiently addressed, and 3) the existing quarry should be ungrandfathered. The third point, ungrandfathering, was addressed to the Commissioner and is discussed, above.

An Issues Conference "may be reconvened at any time to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues conference." 6 NYCRR 624.4(b)(1). The new information identified by these Intervenors, regarding fugitive dust impacts, is a sample collected on filter material which had been placed over the vent of an air exchange unit in a classroom at Schoharie Central School. The sample was analyzed by the Upstate Freshwater Institute, Syracuse, New York, and indicates 29% of the sample is calcium related particles which contain 4.4% silicate. Overall, 3.2% of the particles were silica rich. The laboratory analysis is Exhibit C of the Motion to Reopen. No explanation was provided why this sample and analysis could not have been available at the time of the issues conference.

As noted by Applicant and Department Staff, the possibility of fugitive dust from the quarry adversely impacting the Schoharie Central School was discussed at length during the Issues Conference. Applicant goes further, in arguing that the 1994 SEQR Findings Statement and permit support issuance of the current permit modification application because, in Applicant's view, the issues presented by the modification application 12 years ago are identical to those presented in the modification application now under consideration.

RULING #3: The ungrandfathering petition was addressed to the Commissioner and has been decided, as summarized above. Unsurprisingly, circumstances surrounding the existing quarry have changed since 1995. However, this is not a sufficient basis to warrant reconvening the issues conference in this matter. Moreover, the joint Intervenors provided no explanation why this sample and analysis could not have been available at the time of the issues conference, failing to satisfy the requirements of 6 NYCRR 624.4(b)(1). In sum, the joint motion to reopen the issues conference is hereby denied.

III. Adjudicable Issues Between the Applicant and Department Staff

As between the Applicant and Department Staff, an issue is adjudicable if it relates to a matter cited by Department Staff as a basis to deny the permit and is contested by the Applicant (6 NYCRR 624.4(c)(ii)), i.e., Department Staff's community character issues; or if it relates to a dispute between the Department Staff and the Applicant over a substantial term or

condition of the draft permit (6 NYCRR 624.4(c)(i)), i.e., Applicant's objections to the draft permit.

With respect to these adjudicable issues, the burden of persuasion is on the applicant to show that no substantive and significant issues exist and that the applicant's presentation of facts in support of its application does meet the requirements of the statute or regulation. 6 NYCRR 624.9(b)(1).

With respect to SEQRA issues, because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b).

A. Community Character

Department Staff's community character position is stated in letters dated March 30, 2007 and June 4, 2007 (Exhibit 4) and in the Departmental Hearing Request Form. Department Staff rely upon the Town and Village Comprehensive Plan and the Village zoning law as indicative of the Town's and Village's community character. Department Staff have identified six elements of community character in its denial of the permit: 1) that the proposed expansion is within a scenic rural agricultural area comprised of quiet open spaces; 2) that as compared to the existing operation, buffering effects will be lost because the expansion area would be approximately 1500 feet closer to village neighborhoods, and approximately 340 feet closer to Lasell Park; 3) noise impacts; 4) visual impacts; 5) blasting and vibration impacts; and 6) air and dust impacts.

However, Department Staff's position is that no other issues (e.g., noise, visual, air, water, traffic, etc.) form the basis for permit denial other than community character. For example, while Department Staff have identified visual impacts as a component of its community character analysis, Department Staff do not separately assert visual impacts as a SEQRA issue. Instead, Department Staff conclude solely that the project presents significant and adverse changes in community character that cannot be acceptably mitigated.

- SEQRA's Substantive Requirements

The mining permit process is designed to promote the mining industry by authorizing the economically necessary development of mineral resources "compatible with sound environmental management practices." ECL 23-2703(1). Competing with this ECL Article 23

mandate is the mandate in ECL Article 8, SEQOR, to mitigate adverse environmental impacts to the maximum extent practicable. ECL 8-0109(1). The administrative permit review, including the hearing process, provides the record upon which the agency decisionmaker may issue an appropriate determination on the permit application, balancing both the interests of ECL article 23, title 7 and ECL article 8, as well as other relevant statutory and regulatory provisions.

Department Staff have recommended denial of this permit based upon SEQOR "community character" impacts that cannot be sufficiently mitigated and that will be unacceptable.

Applicant contends, as a matter of law, that in SEQOR review of this permit modification proceeding "community character" considered alone and apart from any other SEQOR issues, cannot be an adjudicable issue because no statute or regulation provides quantitative standards for "community character." Moreover, in Applicant's view, this is a watershed moment for environmental law in New York, because if this permit is denied solely on the basis of SEQOR community character impacts, it will be a determination made upon a standard-less lack of criteria; the subjective grounds of an unpromulgated rule and the decisionmaker's subjective personal whim. Therefore, Applicant concludes that any permitting decision on that basis must be, as a matter of law, arbitrary and capricious.⁵ Applicant erroneously contends that SEQOR is applied only through the substantive statute; in this case, the MLRL.

However, this argument ignores the substantive requirements of SEQORA. A vital component of SEQORA is its substantive requirement that agencies "act and choose alternatives which, consistent with social, economic and other essential considerations, to the maximum extent practicable, minimize or avoid adverse environmental effects, including effects revealed in the environmental impact statement process." ECL 8-0109(1). This statutory mandate requires state and local agencies not just to consider the environmental impacts of their acts, but to minimize or avoid adverse environmental impacts; this express substantive requirement goes beyond the burden that the National Environmental Policy Act places on federal agencies. See generally, McKinney's Consolidated Law of New York, ECL 8-0109 and Practice Commentary C8-0109:2, Philip Weinberg; ECL 8-0103 and Practice Commentary, Philip Weinberg *citing, Town of*

⁵ Or, in Applicant's language, 'the mere whim' of an agency decisionmaker.

Henrietta v Department of Environmental Conservation of the State of New York, 76 AD2d 215,223, 430 NYS2d 440, 447 (4th Dept. 1980) [An agency in approving an action must make written findings that it has imposed whatever conditions are necessary to minimize or avoid all adverse environmental impacts revealed in the environmental impact statement].

Moreover, because Applicant states that mining is not expected to occur until approximately forty years hence, when the existing mine's reserves are exhausted, it is Applicant's prerogative to proceed with this permit application at present, rather than await a judicial disposition on its challenge to the Town's land use law. In view of the forty-year time frame, Applicant would suffer no prejudice in awaiting a judicial determination on validity of the local zoning law.

Department Staff assert that their community character issue goes beyond the quantitative standards set forth in other substantive environmental regulatory programs, such as the MLRL, and is based upon the substantive qualitative requirements and standards of SEQRA. The Court of Appeals has stated that "[t]he impact that a project may have on ... existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis" (*Chinese Staff & Workers Assn. v. City of New York*, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 502 N.E.2d 176). It follows that community character, as a "stand alone" SEQRA issue, may be adjudicated in a NYSDEC permit hearing.

An argument similar to Applicant's was presented to the Court in *Matter of Lane Construction Corp. v Cahill*, 270 AD2d 609, 704 NYS2d 687 (3rd Dept. 2000). *Lane* concerned a hard rock permit application for a MLRL permit and related permits that were denied on the basis of SEQR visual impacts. Like community character impacts, SEQR review of visual impacts is a qualitative analysis. In *Lane*, Petitioner asserted that because the Department had not adopted regulatory standards or criteria applicable to mining projects relating to visual standards, the agency determination was ultra vires, arbitrary and capricious and null and void. *Lane*, 270 AD2d 609, 610. Although the Court did not reach this issue because it had not been raised below, the Court stated,

"were we to consider the merits of this argument, we would find it unavailing for two reasons. First, the [agency decisionmaker's] determination was based on the provisions of SEQRA. Consequently, the absence of regulations concerning visual standards governing mining

operations pursuant to the Mined Land Reclamation Law (ECL art 23, tit 7), assuming such could be promulgated, would have no bearing on the [agency decisionmaker's] determination. Also, while part of the goal of ECL article 23 was to promote mining by providing guidelines through the adoption and creation of uniform restrictions and regulations [citation omitted], the statute does not mandate that DEC pass detailed regulations describing the exact visual or sound impacts that would preclude the issuance of a mining permit." *Id.*

The *Lane* court found that the Department had the requisite substantial evidence supporting its denial of a permit to mine that would have severely impacted a scenic hilltop. The court upheld the Department's finding "that despite the proposed mitigation efforts, unacceptable environmental impacts would occur." *Lane Construction Corp. v. Cahill*, 270 AD2d 609, 704 NYS2d 687 (3rd Dept. 2000); see also, McKinney's Practice Commentary C8-0109:2. The court's reasoning regarding the qualitative SEQR visual impacts review in *Lane* applies equally to the qualitative SEQR community character impacts at issue in this permit application.

Applicant contends, as a matter of law, that community character as a "stand alone" issue, in the absence of other SEQR issues, is not an adjudicable issue. The Commissioner has stated that "[i]mpacts on community character are often intertwined with other environmental issues and can be addressed in the context of those specific issues [citations omitted]." *St. Lawrence Cement*, Second Interim Decision, *supra* at 117. Although community character as a "stand alone" issue was not found to be an adjudicable issue in *St. Lawrence Cement*, that determination was limited to the facts of that case. Contrary to Applicant's assertion, the *St. Lawrence Cement* community character determination does not, as a matter of law, preclude consideration of community character as a "stand alone" issue.

Department Staff have not identified SEQR visual impacts as a basis for permit denial. Instead, within the SEQR community character issue, Department Staff have identified a visual impacts component. For purposes of SEQR visual impact review, Department Staff contend that the Department's program policy, Assessing and Mitigating Visual Impacts, DEP-00-2 (the "VIA policy"), limits Departmental review to sensitive receptors of federal or statewide significance. However, this interpretation of the VIA policy is too restrictive and must be rejected.

The VIA policy states that with respect to local resources, Department Staff should defer to local decision makers, who are likely to be more familiar with and best suited to address them. VIA at 2. However, Department Staff, as the SEQR lead agency must make findings on the project's visual impacts, pursuant to 6 NYCRR 617.11(d)(2). This mandate requires assessing all potential adverse visual impacts, not only impacts of statewide significance.

Department Staff contend that potential adverse impacts of statewide significance have been mitigated to the maximum extent practicable, but that potential local adverse visual impacts cannot be so mitigated. Department Staff explained that this is why Staff identified a visual impacts component within the community character issue. Department Staff, however, have not identified separately a SEQR visual impacts adjudicable issue. Issues Conference Transcript, pages 1236, line 13 through 1238, ln. 19 ("T__").

Department Staff's interpretation of the VIA Policy, as applied in this case, is too restrictive because Department Staff concede that adverse visual impacts of local significance cannot be satisfactorily mitigated, but has framed this issue only as a SEQR community character issue instead of separately as a SEQR community character issue and as a SEQR visual impacts issue.

Department Staff's tentative SEQR finding that potential adverse visual impacts have been mitigated applies only to visual impacts of statewide significance, while improperly treating adverse visual impacts of local significance only as a component of community character. Implicitly, Department Staff concede that SEQR visual adverse impacts of local significance can not be satisfactorily mitigated.

By comparison, SOS, the Town, and the Village assert that potential adverse SEQR visual impacts of local significance are an adjudicable issue both as potential visual impacts and as a component of community character.

SOS, in concurring with the Town and Village, notes that pursuant to 6 NYCRR 617.7(c)(1)(iv), criteria that are considered indicators of significant adverse impacts on the environment include "(iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted." The Town and Village Comprehensive Plan and the Town Zoning Law, these Intervenor's contend, are the community's current plans or goals as officially approved or adopted,

properly and necessarily considered in the SEQR review of this permit application. See 6 NYCRR 617.7(c)(1)(iv).

As noted in *St. Lawrence Cement*, Second Interim Decision, *supra*, the Department, to a large extent, relies on local land use plans as the standard for community character. Adopted local plans are afforded deference in ascertaining whether a project is consistent with community character. *St. Lawrence Cement*, *supra* at 116. "If a zoning ordinance or other local land use plan exists, it would be evidence of the community's desires for the area and should be consulted when evaluating the issue of community character as impacted by a project." *St. Lawrence Cement*, *supra* at 116, citing, *Matter of William E. Dailey, Inc.*, Interim Decision of the Commissioner, June 20, 1995, at 8 and *Matter of Lane Constr. Co.*, Interim Issues Rulings, February 22, 1996, at 16 [local zoning ordinance as "expression of the community's vision of itself"].

Nonetheless, Applicant strenuously objects to Department Staff's denial based solely upon community character. Applicant contends that because the existing mine has been operating for approximately 100 years, mining is part of the community's character; and further, that the expansion is not a change in operations, but merely represents a continuation of the existing mining operations into the modification area.

In sum, Applicant contends that once Department Staff accepted the Draft EIS and issued a notice of complete application, the agency's decision whether to grant or deny the permit application must be based upon the substantive criteria of the MLRL. But, this analysis is erroneous and must be rejected. Acceptance of the EIS as adequate for public review does not finally conclude the SEQR review, as Applicant contends. See, 6 NYCRR 617.9(4). Accordingly, community character is a relevant concern in the SEQR analysis and, in this case, is the basis of an adjudicable issue in the Department's permit review.

- Definition of Community Character

Pursuant to ECL article 8, "environment" is defined as "the physical conditions which will be affected by the proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character." ECL 8-0105(6). The term "environment" as defined in SEQRA, is broadly defined and includes "existing patterns of population concentration, distribution, or growth, and existing community or

neighborhood character." *Chinese Staff and Workers Association v City of New York*, 68 NY2d 359, 365 (1986). "Thus, the impact that a project may have on the population patterns or existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis since the statute includes these concerns as elements of the environment. [footnote omitted; emphasis added]" *Id.* Therefore, community character is one element of "environment" as defined in SEQRA, and community character is within the scope of SEQRA review.

It is undisputed that no statutory or regulatory definition of "community character" is provided in SEQRA law or regulation. However, a standard for assessing a community's character has been articulated, pursuant to case law and agency precedent. In determining the nature of the community's character and whether the project will have an adverse effect upon it, if there is in effect a master land use plan, designated special districts, or local zoning ordinances, then these are instructive and are afforded deference in ascertaining whether a project is consistent with community character. See, *In the Matter of Crossroads Ventures*, Interim Decision of the Commissioner, December 29, 2006, at 71, citing, *Matter of Lane Construction Co.*, Interim Issues Ruling, February 22, 1996, at 16; *Matter of William E. Dailey, Inc.*, Decision of the Commissioner, June 20, 1995, at 8; *Matter of Miracle Mile Assocs.*, Decision of the Commissioner, December 6, 1979, at 3; see also, *Matter of St. Lawrence Cement Company, LLC*, Second Interim Decision of the Commissioner, September 8, 2004, at 114.⁶

In the recent decision of *Village of Chestnut Ridge v Town of Ramapo*, 45 AD3d74, 841 NYS2d 321 (2nd Dept 2007), the court addressed the definition of community character, stating,

"[t]he power to define community character is a unique prerogative of a municipality acting in its governmental capacity. All of the other incidents of local government, including its electoral and legislative processes, management policies, and fiscal decisions, are ultimately aimed at determining and maintaining the community that its residents desire."

⁶ Regarding the *Crossroads* decision, Commissioner review of a motion for reconsideration of the community character decision has been suspended at the applicant's request. See, *In the Matter of Crossroads Ventures*, Ruling of the Commissioner, November 9, 2007.

Chestnut Ridge, supra at 841 NYS2d 321, 339.

Necessarily, the "definition" of community character is a case-by-case determination, dependent upon particular elements of community character of import to that permit review. In this case, the Town and Village assert that regarding community character, they have made their wishes known through promulgation of the Town and Village Comprehensive Plan and the Town Zoning Law. These documents, the Town and Village contend, were many years in development and represent the will of the citizens of the Town of Schoharie. Moreover, the Town and Village stress that these documents were not created simply in response to this permit application.

The Town and Village contend that the Comprehensive Plan identifies and prioritizes both the unbuilt and the built environment, and thereby defines local community character. The unbuilt environment includes natural features such as landscapes, etc.; the built environment includes features such as schools and buildings, etc., each components of the area's community character.

In addition, the Town and Village have identified the Village's Main Street Revitalization Plan (August 2006; Exh. 7) and the Schoharie County Long-Range Economic Development Strategy (October 2004; Exh. 8) as two other local land use plans that are indicative of the character of the community and planned development of the Village and Town (consistent with the Town and Village Comprehensive Plan) that will be adversely impacted by this project.

The Town Zoning Law designates the area comprising the mining modification site as a "rural-agricultural" district, not including heavy industrial uses such as mining. Pursuant to Town of Schoharie Land Use Law (adopted August 15, 2005),

"3.1-1 Rural Agricultural District

This District encompasses the largest area of the Town. The intent for this District is to allow uses that are compatible with the predominant agricultural and residential uses. The purpose is to allow and promote low-density residential development and commercial or home-based uses that will not have a material adverse effect on the rural character of the area. Most uses except single family residences will require Site Plan approval, Special Use Permit approval or both in order to review each proposed use on a case by case basis in order

to ensure each new use and it's [sic] location are compatible with the land uses and environmental conditions that exist on the surrounding area as well as to properly plan for future growth and development. Preservation of open spaces and scenic vistas will be encouraged. An Overlay District has been established which includes portions of the R-A District in order to provide additional protection to the Town that are environmentally sensitive."

Town of Schoharie Land Use Law (adopted August 15, 2005), Section 3.1-1 Rural Agricultural District.

The Town and Village Comprehensive Plan identifies values of importance to the community, including preservation of open spaces, preservation of the rural character of the area, preservation of predominant agricultural and residential uses, and protection of existing environmental resources.

Lastly, as noted in *Lane, supra*, this impact review pursuant to SEQRA is not intended to, and in fact does not in any way, rule upon the validity of the Comprehensive Plan or Zoning Law itself or the validity of its application to the mining project proposed by the Applicant. Instead, the Department looks to these planning documents as the expression of the community's vision of itself. *Supra, Lane, citing, WEOK v. Planning Board*, 79 NY2d 373 (1992); *Matter of Wilmorite*, Commissioner's Decision May 24, 1982; *Matter of Pyramid Crossgates*, Commissioner's Decision November 28, 1980.

RULING #4: The community character issue will be adjudicated, pursuant to 6 NYCRR 624.4(c)(1)(ii), because this issue relates to a matter cited by Department Staff as a basis to deny the permit and is contested by the Applicant.

Community character, as defined in this proceeding, includes the built and unbuilt environments, quality of life, and the unique character of the Town and Village of Schoharie, with high value on its scenic rural qualities.

Department Staff have identified six elements of community character in its permit denial: 1) that the proposed expansion is within a scenic rural agricultural area comprised of quiet open spaces; 2) that as compared to the existing operation, buffering effects will be lost because the expansion area would be approximately 1500 feet closer

to village neighborhoods, and approximately 340 feet closer to Lasell Park; 3) noise impacts; 4) visual impacts; 5) blasting and vibration impacts; and 6) air and dust impacts.

Department Staff's interpretation of the VIA Policy, as applied in this case, is too restrictive and must be rejected. Pursuant to 6 NYCRR 617.11(d)(2), the Department, as the SEQRA lead agency, must make findings on all potential adverse visual impacts, not only those impacts of statewide significance.

Therefore, Department Staff must address visual impacts of local significance as a basis of permit denial, as a separate SEQRA issue from local visual impacts as a component of SEQRA community character. Consequently, pursuant to 6 NYCRR 621.8(b), as between Department Staff and Applicant, SEQRA visual impacts of local significance are a substantive and significant issue requiring adjudication.

Lastly, I note that Intervenors have proposed other SEQRA issues for adjudication that also pertain to community character. To the extent those issues are certified for adjudication, those issues will inform the community character adjudication.

B. Applicant's Objections to Draft Permit Conditions

1. Numerical Noise Limit: Draft MLRL Permit, Condition 15

Applicant objects to several conditions of the draft MLRL permit. Regarding noise regulation, Applicant asserts that the draft MLRL permit seeks to impose a numerical noise limit, and that the Department lacks authority to do so. Draft MLRL Permit SC #15 addresses noise levels. Applicant cites 6 NYCRR 422.2(c)(4)(i), which addresses noise regulation but contains no numerical limit. (Applicant cites the Department's solid waste regulations for purposes of comparison; those regulations do contain numerical noise limitations.)

Regarding noise control, 6 NYCRR 422.2(c)(4)(i) requires only that noise control may be provided by "...the utilization of equipment which is adequately muffled to prevent excessive noise and vibration; and through the use of screening for control of... noise." Department Staff assert that authority for this permit condition is based upon SEQRA (617.11(d)(2)) and the Department's program policy, *Assessing and Mitigating Noise Impacts*, DEP-00-1

(Issued 10/6/2000; Revised 2/2/2001). Again, Department Staff's position is that this permit should be denied for other reasons (community character); the draft permit condition is provided for the Commissioner's consideration, but does not indicate Staff's approval of the permit condition (or the permit).

Applicant contends that its proposal complies with this regulatory provision. Applicant concludes that Draft MLRL permit SC #15, requiring compliance with numerical noise limits, is unsupported by statutory or regulatory authority and should be revised to require only compliance with 6 NYCRR 422.2(c)(4)(i).

RULING #5: The SC #15 noise issue will be adjudicated, pursuant to 6 NYCRR 624.4(c)(1)(i), as applied in this case, because the issue relates to a dispute between Applicant and Department staff over substantial terms or conditions of draft permit SC #15.

- 2. Attempt to Regulate Existing Operation Through the modification Draft MLRL Permit: Draft MLRL Permit, Conditions 6 (dust control), 8 (hours of operation), 11 (importation of outside materials) and 15 (noise)**

Applicant contends that Department Staff improperly is attempting to impose new regulatory requirements on the existing operation through terms and conditions of the Draft MLRL Permit prepared for this modification proceeding. Conditions at issue include Special Conditions ("SCs") #6 (dust control), #8 (hours of operation), #11 (importation of outside materials), #14 (setbacks and buffers) #15 (noise) and #24 (tracked materials). Applicant's concern regarding tracked materials is that Eastern Avenue is a town road that runs through the existing operation, and that as haul trucks cross that road, some material will fall on Eastern Avenue, and will continue to do so if the permit modification were to be granted.

Department Staff explained that SC #6, regarding dust control, is a standard provision similar to the dust control provision in the current permit for the existing mine. Applicant indicated that the provisions are not the same, and that it would accept the language in the current permit. Regarding SC #8, hours of operation, Applicant has indicated its acceptance of that draft permit condition. Regarding SC #11, importation of outside materials, again, Department Staff assert that this is a standard provision. Regarding MLRL Draft permit, SC #14, setbacks and buffers, Department Staff explained that this

provision was included in the draft permit to allow the Commissioner to mitigate SEQRA impacts, including noise, visual and dust impacts, in the event a permit were to be issued.

RULING #6: The following issues will be adjudicated, pursuant to 6 NYCRR 624.4(c)(1)(i), as applied in this case, because these issues relate to disputes between Applicant and Department staff over substantial terms or conditions of the draft permit: SC #6 (dust control), SC #11 (importation of outside materials), SC #14 (setbacks and buffers), SC #15 (noise) and SC #24 (tracked materials).

IV. Intervenors' Proposed Adjudicable Issues

For each issue proposed by an intervenor that also has been identified by Department Staff for adjudication, the intervenor must demonstrate that it can make a meaningful contribution to the record regarding the substantive and significant issue or issues already identified by Department Staff. 6 NYCRR 624.5(d)(1)(ii).

For each issue proposed by an intervenor that has not been identified by Department Staff, the intervenor bears the burden of persuasion to show that a substantive and significant issue exists, requiring adjudication. 6 NYCRR 624.4(c)(iii). Briefly, an issue is substantive if there is sufficient doubt about the Applicant's ability to meet the applicable statutory or regulatory criteria such that a reasonable person would inquire further. An issue is significant if the adjudicated outcome can result in permit denial, a major modification to the proposed project, or the imposition of significant conditions in addition to those proposed in the draft permit. 6 NYCRR 624.4(c)(3); See, generally, *Athens Generating Co., LP*, Commissioner's Interim Decision (June 2, 2000) at 3, "Standards for Adjudication".

A. Community Character

The Town and Village, jointly, and SOS each assert community character as an adjudicable issue. But, the Intervenors differ from Department Staff in that the Intervenors also assert other SEQRA issues as adjudicable issues, whereas Department Staff has not. In the Intervenors' view, community character is intertwined with all other issues required to be analyzed pursuant to SEQRA, and forms the basis for denial of the permit modification application. (Those other SEQRA issues, discussed below, include visual impacts, noise impacts, blasting impacts,

fugitive dust emissions, traffic impacts, hydrogeological impacts, and cultural and historic resources impacts.)

The Town, Village and SOS draw a distinction between the existing mine and the proposed modification area. These Intervenor do not object to the continued operation of the existing mine. But they do oppose the proposed modification that would extend mining activities in the area by 69-acre Life of Mine.

- Standard for Adjudicable Issues

Pursuant to 6 NYCRR 621.8(b), "[t]he determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law, including the reasonable likelihood that a permit applied for will be denied or can be granted only with major modifications to the project because the project, as proposed, may not meet statutory or regulatory criteria or standards..."

In this instance pursuant to 6 NYCRR 621.8, Department Staff have identified community character as a substantive and significant issue that requires an adjudicatory public hearing.

Pursuant to 6 NYCRR 624.5(d)(1)(ii), "[t]he ALJ's ruling of entitlement to full party status will be based upon... (ii) a finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party..." Department Staff (a necessary party in this proceeding) have identified community character as a substantive and significant issue. Therefore, Intervenor need demonstrate only that they 'can make a meaningful contribution to the record regarding a substantive and significant issue [community character] raised by another party [Department Staff].' However, Applicant contends that because Intervenor identify the community character issue more broadly than Department Staff, Intervenor should be held to the issues identification standard of demonstrating that their community character issues are substantive and significant issues.

SEQR requires a balancing of project benefits if the project would cause adverse environmental impacts that cannot be completely mitigated or avoided. *Matter of 4-C's Development Corporation*, Commissioner's Decision dated February 7, 1996, citing, *Matter of Wilmorite*, Commissioner's Decision dated May

24, 1982 and *Matter of Pyramid Crossgates*, Commissioner's Decision dated November 28, 1980. The Town and Village acknowledge that the qualitative standards of SEQR cannot be used to abandon quantitative standards in the Environmental Conservation Law (or implementing regulations). However, these Interveners contend that SEQR goes beyond such quantitative standards, to be able to impose additional conditions on a particular project so that the Commissioner may make the required SEQR findings, or in the alternative, deny the project if the Commissioner is unable to make the required SEQR findings because available mitigation measures are not sufficient. When a lead agency finds that available mitigation measures do not sufficiently mitigate potential adverse impacts, the lead agency may deny the project. *Matter of Lane Construction*, Commissioner Decision, June 26, 1998.

As discussed above, the Department, to a large extent, relies on local land use plans as the standard for community character; adopted local plans are afforded deference in ascertaining whether the project is consistent with community character. See, *Matter of Crossroads Ventures*, Interim Decision of the Commissioner, December 29, 2006. Yet the Town and Village contend that the DEIS does not reference or address the Comprehensive Plan other than to contain a conclusory statement that the project is consistent with the goals of the Comprehensive Plan. The Town and Village point to the Town and Village Comprehensive Plan as indicative of community character and Applicant's project is not compatible with the community character of the Town and Village of Schoharie. In the community character adjudication, the Town and Village propose to show that a primary purpose of the Comprehensive Plan is to define and identify what is important to the community and that those community character values would be unacceptably adversely impacted if the MLRL permit were granted.

Regarding visual impacts related to community character, the Town and Village would show that the Comprehensive Plan employed a technique called a Visual Preference Survey that quantifies visual information preferences of the community. Those results are identified in the Comprehensive Plan.

Applicant counters that in the Village of Schoharie, mining is a permitted use, acknowledging the existing mining operation. Further, Applicant contends that at the time Applicant filed its application for modification, the zoning law permitted mining in agricultural districts.

**- Definition of Community Character:
Built and Unbuilt Environments**

The unbuilt environment (landscape, natural surroundings, etc.) is one component of community character; other components include the built environment, schools, and buildings. In addition, the Intervenors contend, most of the Village buildings are historic and must be analyzed and addressed in this project review. The Town and Village maintain that the Comprehensive Plan identifies and prioritizes both the unbuilt and the built environment, and defines local community character.

The Town and Village assert that quality of life, as identified in the Comprehensive Plan, is an important aspect of community character, and would be adversely affected if the project were permitted. The Town and Village propose to show through the Comprehensive Plan that the unique character of the Town and Village of Schoharie, with high value on its scenic rural qualities, is what the residents value.

- SEQR/Economic Issues

In addition, the Town and Village contend that economic character of the community is within the community character SEQR analysis, but was not addressed in the DEIS.

As noted in *Matter of St. Lawrence Cement*, First Interim Decision, December 6, 2002, "[w]hile it is settled that purely economic impacts are not relevant under SEQRA, it is appropriate to consider the economic implications of environmental impacts. See e.g., *Matter of Red Wing Properties, Inc.*, Interim Decision of the Commissioner, January 20, 1989 (Commissioner determined that the reduction of property values, considered in isolation, cannot be considered an environmental impact, even under the broad definition of 'environment' under ECL Article 8) and *Wal-Mart Stores, Inc. v. Planning Bd. of the Town of North Elba*, 238 A.D.2d 93 (3d Dept. 1998) (Court upheld consideration of the economic impact of the store in tandem with a community character impact issue); see also, *Lazard Realty, Inc., v N.Y.S. Urban Development Corporation*, 142 Misc.2d 463, 537 N.Y.S.2d 950, Jan. 18, 1989 (Economic effects may be environmental impacts only if they have an impact on one of the factors in the ECL Article 8 definition of "environment", such as population patterns or existing community character, citing, *Chinese Staff and Workers Association v. City of New York*, 68 N.Y.2d 359, 366, 509 N.Y.S.2d 499, 502 N.E.2d 176)."

Further, the propriety of reviewing economic impacts in association with environmental issues has additional support in ECL § 8-0113(2)(b), which directs the Department, through its regulations, to include criteria to take economic and social factors into account when determining the significance of an environmental impact. Moreover, Commissioner decisions uphold the potential adjudicability of environmental/socio-economic issues. See, e.g., *Matter of Sithe/Independent Power Partners, L.P.*, Interim Decision of the Commissioner, November 9, 1992.

- Proposed Expert Witnesses

The Town, Village and SOS jointly offer Nan Stolzenberg, Ruth Piwonka, and the Honorable John Borst, Village of Schoharie Mayor, as expert witnesses on community character issues. Nan Stolzenberg would offer expert testimony applying the Comprehensive Plan, concluding that the Comprehensive Plan does not contemplate expansion of mining in the Town or Village. Her testimony, referencing the Comprehensive Plan, would support her opinion that the focus of the community is on development of agricultural business and development of recreational and historic resources to increase tourism. Ms. Stolzenberg's primary contention is that the proposed modification area is in an agricultural district, and the Town's Comprehensive Plan and Zoning law (specifically, Local Law 2-2005), prohibit mining in the Town's Agricultural District. Therefore, SOS, the Town, and the Village assert that this permit application must be denied.

Mayor Borst would testify regarding development of the Comprehensive Plan and other economic development plans such as the Main Street Revitalization Plan, as a template for the community's future growth, and consequently, an essential element in assessing the Village's community character. The Mayor would testify that primary character of the Village is defined by local agriculture and tourism activities, surrounded by the natural beauty of the Schoharie valley. The Mayor would offer evidence to show that the direction of the community is in developing agricultural, recreational and historic resources to encourage tourism. The Main Street Revitalization Plan, the Town of Schoharie hiking/bicycling trail and local re-enactments of Revolutionary War battles are community activities and elements indicative of community character that the Mayor would elaborate upon at adjudicatory hearing.

Ruth Piwonka would offer testimony regarding historic resources in the Town and Village, including information regarding structures listed on the State and National Register of Historic Places and structures potentially eligible for listing

on the Register. Ms. Piwonka's proposed testimony relates primarily to the issue of historic resources, but also is relevant to community character issues.

In addition, SOS offer Professor Scott Trees, PhD, Economist, as their expert witness on economic factors contributing to community character issues. Professor Trees is Chair of the Economics Department at Siena College, Albany, New York. SOS contend that the DEIS contains only a conclusory assertion that operation of the mine would have positive economic impact to the community. However, SOS continues, production rates at the mine will be driven by many variables, rendering analysis of total jobs and wages attributable to the mine very difficult to predict.

In summarizing his proposed testimony, Professor Trees stated he would discuss economic impacts of the project as one element of community character. SOS and Professor Trees contend that the DEIS addresses economics only twice, providing census information for the County of Schoharie (DEIS page 48) and census information for the Town of Schoharie (DEIS page 52). SOS propose to offer Professor Trees' testimony at an adjudicatory hearing regarding these alleged deficiencies in the DEIS.

Professor Trees contends that the Comprehensive Plan indicates the community's desire not to develop industrial uses but instead, to develop agricultural uses and historical and cultural resources to further tourism in the area. Professor Trees would provide expert opinion testimony that the goals of the Comprehensive Plan for development of the Town and Village are inconsistent with mining expansion.

In addition, Professor Trees contends that in the DEIS, Applicant relies only on demand in the marketplace to dictate production, and has provided no historical production information. SOS contend that historical production of the existing facility should be adjudicated within the community character issue, to show the extent to which mining has existed historically and the extent to which production reasonably could be expected to increase, should the modification application be granted. In other words, SOS propose to rebut the Applicant's contention that mining is consistent with the Comprehensive Plan (and community character), by showing that the existing mining operation has changed over time; that it has expanded and could be expected to continue to expand if the modification is granted, thereby creating greater adverse community character impacts. In sum, SOS contend that these economic issues relate to review of SEQR community character impacts of the proposed modification.

RULING #7: Department Staff, in a letter dated March 30, 2007, advised Applicant of its determination, pursuant to 6 NYCRR 621.8, to hold an adjudicatory hearing for this project, based upon the existence of substantive and significant issues. Section 621.8(b) provides "[t]he determination to hold an adjudicatory public hearing shall be based on whether the department's review raises substantive and significant issues relating to any findings or determinations the department is required to make pursuant to the Environmental Conservation Law..." Here, Department Staff have determined pursuant to 6 NYCRR 621.8, that community character is a substantive and significant issue.

In view of the offers of proof made by the Town, Village and SOS, I find that their participation in adjudication of the community character issue can make a meaningful contribution to the record regarding the adjudicable community character issue raised by Department Staff. See, 6 NYCRR 624.5(d)(1)(ii) [The ALJ's ruling of entitlement to full party status will be based upon...(ii) a finding...that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party...].

As discussed below, I find that several SEQR issues proposed by these Intervenors for adjudication are adjudicable issues, in addition to their consideration in the context of the community character issue. Therefore, the Town, the Village and SOS are granted full party status.

B. Cultural, Historical and Archaeological Resources

By letter dated June 8, 2007, the New York Office of Parks, Recreation and Historic Preservation ("OPRHP") has indicated there will be no adverse impacts to cultural, historical or archaeological resources from the project, assuming compliance with four recommended conditions:

1. Existing condition reports are to be completed for the National Register listed Old Lutheran Parsonage, Lasell Hall, the Schoharie County Courthouse (original section), Lutheran cemetery (specifically monument conditions survey). Condition studies should focus on

structural conditions that would be most susceptible to vibration damage.

2. Active cracks in the buildings noted above will be monitored through the use of traditional methods. A plan should be established to ensure that monitoring is done during blasting activity but also during non-blasting periods to determine cause-effect relationships if any.

3. A specific blast monitoring plan should be established for these historic properties and should also include all National Register listed resources in the vicinity including the Old Stone fort building and the Schoharie Valley Rail Road complex. The plan should account for the susceptibility of historic buildings to vibration and provide for a long term seismic survey during blasting events. This may require the placement of additional sensors.

4. A fund should be established and maintained that will be dedicated to repair damage to historic buildings that can be shown, through a long term monitoring process, to have occurred as a direct or indirect result of vibration associated with the mining activity.

Following discussions between Department Staff and OPRHP Staff, Department Staff sent an e-mail to the issues conference participants dated June 22, 2007, providing a revised Draft MLR, SC #23. Department Staff have revised Draft MLRL Permit SC #23, adding a final sentence, indicated below in bold:

"23. Structures

a) Prior to the initial blasting within the excavation area south of Rickard Hill Road, the permittee shall offer to conduct a condition survey in accordance with the procedures detailed below for each off-site structure not owned by the permittee within two-thousand (2000) feet of the modification area. This survey shall determine and document the conditions of the structure at the time of the survey. Documentation shall include tape-recorded descriptions, diagrams, notes and

photographs as needed to detail defects in walls, ceilings, floors, foundations and windows both on the interior and exterior of the structure. The permittee shall hire professionals experienced in condition or pre-blast surveys to perform all condition surveys. A copy of the documentation will be provided to the owner, determined according to the municipal tax records, within thirty (30) days of completion of the survey. **The owner shall be responsible for any subsequent monitoring of their structure(s)."**

Draft MLRL Permit, Revised SC #23.

In view of revised SC #23 language and other conditions in the Draft Permit, and the fact that the Palatine House is a listed site for one of the four seismographs in the Blasting Overview and Best Management Practices, Appendix I of the DEIS, Department Staff state that the first three conditions of the June 8, 2007 OPRHP letter are satisfied.⁷ Regarding the fourth OPRHP condition, Department Staff advised OPRHP Staff of legal and administrative difficulties for the Department in establishing and administering a fund to repair any damage to historic buildings. Instead, OPRHP Staff and Department Staff agreed that in the event this MLRL permit were to be issued, establishment and administration of an historic building repair fund would best be arranged between the Town, Village and Applicant, and is not a matter to be addressed in the MLRL permit. Nonetheless, establishment of such a fund remains an OPRHP condition.

SOS seek to adjudicate the scope and adequacy of a monitoring plan and how it would be administered. Regarding a repair fund, SOS note that the current draft permit contains no provision addressing such a fund or administration of such a fund. SOS contend that the Department has an independent obligation to make findings with respect to the potential impact of this project on historic resources.

Department Staff rely upon the expertise of OPRHP in making SEQRA findings that potential adverse impacts to these resources have been mitigated to the maximum extent practicable. However, Department Staff's reliance upon advice from another agency does

⁷ Attached to Department Staff's June 22, 2007 e-mail, was a June 20, 2007 letter from OPRHP acknowledging that the revised permit language satisfied their concerns regarding the "conditions survey."

not relieve Department Staff of its obligation to make its own independent judgment of the scope, contents and adequacy of the EIS. See, ECL §8-0109(3); *Jackson v N.Y.S. Urban Development Corp.*, 503 NYS2d 298, 311-312, 67 NY2d 400 (May 8, 1986) [Nothing in SEQRA bars an agency from relying upon information or advice received from others, including consultants or other agencies, provided that the reliance was reasonable under the circumstances.]

Applicant cites *Matter of Amenia Sand and Gravel*, Issues Ruling, June 16, 1997, to support its contention that where OPRHP has determined that a proposed project will have no adverse impacts upon properties on or eligible for inclusion on a state or national register of historic places, no adjudicable issue exists regarding archaeological, cultural and historic resources.

SOS contend that several properties listed or eligible for listing on the National Register of Historic Places were not addressed in the DEIS, including the Palatine House, Presbyterian Church, Lasell Hall and the County courthouse. Because it is SOS's thesis that character of the community is preserving and expanding rural, agricultural and tourism activities in the area, SOS contend that these historical and cultural resources are of great importance and must be addressed in an adjudicatory hearing. In addition, SOS contend that no mitigation is proposed for impacts from blasting and changes in the visual character of the area.

The DEIS, SOS assert, includes only those historic properties that are within the viewshed of the proposed modification area, thereby ignoring other potential impacts, including blasting, on these unidentified historic assets of the Village and the Town.

SOS's proposed expert on historic and cultural resources, Ruth Piwonka, has identified ten Village or Town properties listed on the New York and National Registers of Historic Places, which are not addressed in the DEIS. SOS contend that this omission in the DEIS should be addressed through an adjudicatory hearing.

In addition, the Town and Village join with SOS's criticism of deficiencies in the DEIS inventory of cultural and historic resources, supported by their proposed expert, James Tinney, Barton & Loguidice, P.C.

RULING #8: SOS has identified an adjudicable issue (a deficiency or omission) as to the ten Village or Town

properties listed on the New York and National Registers of Historic Places, but not addressed in the DEIS.

OPRHP has determined that the proposed project will have no adverse impacts upon properties on or eligible for inclusion on a state or national register of historic places.

Therefore, no adjudicable issues exist regarding archaeological, cultural and historic resources, assuming that Applicant and the Town and Village establish and maintain a fund that will be dedicated to repair damage to historic buildings that can demonstrate, through a long term monitoring process, to have occurred as a direct or indirect result of vibration associated with the mining activity.

OPRHP Staff and Department Staff have agreed that, in the event this MLRL permit were to be issued, establishment and maintenance of such a repair fund is best arranged between the Town, Village and Applicant. The establishment of such a fund, to be administered by the Town and Village, should be addressed in a permit condition of the draft MLRL permit, because establishment of such a fund is a necessary condition of OPRHP approval.

C. SEQRA Segmentation and Cumulative Impact

The Town contends that discussion of coordinated review, segmentation and cumulative impact proposed issues are related. As a matter of law, the Town contends that the application must be denied because mining would not occur in the modification area until approximately 40 years hence. SOS, the Village and Cave Conservancy concur. These Intervenors contend that this permit application is not a modification of an existing mine site, because the proposed 69-acre Life of Mine mining area is not within the boundaries of a previously mined land use plan, but instead is located across a public highway. These Intervenors cite regulatory provisions requiring consideration of "existing" conditions, asserting that it is unknown what baseline conditions will exist 40 years hence. Consequently, these Intervenors contend, the necessary SEQR review cannot be accomplished and the permit application must be denied.

However, Department Staff state that SEQR regulations require that a lead agency consider the entire set of activities or steps to an action (and that failure to do so would be improper segmentation of the SEQR project review). See, 6 NYCRR Part 617.7(g). This is particularly so, Department Staff

contend, in mining projects which commonly are implemented in phases over a period of many years. Department Staff have identified the project as modification of the existing MLRL permit (and related permits).

Department Staff state that pursuant to the Uniform Procedures Act ("UPA"), once a permit application is deemed complete for public review, the Department is required to continue processing the permit application and render a final agency determination on the permit application. *See generally*, ECL Article 70 and 6 NYCRR Part 621.

Applicant concurs with Department Staff and goes further, arguing that the issue in these proceedings is not the "commencement" of mining activities, but instead "the natural progression of adding additional acreage to an existing quarry operation." However, SOS counter that neither is it the Department's obligation to assist Applicant with securing reserves for future inventory, nor does the Department's policy equate to an expectation that mining activity will eventually transcend the boundaries of the existing quarry and "naturally progress" to adjacent lands.

RULING #9: Department Staff have properly identified this project as an application for permit modification. The Intervenor's contention that, as a matter of law, the required SEQR review cannot occur when mining in the modification area will not commence until approximately 40 years hence, must be rejected as contrary to the requirements of UPA and SEQRA. No substantive and significant issue has been identified.

SOS make two arguments regarding cumulative impacts. First, SOS contend that the temporal extension of mining activity by increasing the existing by 69 acres in close proximity to Village and Town residential receptors will create severe adverse cumulative impacts that cannot be adequately mitigated. In its second argument regarding cumulative impacts, SOS contend cumulative impacts will occur during the transition from mining the existing site to mining the modification area, in that reclamation will be occurring at the existing site while mining is commencing in the modification area, which will extend the scope of mining activities between the existing site and the modification area. However, SOS failed to explain how this transition would be any different than the concurrent reclamation that already occurs as mining progresses at the existing site.

Concurrent reclamation, Applicant asserts, is required by the current permit and by the proposed Draft MLRL permit to be issued should the permit modification application be granted. Applicant states that no cumulative impact is possible in this instance, as a matter of law, because cumulative impacts applies to impacts of two separate projects, whereas this modification is a proposed continuation of the existing mining project

RULING #10: No substantive and significant issue requiring adjudication has been identified concerning cumulative impacts.

D. General Issues Regarding Draft Permit Conditions

1. Surety Bond: MLRL Permit SC #2

In this proposed issue, the Town and Village assert that the reclamation surety bond should be for a specified amount sufficient to ensure full reclamation of the project site. However, Department Staff explained that the draft permit language is standard in MLRL permits; the surety condition of the draft permit is used for all MLRL permits statewide. Prior to issuance of the permit, Applicant is required to submit sufficient financial security to ensure reclamation of the area anticipated to be affected during the five-year permit term. Reclamation occurs concurrently with ongoing mining activities.

RULING #11: No substantive and significant issue requiring adjudication has been identified.

2. Reclamation: MLRL Permit SCs #16 and #17

Regarding MLRL SC #16, the Town and Village seek more detailed information about the type of soil that would be deemed overburden material or topsoil to be used in reclamation. The Town and Village are concerned that the quality of overburden or topsoil will be insufficient to support required plantings.

MLRL SC #17, concerning use of berms as visual barriers on the site, requires two staggered rows on a six-by-six basis of red and white pine required to be planted in front of the poplar. Department Staff stated that these draft permit conditions are standard in MLRL permits. Regarding SC #16, topsoils removed for mining would be stored onsite to be used later for reclamation. Further, Department Staff noted that with respect to the existing operation, reclamation has occurred in an unexceptional manner; overburden and topsoil have supported required plantings.

RULING #12: No substantive and significant issue requiring adjudication has been identified.

3. SEQR Economic Compensation: loss of real property values

The Town and Village assert that the draft MLRL permit should provide some mechanism for economic compensation of landowners who may suffer loss in value of real property due to mining activities.

The Applicant correctly responds that economic compensation for reduction of property values is not considered to be an environmental impact within the meaning of ECL Article 8, SEQRA, and therefore is not appropriate for adjudication. *Matter of Red Wing Properties, Inc.*, Commissioner Decision, January 20, 1989, *Matter of William Dailey*, Commissioner Decision, June 20, 1995 [diminution of property values was not an issue for adjudication based upon prior agency precedent].

RULING #13: No substantive and significant issue requiring adjudication has been identified regarding economic compensation for possible adverse impacts to real property values.

E. Hydrogeology Issues

1. Introduction

Groundwater is addressed in DEIS §4.1, Natural Resources (§4.1.1, Geology; §4.1.2, Water Resources) and in DEIS Appendix H, Hydrogeologic Impact Assessment (November 30, 2005).

The Schoharie Quarry modification area is located in the Appalachian Uplands Province at the northern edge of the Helderberg Escarpment. The Helderberg Escarpment forms a prominent east-west trending ridge in Schoharie and western Albany Counties. Near the Town of Altamont, about 12 miles east of the quarry site, the escarpment turns southward and continues down the Hudson Valley to Kingston where topographically it merges with the Catskill Mountains. Schoharie Creek runs approximately 4500 feet west of the planned expansion, flowing north. There are six geologic formations currently being worked in Schoharie Quarry, and there are four units that are encountered in core on the modification area property or in

outcrops in the area.⁸ See, generally, DEIS §3.0, Environmental Setting. The geology of the modification area is characterized as fractured bedrock (karst features) and carbonate rocks. Groundwater is transmitted via fractures, faults and joints in the bedrock (as compared to a sand and gravel aquifer where the water travels between the sand and gravel grains).

Department Staff have accepted Applicant's Hydrogeologic Impact Assessment and find no substantive and significant issues with respect to hydrogeology.

SOS, the Town, the Village and Cave Conservancy raised several proposed issues regarding hydrogeology at the site. Issues of concern include impacts to residential wells, the Palatine House spring and Becker's Cave. These Intervenor contend that the DEIS hydrogeologic characterization is incomplete and not sufficient to characterize surface and groundwater flow due to the fractured bedrock karst geology underlying the site. Resources of concern to these Intervenor include nearby residential wells, Palatine House spring and Becker's Cave (which contains surface water).

Following is a more detailed discussion of proposed hydrogeology adjudicable issues.

The entrance of Becker's Cave is located in the Village of Schoharie, south of Prospect Street and north of Warner Hill Road. The Cave entrance is located to the west of the modification area, on the west side of the slope below the Village's Lasell Park. Becker's Cave occurs under Lasell Park and extends onto the southwest portion of the modification area. DEIS 4.1.1.1, pg 54. Geologically, the cave is located in the lower part of the Manlius Formation.

From the entrance, approximately 100 feet into the cave, it opens up into the "Big Room," which is about eight feet wide and about four or five feet high. The main passage of the cave continues southeast. From the Big Room, the passage continues about 80 feet southeasterly, then turns northerly for approximately 60 feet, then continues southeasterly for approximately 80 feet. The passages from the Big Room are

⁸ From top to bottom, the formations are Port Ewen Limestone, Alsen Formation, Becraft Limestone, New Scotland Limestone, Kalkberg Limestone, Coeymans Limestone, Manlius Limestone, Rondout Shaly Dolife of Mineite, Cobleskill Doite and Brayman Shale.

approximately four feet wide and two to four feet high. Beyond that, the cave extends approximately 330 feet southeasterly, but the cave narrows to a few feet wide and less than two feet high, filled with water up to 18 inches deep. The section of the cave beyond the Big Room is only accessible by more experienced, well prepared cavers. This passage ends in a 40-foot wide solution-widened joint passage that is blocked on the south by a collapse and on the north by its narrow width. DEIS 4.1.1.1, pg 55. The proposed project includes a 300-foot buffer around Becker's Cave from the limit of excavation.

The property boundary of the modification area is approximately 100 feet from the Village boundary in this area of the site. Nearby, in the area of the Village's Lasell Park, the Village and modification area boundaries are adjacent for approximately 1000 feet, then jog to a separation of approximately 200 feet between the property lines at the northernmost corner of the modification area. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions.

Subterranean portions of Becker's Cave extend approximately 650 feet to the southeast, of which approximately 350 feet of cave chambers are located below the modification area. A watercourse in the cave extends from just inside the modification area property line for approximately 200 feet to the south east within the modification area. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions.

Palatine House spring is located in the Village of Schoharie, approximately 850 feet southwest of Becker's cave entrance and approximately 500 feet southwest of the modification area's southwestern corner, north of Warner Hill Road near its intersection with Ward Lane. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions. For Palatine House spring, the map indicates a surveyed elevation of 635.2 feet;⁹ for Becker's Cave entrance, the map indicates a surveyed elevation of 684.7 feet.

The site geology is thinly bedded limestone that is highly fractured, with karst features. This highly fractured geology includes mud-filled fractures, open fractures and solutional fractures.

2. The Cave Conservancy Petition

⁹ The map indicates an elevation of 680 feet reported by DEC.

During the issues conference, Applicant made a motion challenging the sufficiency of the Cave Conservancy's petition on hydrogeology. Applicant asserts that Cave Conservancy has made no offer of proof specifying evidence or expert opinion they proposed to present in an adjudication of the issue. Further, Applicant asserts that Cave Conservancy's Exhibit A was untimely, a summary referenced in the petition was not provided and statements are conclusory without support, and therefore cannot be substantive and significant.

Cave Conservancy's Exhibit A, the resume of proposed expert Hempel, was filed on June 14, 2007 (a day prior to filing the final round of supplemental petitions). Further, Cave Conservancy contends that the third paragraph of the resume provides the summary of Mr. Hempel's proposed testimony. In addition, Cave Conservancy explained that their Exhibit B has been available since November 18, 2005, when it was filed with Department Staff. During the issues conference, the Applicant's motion on sufficiency of the petition was denied, because Cave Conservancy offered a proposed expert on hydrogeology and also because Applicant suffered no prejudice by receipt of Exhibit A on June 14, 2007, prior to the filing of supplemental petitions for party status.

3. The Town's Proposed Hydrogeology Issues

Michael Brother, CGWP, and Steven LeFevre, both of Barton & Loguidice, PC, engineering consultants, are the Town and Village proposed hydrogeology experts. SOS's proposed hydrogeology expert is John Gansfuss, PhD. The Village, SOS and Cave Conservancy concur and join in the Town's proposed hydrogeology issues.

The Town's thesis is that the expansion area contains a complex groundwater regime that has not been adequately characterized. Further, given the inadequate characterization, the Town contends that the Department cannot make findings required pursuant to SEQR and requirements of 6 NYCRR part 422. As explained below, the Town concludes that Applicant's hydrogeologic study is deficient and as a result, Department Staff cannot make required SEQR findings pursuant to 6 NYCRR 617.11(d)(1), (2) and (5).

- Potential Adverse Impacts to Nearby Residential Wells, Palatine House Spring and water flowing through Becker's Cave

On February 16, 2005, Department Staff issued a "Notice of Incomplete Application" in this matter, requiring that a pump test be performed if groundwater will be encountered by mining operations in the proposed expansion area, and if the Applicant intends to lower the water table during mining operations via pumping. The Town's proposed experts contend that the methodologies and studies prepared by Applicant are inadequate to characterize the elevation of the groundwater table, and consequently, Department Staff's decision to not require a long-duration aquifer pump test was erroneous. The collection and evaluation of this hydrogeologic field data, the Town asserts, would form the basis for determining the potential impact of dewatering activities on nearby residential wells, the Palatine House and water flowing through Becker's Cave. The Town argues a long-duration aquifer pump test can be conducted at this site and would sample a much larger volume of the aquifer, whereas the slug tests performed sample only a small volume of water in close proximity to the well.¹⁰

The concern of the Town and concurring Intervenors is that a more complete characterization of hydraulic conductivity is necessary because it governs the rate and volume of groundwater flow beneath and through the site. If adverse water quality impacts occur as a result of mining operations at this site, Intervenors reason, those impacts will be reflected in adjacent properties, residential wells or possibly at down gradient springs.

The Town's proposed experts contend that core wells are not sufficient to characterize groundwater in a fractured bedrock geology such as exists at the site. The Town (and concurring Intervenors) argue, at a minimum, for packer pressure testing of discrete intervals in the bedrock to assess distribution vertically of hydraulic conductivity in the bedrock. Then, based upon that data, discrete monitoring wells intended to isolate a single zone of the aquifer will be installed. The Town's proposed experts contend that a typical characterization in fractured bedrock would include several different zones in order

¹⁰ During the issues conference, at the Town's request, Applicant was directed to provide digital plots of individual slug test base data in tabular form to the Town. Applicant agreed to provide the data in spreadsheet format, if available, or in "PDF" format. Further, at the Town's request, Applicant indicated it would provide circulation fluid loss data, if Applicant can locate this information.

to understand the directions and magnitudes of water flow vertically in the system.

Applicant states that DEIS Appendix H represents a two-year hydrogeologic study, conducted in consultation with Department Staff. The study methodology was reviewed by Department Staff and the study has been accepted and approved by Department Staff. Groundwater monitoring is continuous and ongoing. Further, Applicant notes that resources to the west of the modification area, including residential wells, Palatine House spring and Becker's cave are below the groundwater level that exists at the western edge of the modification area, and lower than the excavation depth proposed for the modification area. Although residential wells to the east of the modification area are at a higher elevation, Applicant's hydrogeologic study predicts no adverse impact to these wells.

Applicant contends that the modification area will be a "dry quarry," as is the existing mining operation. In Applicant's view, groundwater at the proposed modification area is in the same hydrogeologic regime as the existing quarry and will act in the same way it does at the existing quarry, which is a dry quarry.

Department Staff explained that initially, little hydrogeologic information was available for the modification area. It was unknown if Applicant would be mining into the water table, and if so, how deep into the water table. However, after installation of three core (monitoring) wells, groundwater levels were determined and water levels were characterized. Department Staff determined that no water withdrawal or discharge would be required. Therefore, the Applicant was not required to perform a long-duration aquifer pump test.

Because no proposed pumping or permitted discharge will occur, Department Staff contend, groundwater and surface water will continue to flow from recharge areas east of the quarry and continue to discharge to areas west of the quarry, as is currently the case. Consequently, Department Staff determined that a slug test would be more appropriate for this project, rather than the long-duration pump test that was contemplated previously. Department Staff explained that the slug tests that were performed provide site-specific information on each well location, including hydraulic conductivity information which can be converted into transmissivity information. In fractured bedrock, Department Staff stated, it is difficult to place a pumping well in a suitable location.

Lastly, Department Staff state that the existing site provides an analogue for the proposed modification area. Staff conclude that the hydrogeological history of the existing site, in addition to data produced from the three core wells in the modification area, provide sufficient groundwater characterization information to Department Staff for its review of this project.

Regarding potential impacts on residential wells, Palatine House spring and Becker's Cave, Department Staff stated that for carbonate bedrock quarries such as this, Department Staff require installation of a bedrock monitoring well network and long-term monitoring programs. If monitoring suggests any impacts may extend beyond the mine operator's property line, Staff will impose additional special permit conditions to protect water resources. Department Staff agree with Applicant's characterization that Palatine House spring and Becker's Cave are at lower groundwater elevation heads than proposed mining, and that surface water and groundwater will continue to flow from the east towards the west and will continue to recharge those areas.

Draft MLRL Permit SC #20 contains provisions protective of water quality, including installation of three additional wells (in addition to the existing 3 core wells onsite) along the southern perimeter of the area. All six wells must be monitored until each is intercepted by mining activities or until mining at the site permanently ceases. Furthermore, if an off-site property owner claims loss of quality or quantity of water due to blasting or mining, Applicant must immediately provide the property owner with a temporary potable supply of drinking water within 30 days of the complaint, notify Department Staff, investigate the loss claim, and provide Department Staff with a report. If Department Staff find that blasting or mining is a contributing cause of the problem, Applicant must take immediate corrective action to restore a potable water supply to the complainant. Draft MLRL Permit Condition 21 requires a well survey for each well within 2000 feet of the area to be affected by mining during the permit term (usually a five-year term).

Lastly, because the geology of the lower portions of the modification area exhibit karst features, there may be enlarged fractures and solution cavities. Draft MLRL Permit Condition 26 requires Applicant to maintain filtration of waters flowing into those features. Filtration would include use of clean gravel and sand, and installation of gravel berms.

RULING #14: The Town and concurring Intervenors mistakenly contend that Department Staff first required a long-duration aquifer pump test, then later withdrew that requirement. Department Staff's February 16, 2005 "Notice of Incomplete Application" required a long-duration aquifer pump test only if groundwater will be encountered by mining operations in the proposed expansion area, and if the Applicant intends to lower the water table during mining operations via pumping.

As explained by Department Staff, after installation of the three core (monitoring) wells, groundwater levels were determined and water levels were characterized. Department Staff then determined that no water withdrawal or discharge would be required. Therefore, the Applicant was not required to perform a long-duration aquifer pump test.

I find that the hydrogeologic history of the existing site, coupled with the three existing core wells in the modification area and three additional proposed wells, provide sufficient groundwater characterization for the modification area. No substantive and significant adjudicable issue is identified regarding necessity of a long-duration aquifer pump test.

- Other Hydrogeology Issues:

The Town and Village contend that Draft MLRL SC #20(D), requiring further future evaluation at 690 feet elevation before additional mining occurs to the final elevation of 660 feet, is impermissible segmentation.

Applicant states that hydrogeologic information presently available is sufficient to support mining to elevation 690 feet and projects no impact in mining to a final elevation of 660 feet. However, to be conservative because it would be decades before even elevation 690 feet would be reached, Draft MLRL SC #20(D) requires further future evaluation at 690 feet elevation before additional mining occurs to a final elevation of 660 feet.

Because well monitoring data collection is ongoing, additional data would be developed as mining in the modification area occurs over the years. Therefore, the draft permit authorizes mining to a final elevation of 660 feet, with the understanding that at elevation 690 feet, further Departmental review will occur to determine whether projections that were made in this permit application are borne out by future actual field data. If the Department concludes that the field data confirm

the projections, then mining below elevation 690 feet to a final elevation 660 feet would occur.

In sum, Applicant asserts that the project has been reviewed as a whole, and that SC #20(D) represents Department Staff's phased approach of hydrogeologic study. SC #20(D) is more protective of the environment, avoiding potential adverse environmental impacts, by requiring confirmation of projected impacts through verification with future actual field data to be developed.

Draft MLRL Permit SCs #20(E) through #20(G) are the well arbitration provisions. The Town's initial petition, dated March 27, 2007, requested clarification or additional information from Applicant regarding the residential well water survey and arbitration agreement. During the issues conference, Applicant confirmed that a table summarizing the characteristics of each homeowner well was provided in its Response to Comments, Exhibit 10A through 10C. The hydrogeologic investigation, DEIS Appendix H, identified a radius of maximum potential influence of 500 feet. Yet, Draft MLRL Permit SC #20(G) would require a well survey for wells within a 2,000-foot radius.

Nonetheless, the Town and SOS assert that several residential properties exist just outside the 2000-foot radius of Applicant's residential well survey, and these properties should be included in a revised survey. The Town and SOS are primarily concerned about residences on Ward Lane and Colby Road. In addition, the Town contends that its criticism of Applicant's well survey is that it is further indication of an incomplete, inadequate hydrogeologic investigation.

Applicant contends that, as a matter of law, in light of its acceptance of the well arbitration provision, no adjudicable issues exist regarding potential adverse impacts to neighboring wells. In *Matter of Empire Bricks*, 1990 WL 179755, (N.Y.Dept.Env.Conserv.), Commissioner's Decision, August 1, 1990, NYSDEC Application No. 3-5148-108/1-0, the Commissioner found acceptable as mitigation the applicant's willingness to provide adjacent landowners with potable water whenever the water quantity was insufficient until such time that the applicant could demonstrate it is not responsible for the conditions.

Applicant asserts no adjudicable issue has been identified regarding the well survey or arbitration agreement. Moreover, the Applicant asserts that the Town has not identified a distance greater than the 2000-ft radius employed in the well survey and

has not identified any specific wells that were not included in the survey.

Department Staff state that the 2000-foot radius is a standard condition used by the Department's mining program. Staff state that Draft MLRL permit SC #20(E) provides protection to any property owner's well water affected by the mining operation, without limitation.

RULING #15: No adjudicable issues exist regarding Draft MLRL SC #20(D), which requires further future evaluation at 690 feet elevation before additional mining occurs to the final elevation of 660 feet.

No adjudicable issues exist regarding the well survey or arbitration agreement. The Draft MLRL Permit, including SC #20(E), provides protection to any property owner's well water affected by the mining operation, without limitation.

A total of six wells will be installed at the site: the three existing core wells plus three additional wells to be installed along the southern perimeter of the modification area. The Town contends that six wells are not sufficient to characterize groundwater at the site, due to the fractured bedrock with karst features. The wells proposed to be installed along the southern perimeter in a direct line with the Nelson and Gathan residential wells, the Town contends, may not monitor the same groundwater flow system that is present in the residential wells. In addition, the Town asserts, pursuant to 6 NYCRR 617.11, that well monitoring data should be filed with Department Staff more frequently than quarterly intervals, to mitigate potential impacts to the maximum extent practicable.

Applicant has performed continuous monitoring in the three existing core hole wells since August 2005 and would perform continuous monitoring in the three planned wells along the southern perimeter prior to the commencement of mining activities in the modification area. DEIS §4.1.2.1.3.1, pg. 62. Before the perimeter wells are installed, Department Staff will review and must approve the proposed well locations.

Department Staff contend that in addition to the six on-site wells, well data will be available from all the residential wells within a 2000-foot radius of the site perimeter. This, in Staff's view, is more than sufficient to characterize and monitor groundwater. (Regarding reporting of well monitoring data, Department Staff explained that quarterly intervals are

sufficient to monitor well data and prevent excessive drawdown, if any, of the nearby residential wells.)

RULING #16: I credit Department Staff's explanation, summarized above, that the six monitoring wells on-site, in addition to data from nearby residential wells, provide sufficient data to characterize and monitor groundwater impacts of the project. No adjudicable issue exists regarding the location and monitoring periods of the onsite wells.

The Town contends that dye testing was employed to show that there is a hydrogeologic connection between Becker's Cave and the Palatine House spring, but it is unknown whether a connection exists between surface water passing through the site and Becker's Cave. The Town is concerned that karst features in the bedrock may be hydraulically connected to Becker's Cave (and consequently, to Palatine House spring) and asserts an additional dye test should be performed by Applicant to determine whether such a hydraulic connection exists.

Applicant and Department Staff contend that there are many contributing sources to the Palatine House spring, and the modification project does not involve taking away the contributing basin to the spring. See, for example, DEIS Apdx H, pg 27; Exhibit 10, §3.6.1.3, Response to Comments on Palatine spring.

RULING #17: It is not uncommon with hydrogeology to encounter disputes about the number of wells or studies required to characterize the flow of surface and groundwater through a site. The DEIS and Appendix H provide sufficient information to support Department Staff's determination that further characterization via the proposed dye test is unnecessary. No adjudicable issue exists regarding the need for dye tests for the surface waters at the site.

Next, the Town questions Applicant's contention that potentiometric surface will sharply transition upward in the area immediately adjacent to the mine. But the Town's concern here really is that as previously stated, three core wells are insufficient to provide hydrogeologic characterization of the site. More specifically, that Applicant's representation of the transition of potentiometric surface is based upon hydraulic conductivity values that rely upon data from the three core wells. In the Town's view, these hydraulic conductivity values are not reliable and further site characterization is required to

assure that potential adverse impacts will be minimized to the maximum extent practicable, consistent with SEQR. However, adequacy of the site characterization has been discussed above.

The Town questions the basis of Applicant's statement in the DEIS that "the residential wells in the area adjacent to the planned site are completed in different units. The subsurface karst features complicate the construction and yield of water wells due to highly contrasting conductivities in the rock versus the karst influenced rock. In general, there are isolated areas to the east and southeast of the 820-foot elevation that yield plentiful water. Wells in these areas are typically shallow (150 to 200 feet deep)." DEIS p 22. The Town requested clarification of the basis for these conclusions.

The Town contends that the residential water well surveys show that only two wells, the Kennedy and the Nelson wells, exist at an elevation greater than 820 feet, and both wells are deeper than 300 feet. None of the surveyed wells, the Town asserts, fit Applicant's contention of shallow wells at elevations above 820 feet. Applicant however, pointed to the Jaqueway property, 240 Ward Lane, with a well depth of 150 feet, and depth to water of 38 feet. Again, the Town seeks to show inadequate hydrogeologic site characterization; an issue has already been addressed, above.

Draft MLRL permit SC #26 provides that exposed solution features in the mine floor, including caverns, cavities and open fractures shall be filled with clean gravel and sand to provide sediment filtration, or in the alternative, gravel filter berms shall be installed immediately around the solution features so as to prevent the infiltration of sediment-laden waters into the features. The Town asserts that this provision does not comply with the SEQR mandate to minimize adverse impacts to the maximum extent practicable; that both measures should be required rather than "either or." However, Department Staff state that this permit condition is intended as a proactive condition to provide an extra measure of environmental protection, yet is being misconstrued by the Intervenors. Applicant stipulated that it will install gravel filter berms around such features, to prevent sediment-laden waters from infiltrating such exposed solution features.

RULING #18: No substantive and significant issue requiring adjudication has been identified.

F. Air and Dust

Air pollution control for this proposed project is regulated via the SEQRA review process, the Draft Air State Facility permit, and the Draft MLRL permit (primarily, fugitive dust control conditions). DEIS Appendix G contains Applicant's Air Emission Summary, and Applicant's fugitive dust control plan (November 30, 2005). For this project, DEIS Appendix G indicates an existing permitted capping limit of 16.2 tons per year ("TPY") of particulate matter less than 10 microns ("PM₁₀") emissions from stationary sources. The Air Emission Summary states that "[n]o changes to existing caps are proposed."

SOS, the Town and the Village have asserted several proposed adjudicable issues related to fugitive dust adverse impacts from the proposed project attributable to general mining operations and to blasting events. SOS contend that additional significant dust control mechanisms are available that are not proposed in the Applicant's fugitive dust control plan, but should be required to mitigate fugitive dust impacts. In addition, during the issues conference, SOS asserted that many of its members have complained to Department Staff regarding fugitive dust emissions from the existing operation. However, Department Staff responded that fewer than five complaints have been received and further, that no violations of any kind at the existing operation have been noted during Department Staff's inspections in response to dust complaints.

1. Applicability of Commissioner's Policy CP-33

The United States Environmental Protection Agency ("USEPA") has promulgated National Ambient Air Quality Standards ("NAAQS") for regulation of particulate matter, including PM₁₀ and fine particulate matter, which is less than 2.5 microns ("PM_{2.5}"). The PM_{2.5} 24-hour average standard, revised effective December 18, 2006, is 35 micrograms per cubic meter ("mcg/m³").

On December 29, 2003, the Department issued the policy "Assessing and Mitigating Impacts of Fine Particulate Matter Emissions", Commissioner's Policy CP-33 ("CP-33"), pending USEPA's implementation of final revised NAAQS for PM_{2.5}. Elevated levels of PM_{2.5} in the atmosphere have been linked to serious health conditions in humans. PM_{2.5} can be emitted as a

primary pollutant directly from stationary or mobile sources, including sources that burn fossil fuels.¹¹ CP-33, p. 2-3. The Department's CP-33 policy provides a mechanism for complying with the provisions of SEQRA as it relates to the impact of emissions of PM_{2.5}, until such time as the PM_{2.5} NAAQS are fully implemented in the State of New York. CP-33 at 2. By its terms, CP-33 applies when the Department is the lead agency conducting a SEQRA review of any project or action. CP-33, p. 4.

Assessment and minimization of PM_{2.5} emissions are required for all projects that trigger thresholds identified in the policy. As a conservative modeling requirement, Department Staff require permit applicants to quantify emissions of PM₁₀ from a proposed project and assume that all measured or estimated PM₁₀ emissions are PM_{2.5} emissions. If primary PM₁₀ emissions from a project do not equal or exceed 15 TPY, then the PM_{2.5} emissions from the project shall be deemed insignificant and no further assessment is required. CP-33, p. 5.

For projects with an annual potential to emit 15 TPY or more of PM₁₀ (as calculated consistent with provisions of CP-33), an applicant must analyze the potential consequences of secondary formation of PM_{2.5} as part of the environmental assessment. CP-33, p. 5. Further, Department Staff must ensure that particulate emission impacts are minimized to the maximum extent practicable, in order to make its findings under SEQRA¹². CP-33, p. 5. CP-33 provides suggested mitigation for stationary and mobile sources and encourages applicants to propose creative source specific mitigation measures.

SOS, the Town, the Village, and Cave Conservancy contend that CP-33 is applicable to this project review because the existing facility emits more than 15 TPY of PM₁₀. Consequently, these Intervenor reason, an omission exists in the DEIS, because Applicant failed to conduct particulate modeling required pursuant to CP-33. SOS and concurring Intervenor contend that PM_{2.5} air quality impacts should be modeled, including quantitative modeling of potential PM_{2.5} precursor emissions,

¹¹ Secondary PM_{2.5} formation is a long term process that occurs from chemical reactions in the atmosphere.

¹² Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b).

qualitative discussion of potential secondary PM_{2.5} formation and demonstration that the project will comply with all state and federal regulations and programs applicable to the emissions of PM_{2.5} precursor pollutants. Because these analyses have not been performed, SOS and concurring Intervenors assert, the Department lacks the necessary information to evaluate potential adverse particulate air pollution impacts of the project and, consequently, cannot make required SEQR findings nor issue the SEQR certifications required pursuant to 6 NYCRR 617.11.

SOS and concurring Intervenors assert that CP-33 expressly states that measuring PM_{2.5} emissions includes both mobile and stationary sources. These Intervenors note that CP-33 consistently refers to "sources" and argue that the purpose of the policy is to evaluate the impacts of a project as a whole, not each source individually. Therefore, SOS and concurring Intervenors conclude, Department Staff have erred in applying CP-33 to evaluate the particle emissions of just one source in this project review (*i.e.*, the proposed new tertiary crusher). Moreover, these Intervenors argue that Department Staff have changed its position on this issue, admitting in its brief that CP-33 does apply to mobile sources. (See, Department Staff Memorandum at 5.)

Applicant¹³ and Department Staff do not dispute that CP-33 applies to this project review. They contend, however, that the modeling sought by the Intervenors is not required because projected PM₁₀ emissions (the CP-33 surrogate for PM_{2.5} emissions) are below the 15 TPY cap. Department Staff explained that the proposed project does not include the existing permitted quarry, but is limited only to the additional 69-acre Life of Mine and a new tertiary crusher. Department Staff apply the CP-33 cap of 15 TPY only to the proposed increased emissions attributable to the modification - - not to the project as a whole. The application for permit modification of the State Air Facility permit does not seek any increase in the existing permit's PM₁₀ emissions cap.

In concurring with Department Staff, Applicant notes that the project description on the first page of the State Air Facility permit modification application states that "this application is to modify the existing State Air Facility Permit to add a 400 tph crusher in the aggregate plant [*i.e.*, the tertiary crusher]." Applicant states that the 16.2 TPY of PM₁₀ indicated in the Air Emissions Summary represents the total of

¹³ Intervenor, CMA, concurs with Applicant's position on proposed air and dust issues.

existing and proposed additional emissions, and this information is provided for the sole purpose of determining the operation's status as either a "minor" or "major" facility.

Moreover, Applicant states that the 16.2 TPY of PM_{10} , referenced in DEIS, Appendix G, includes emissions from Applicant's blacktop plant, which is located on the same site as the existing mining operation and therefore, is regulated in the same air permit that regulates the existing mining operation. Applicant asserts that the blacktop plant is considered "secondary manufacturing" and is not regulated under the MLRL. If the emissions for the blacktop plant are subtracted out of the 16.2 TPY, Applicant reasons, then emissions from the mining operations are less than the 15 TPY threshold of Commissioner's Policy #33. Department Staff concur with this explanation. Therefore, Applicant and Department Staff conclude that Staff correctly determined that no CP-33 air modeling is required for the present MLRL permit modification application.

Regarding modeling of mobile source emissions for CP-33 applicability, Department Staff explained that CP-33 requires modeling of mobile source emissions only if stationary sources exceed the threshold; Department Staff have interpreted the CP-33 cap of 15 TPY as applicable only to stationary sources. Moreover, because the proposed project proposes no increase in emissions from the existing operations, Department Staff explained, CP-33 particulate modeling is not required for this permit application review.

Applicant concurs with the Department Staff analysis, underscoring that no new mobile sources are proposed for this permit modification and that the project will not generate an increase of PM_{10} emissions above the PM_{10} emissions cap for the existing permit. Instead, fugitive dust emissions from mobile sources such as haul trucks are controlled by provisions of the MLRL permit, including Best Management Practices and a Fugitive Dust Control Plan.

In sum, Department Staff and Applicant assert that CP-33 applies only to the proposed modifications to the existing project, not to the entire proposed project including existing facilities. They assert that no increase is proposed in the existing PM_{10} emissions cap; and, therefore, the modeling provisions of the CP-33 policy are not triggered by this project proposal.

RULING #19: CP-33 was adopted by the Department pending implementation in New York of the federal $PM_{2.5}$ NAAQS and

promulgation of necessary implementing regulations. CP-33 at §III. Once established, the PM_{2.5} regulations will contain provisions for the Prevention of Significant Deterioration ("PSD") of the PM_{2.5} NAAQS. CP-33's PM₁₀ 15 TPY threshold corresponds to the existing *de minimis* threshold under the federal PSD program for PM₁₀.

Department Staff correctly applied CP-33 to determine that no air modeling is required for this MLRL permit modification application because the mining operations do not have the potential to emit more than 15 tons per year of PM₁₀. Further, I adopt Department Staff's explanation of consideration of mobile sources in interpreting the CP-33 policy.

No substantive and significant issue has been identified regarding air modeling of dust emissions from the permit modification application pursuant to CP-33.

2. SOS's Air Modeling Data

SOS also conducted their own air modeling of Applicant's existing quarry operation for PM_{2.5} (and PM₁₀). This air modeling data, SOS contend, is indicative of fugitive dust impacts to be expected from the proposed modification project. SOS state that the monitoring was conducted using Dust Track monitors according to the manufacturer's recommendations. Monitoring occurred from May 25, 2007 through June 22, 2007. Over Applicant's objection, I authorized SOS to submit this data by June 29, 2007, and I provided a schedule for written filings addressing this data (after the last issues conference hearing date).

SOS assert their air monitoring data indicates 1) that PM_{2.5} and PM₁₀ concentrations monitored at residential locations nearby Applicant's existing operation share a direct relationship with Applicant's quarry operations; and 2) that Applicant's operations cause varying degrees of offsite impacts due to prevailing winds, other weather conditions, and the proximity of the monitoring location to the source of emissions within the mine along haulage routes. SOS conclude that PM₁₀ fugitive dust emissions originating from within Applicant's existing operation are impacting offsite residences. The PM_{2.5} data indicate numerous distinct spikes in fugitive dust emissions, which SOS attribute to Applicant's operation of the existing quarry.

The data, SOS contend, show that PM_{2.5} concentrations rise once Applicant's workday begins at 7:00 a.m., and fall shortly

after the workday concludes, at approximately 5:00 p.m. For example, one data event identified by SOS was collected on June 5, 2007 on Eastern Avenue, the primary access road for the existing quarry. SOS measured $PM_{2.5}$ before and after the workday at concentrations below 0.02 mg/m^3 , whereas during the workday, measured concentrations are in the range of between 0.04 mg/m^3 and 0.05 mg/m^3 , with five spikes registering concentrations in excess of 1.0 mg/m^3 and one of these registering almost 2.0 mg/m^3 . See, SOS letter dated June 29, 2007, Exhibit A, Resource Systems Group, Inc., Additional Monitoring Comments, June 19, 2007, Figure 1. Other data events, SOS contend, show similar data curve to Figure 1.

One data event identified by SOS monitors a blasting event. Id., Figure 4. The monitoring location is identified as approximately 2,000 feet from the blasting area. Concentrations of $PM_{2.5}$ before and after the event hover around 0.020 mg/m^3 . Following the blast, for a period of approximately six minutes, the data shows a broad spike, peaking at more than 0.120 mg/m^3 .

SOS concede that their data shows no exceedence of NAAQS attributable to mining operations. Instead, SOS, joined by the Town and the Village, assert that pursuant to SEQRA, additional mechanisms are required to reduce fugitive dust emissions attributable to general mining operations and to blasting events, in order to mitigate adverse fugitive dust impacts of the proposed modification to the maximum extent practicable. 6 NYCRR 617.11(d). Ultimately, these Intervenors contend that the Department, as lead agency, cannot make the required SEQRA findings regarding fugitive dust emissions and therefore must deny this permit modification application.

In conclusion, SOS contend that fugitive dust, including $PM_{2.5}$ and PM_{10} emissions, from the quarry affect neighboring properties. Significant fugitive dust $PM_{2.5}$ emissions, SOS contend, are not remaining within the existing quarry property boundary, and therefore, are indicative of fugitive dust $PM_{2.5}$ emissions from the proposed modification project.

SOS contend that five items have not been addressed in the fugitive dust control plan that could further control fugitive dust emissions from the proposed modification project: wet suppression of the quarry face floor, blasting only during acceptable wind speed and direction conditions, covering all haul trucks, developing an inspection and maintenance plan for the wet suppression system and training in USEPA Method 22, a qualitative method to determine whether visible fugitive dust migrates off site.

However, as was explained during the issues conference, these practices already are implemented by Applicant in operation of the existing quarry and these practices would extend to mining activities in the modification area. For example, watering below the blast area is sometimes done, whereas watering the blast zone itself could cause misfires if the explosives become wet; five of Applicant's employees are certified in USEPA Method 22; covering trucks is required under Vehicle and Traffic Law (not regulated by the Department).

RULING #20: No substantive and significant adjudicable issue has been identified as to whether additional mechanisms are available to reduce fugitive dust fine particulate matter and particulate matter emissions attributable to general mining operations and to blasting events for the proposed project to the maximum extent practicable, pursuant to SEQRA (and the Draft MLRL permit, fugitive dust control conditions). This proposed issue is not adjudicable because fugitive dust emissions will be within health-based NAAQS quantitative standards. Further, under SEQRA, SOS has not identified any additional dust control measures that could further control fugitive dust emissions from the proposed modification area.

3. Visible Dust Emissions

Draft MLRL SC #6 (and the current MLRL permit for the existing facility, SC #6) prohibit visible dust from leaving the mine property. In this regard, SOS has provided several photographs purporting to depict visible dust plumes traveling from the existing facility. SOS argue that visible fugitive dust emissions from the existing operation migrate off-site, and further, this is indicative that such fugitive dust emissions will occur if mining is authorized in the modification area.

RULING #21: SOS, the Town and the Village have identified an adjudicable issue regarding visible fugitive dust emissions from the modification area. These Intervenors offer evidence of visible fugitive dust emissions from existing site as indicative of visible fugitive dust emissions to be expected from the modification area, if the permit modification is granted.

SOS joined by the Town and the Village assert that the emissions inventory, the final page of Appendix G in the DEIS, contains omissions. These Intervenors contend that drilling, blasting, jaw crusher loading, truck hauling and stockpile wind

erosion should be included in the emissions inventory. SOS contend that the emissions inventory is incomplete until these sources are included in the inventory. SOS note that emissions information for all of these sources are available in USEPA AP-42 documents, including blast emissions. In SOS's view, adequacy of the fugitive dust control plan cannot be evaluated without evaluating the complete site emissions, including the identified omissions to the inventory.

However, as discussed above, Department Staff and Applicant assert that CP-33 applies only to an application for an air pollution control permit - - in this instance the air permit for the primary and tertiary crushers. Other area sources of fugitive dust, they contend, are regulated pursuant to MLRL and 6 NYCRR Part 422.

RULING #22: The purported emissions inventory omissions asserted by SOS, the Town and the Village are not appropriate sources for inclusion in the DEIS Appendix G emissions inventory. No adjudicable issue exists regarding omissions to the emissions inventory.

4. Silicates in Mined Material

SOS contend that to the extent fugitive dust travels off site, it causes adverse health effects. SOS assert that the quarry rock contain silicate, a known human carcinogen. Consequently, SOS reasons, the fugitive dust produced from mining this stone also contains silicate. Robert Montione, M.S. (aquatic biology), B.S. (biology) was offered by SOS as an expert on this issue. Applicant challenged Mr. Montione's credentials as having no expertise in silicate dust or air pollution generally; his experience summary provides no indication of having dealt with these issues previously; and none of his publications relate to these issues. During the issues conference, I ruled that Mr. Montione is not qualified as an expert in matters of air pollution or silicate dust.

Applicant notes that silicate stone and dust are addressed in Response to Comments §3.8.1. Exhibit 10-A. Applicant explained that silica dust will be controlled through the implementation of the fugitive dust control plan. Moreover, Applicant contends that no empirical evidence suggests that brief exposure to low levels of silica dust produces significant lung diseases or other adverse health impacts; silicosis is an occupational disease and has not been observed in people who live near quarries. Response to Comments §3.8.1. Exhibit 10-A.

RULING #23: SOS has not provided a qualified proposed expert witness on this issue. No adjudicable issue is presented regarding silicate content of fugitive dust.

G. Blasting

1. Potential Adverse Impacts of Blasting on Town and Village Residents and Structures

At the existing site, blasting events occur approximately once every two or three weeks, depending upon market demand. The Town, Village, SOS and the Cave Conservancy each propose adjudicable issues regarding blasting impacts and join each other in proposing these issues for adjudication.

Although no federal or state regulatory blasting standards are applicable to this project, the federal Bureau of Mines provides significant guidance on blasting. In New York State those engaged in blasting must be licensed by the State Department of Labor.

Review of potential adverse impacts of blasting activities for the proposed modification project is within the SEQR review for this project. Draft MLRL permit SC #18 addresses pre-blast notification and SC #19 addresses blasting conditions.

Department Staff explained that in preparing the Draft MLRL Permit conditions regulating blasting, Department Staff relied upon the following Bureau of Mines guidance:

- * Bulletin 656 - Blasting Vibrations and Their Effects on Structures
- * Report of Investigation 8705 - Structural Response & Damage Produced by Ground Vibration from Surface Mine Blasting
- * Report of Investigation 8485 - Structural Response and Damage Produced by Air Blast from Surface Mining.

Cave Conservancy states that although professionally prepared, Report of Investigation ("RI") 8705 is more than 20 years old and is outdated; moreover, the federal Bureau of Mines has never codified any limitations or standards discussed in RI 8705.

Cave Conservancy proposes to offer evidence and expert testimony of John C. Hempel, a licensed professional geologist and licensed Pyrotechnics Operator, with more than 30 years of experience in blasting activities, primarily in West Virginia. Cave Conservancy contends that RI 8705 is open to substantial misinterpretation and misapplication, resulting in unacceptable risk of adverse impacts from blasting. Consequently, Cave Conservancy concludes that Department Staff will not be able to make required SEQR findings pursuant to 6 NYCRR 617.11. In sum, Cave Conservancy asserts that adjudicable issues exist regarding interpretation and application of RI 8705.

In addition, Cave Conservancy proposes to adjudicate the issue of safe blasting vibration limits. For older homes, Cave Conservancy asserts, peak particle velocity ("PPV") should be limited to 0.5 inches per second ("IPS") and for modern homes PPV should be limited to 0.75 IPS. By comparison, Cave Conservancy points to the Particle Velocity vs. Frequency Graph in the Draft MLRL Permit (SC #19[g]), which allows for PPV as high as 2.0 IPS for certain frequencies. Cave Conservancy contends that 0.5 IPS should be the PPV limit, regardless of frequency. Absent adjudication of this issue, Cave Conservancy contends that the Department Staff will not be able to make required SEQR findings pursuant to 6 NYCRR 617.11.

Department Staff and Applicant assert that Bulletin 656 established a maximum PPV of 2.0 IPS as the industry standard. Department Staff explained that in the absence of quantitative regulatory criteria on blasting, the Department's Division of Mineral Resources has developed a set of standard permit conditions to address hard rock mining blasting activities. These permit conditions, Department Staff state, were written as performance standards and mirror the criteria established by the above-referenced studies conducted by the federal Bureau of Mines,¹⁴ and are represented in the Draft MLRL Permit.

In addition, Department Staff and Applicant assert that the blasting history at the existing Schoharie mine provides empirical evidence confirming that the Department's blasting standards, based upon Bureau of Mines guidance, are effective in protecting the public health, safety and welfare. In sum, Department Staff conclude that Draft MLRL permit SCs #18 and #19 do mitigate potential adverse blasting impacts to the maximum

¹⁴ In the Draft MLRL Permit, SCs #18 and #19 comprise these provisions.

extent practicable¹⁵. Applicant concurs with Department Staff, adding that no violations for blasting activities have been issued by Department Staff for the existing operation.

Lastly, Cave Conservancy proposes to provide evidence including expert testimony, to show that blast notification requirements of Draft MLRL Permit SC #19 are not sufficient. Cave Conservancy contends that SC #19, requiring notice to residents within a 2000-foot radius of the mine, should be increased to a 2500-foot radius. Cave Conservancy contends that a 2500-foot notification radius is the generally accepted industry standard. Absent adjudication of this issue, Cave Conservancy argues that the Department will not be able to make required SEQR findings pursuant to 6 NYCRR 617.11.

However, as Department Staff explained during the issues conference, the Draft MLRL permit SC #18(a) provides for notice to residents within a 2000-foot radius of the mine and notice to any additional parties, without limitation, who request prior notification of each blast event. Department Staff stated that Draft MLRL permit SC #18 is a typical pre-blast notification condition used in Departmental hard rock mining permits.

The Town and Village assert several blasting issues, supported by proposed expert witness Gordon Reusing, M.A.Sc.P. Eng. Mr. Reusing is a principal of Conestoga-Rovers Associates. His resume identifies two noise and blasting assessment projects in Canada, Lafarge Cement Quarries, Bath and Woodstock Cement Plants, Ontario, and St. Vincent Quarry, Grey County, Ontario.

The Town and Village assert an omission in the permit application, because the DEIS does not contain any historical data regarding blasting effects from the existing quarry. Department Staff have blasting records for 13 blasting events at the existing mine, which documents have been provided to SOS pursuant to a New York Freedom of Information Law ("FOIL"; POL Article 6) request. Absent adjudication of this issue, the Town and Village contend that the Department will not be able to make required SEQR findings pursuant to 6 NYCRR 617.11. These Intervenors assert that historical blasting data from the existing quarry provides the basis for their experts to review

¹⁵ Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b).

historical data and offer an expert opinion predicting potential blasting impacts in the modification area. Specifically, this data would include the location and nature of the blast, seismographic records of on-site and off-site monitoring, overpressure, type of explosive used and related information. The Town and other Intervenors assert they have not been able to perform this analysis in the absence of data. However, at the issues conference stage of the hearing, Intervenors generally are not entitled to discovery (other than what is available via FOIL). See 6 NYCRR 624.7.

During the issues conference, I ruled that SOS's proposed blasting expert, Robert Montione, is not qualified (T.1030), but that is not fatal to SOS's proposed blasting issue, as the Town, Village and Cave Conservancy have proposed other blasting experts (*i.e.*, Mr. Hempel and Mr. Reusing) whose credentials have not been successfully challenged. In sum, the Town, Village and Cave Conservancy, and their proposed experts, adopt the proposed SOS blasting issue.

The Town and Village cite federal Department of the Interior, Office of Surface Mining Reclamation and Enforcement coal mining regulations as guidance regarding limits on ground vibration and peak particle velocity. They assert that Figure A of Applicant's existing permit is derived from these federal regulations, 30 CFR 715.19, which contain a chart indicating maximum peak particle velocity for any dwelling, public building, school, church, or community or institutional building outside the permit area. However, the Town and Village contend that Figure A has been omitted from the Draft MLRL Permit for the modification project.

Cave Conservancy joins in this issue, and offers Mr. Hempel's expert testimony to show blasting damage has occurred to structures near the existing mine as a result of blasting at the existing mine; therefore, blasting damage can be expected to occur if the permit modification is granted. Damage noted includes broken glass and hairline cracks in drywall. Also, flyrock, deposition of rock debris in residential or adjacent properties has been noted.

In addition, regarding cultural and historic resources in the Town and Village, OPRHP has requested that the Department impose a permit condition to address potential adverse blasting effects on these resources.

Department Staff contend that no blasting complaints had been received by the Department prior to Applicant's application

to expand into the modification area, and only one complaint has been received (from a resident in the center of the Village) after the application was filed. In response to this sole complaint, Department Staff contend, Staff monitored blast events with a seismograph at least two times at the complainant's residence, with no notice to Applicant. The seismograph did not register a change during these blast events. However, SOS, the Town and the Village dispute these assertions and contend that several of their members (or citizens) have made complaints to the Department concerning blasting events at the existing mining operation.

In conclusion, Applicant and Department Staff contend that blasting events have complied with federal Bureau of Mines guidance and New York State regulations, and consequently no substantive and significant issue has been identified for adjudication.

RULING #24: Because the Department is SEQRA lead agency and has required the preparation of a DEIS, the ability to make the findings required pursuant to 6 NYCRR 617.9 will be made according to the standards set forth in 6 NYCRR 624.4(c)(1). See, 6 NYCRR 624.4(c)(6)(i)(b). Pursuant to 6 NYCRR 624.4(c)(1)(iii), I find that SOS, the Town, the Village, and Cave Conservancy have identified a substantive and significant issue requiring adjudication as to whether adverse impacts of blasting on Town and Village residents and structures have been minimized to the maximum extent practicable. SOS have identified residents who would testify as to blasting effects of the existing mine as predictive of effects of blasting in the modification area. The Town and Village and Cave Conservancy each provided expert offers of proof (of Mr. Reusing and Mr. Hempel) that would show adverse effects of blasting at the existing mine as predictive of effects of blasting in the modification area and the Town and Village also would provide residents to testify to these effects. SOS, the Town and Village, and Cave Conservancy are granted party status on this issue.

2. Potential Adverse Impacts of Blasting on Becker's Cave and Palatine Spring House

As described herein above, the entrance of Becker's Cave is located in the Village of Schoharie, south of Prospect Street and north of Warner Hill Road. The Cave entrance is located to the west of the modification area, on the west side of the slope below the Village's Lasell Park. Becker's Cave occurs under

Lasell Park and extends onto the southwest portion of the modification area. DEIS 4.1.1.1, pg 54. Geologically, the cave is located in the lower part of the Manlius Formation.

From the entrance, approximately 100 feet into the cave, it opens up into the "Big Room," which is about eight feet wide and about four or five feet high. The main passage of the cave continues southeast. From the Big Room, passage continues about 80 feet southeasterly, then turns northerly for approximately 60 feet, then continues southeasterly for approximately 80 feet. The passages from the Big Room are approximately four feet wide and two to four feet high. Beyond that, the cave extends approximately 330 feet southeasterly, but the cave narrows to a few feet wide and less than two feet high, and is filled with water up to 18 inches deep. The section of the cave beyond the Big Room is only accessible by more experienced, well prepared cavers. This passage ends in a 40-foot wide solution-widened joint passage that is blocked on the south by a collapse and on the north by its narrow width. DEIS 4.1.1.1, pg 55. The proposed project includes a 300-foot buffer around Becker's Cave from the limit of excavation.

The property boundary of the modification area is approximately 100 feet from the Village boundary in this area of the site. Nearby, in the area of the Village's Lasell Park, the Village and modification area boundaries are adjacent for approximately 1000 feet, then jog to a separation of approximately 200 feet between the property lines at the northernmost corner of the modification area. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions.

Subterranean portions of Becker's Cave extend approximately 650 feet to the southeast, of which approximately 350 feet of cave chambers are located below the modification area. A watercourse in the cave extends from just inside the modification area property line for approximately 200 feet to the southeast within the modification area. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions.

The Palatine House and Spring are historic and cultural resources in the project vicinity, located in the Village of Schoharie, southwest of the modification area and Becker's Cave entrance. The Palatine House is listed on the National Registry of Historic Places.

As described herein above, Palatine House spring is located in the Village of Schoharie, approximately 850 feet southwest of Becker's cave entrance and approximately 500 feet southwest of

the modification area's southwestern corner, north of Warner Hill Road near its intersection with Ward Lane. DEIS Appendix H, Potentiometric Surface Map, Existing Conditions. For Palatine House spring, the map indicates a surveyed elevation of 635.2 feet;¹⁶ for Becker's Cave entrance, the map indicates a surveyed elevation of 684.7 feet.

The site geology is thinly bedded limestone that is highly fractured, with karst features. This highly fractured geology includes mud-filled fractures, open fractures and solutional fractures. Cave Conservancy (and SOS, the Town and Village) assert that potential adverse impacts of blasting and mining may affect cave stability and groundwater of Becker's Cave and waters of Palatine Spring. In view of the undisputed karst geology, Cave Conservancy and other Intervenors assert that the DEIS contains omissions in characterization of these hydrogeologic resources. These asserted omissions include linear feature mapping and geophysical mapping. In addition, the Cave Conservancy contends that Applicant must perform dye tracing that would delineate the source of water in the cave's watercourse.

Cave Conservancy also asserts inadequate evaluation of the potential for reduced water quality including turbidity and chemical pollution as a result of blasting in close proximity to Becker's Cave. If these matters were to be adjudicated, Cave Conservancy contends that Applicant first should be required to develop this information to support its permit application. In the alternative, the Cave Conservancy's proposed expert, Mr. Hempel, would develop and present this missing information, to the extent he is able to do so absent site access.

The Town contends that Draft MLRL permit SC #19, limiting blasting events from 10:00 a.m. to 5:00 p.m., Monday through Friday, should be revised to an end time of 3:00 p.m. In the Town's view, after 3:00 p.m., people are beginning to return home from school and work, and the earlier limiting time would be more protective of residents in the community. However, Department Staff explained that in balancing the various interests, residential concerns for quiet, versus the mining operator's interests in conducting business in a timely manner, the time and days on which blasting events may occur are typical MLRL permit conditions when blasting is required.

¹⁶ The map indicates an elevation of 680 feet reported by DEC.

Regarding Draft MLRL permit SCs #18 and #19, Applicant opposes any revision, stating that the draft conditions meet all statutory and regulatory standards and are typical conditions used throughout the mining industry.

Regarding Cave Conservancy's (and other Intervenors') proposed blasting issues, Applicant states that licensed blasters design each blast differently, taking into account site specific factors including geology, meteorology and location of sensitive off-site receptors, in accordance with U.S. Bureau of Mines guidelines. Applicant concludes that, for blasting in the modification area, Becker's Cave and the Palatine House Spring are sensitive receptors that will be accounted for in planning blasting events.

RULING #25: No substantive and significant issue requiring adjudication has been identified regarding these other proposed blasting issues.

H. SEQR Visual and Aesthetic Impacts

The visual impact assessment (the "VIA") is in DEIS sections 3.2.5.1 and 4.2.2.1, and DEIS Appendix C. Visual Impacts also are addressed in Response to Comments section 3.2.1. (Exhibit 10, Response to Comments).

In evaluating visual impacts of the project, Applicant prepared a digital viewshed based upon a five-mile radius from the project site. A digital topographic map is the "base layer," upon which is superimposed digitized vegetative cover. Drawing CLA-2 in the visual assessment is a copy of the "base layer" topographic map and drawing CLA-1 is the topographic map with digitized vegetative cover. Applicant states that although typical tree height is 60 feet high, a 40-foot tree height was conservatively applied in the vegetative model. Based upon this digital viewshed, Applicant contends that areas with potential views of the modification area are approximately 15% of the total (five-mile radius) viewshed; or 85% of the area has no view of the modification area.¹⁷

Applicant identified historic resources within the five-mile radius and then identified historic resources with potential views of the modification area. Field assessment of these viewpoints resulted in the Applicant's photographs in the VIA.

¹⁷ On drawing CLA-1, the areas with potential views are indicated by yellow shading.

Applicant explained that the photographs were produced in a conservative, "worst case", leaf-off condition, to assess maximum visual impact, if any. In addition, in its Response to Comments, Applicant provided digitized photographic simulations of the project. Exhibit 10A, §3.2.1.

Applicant asserts that proposed mitigation of potential adverse visual impacts include a 300-foot buffer area from Lasell Park, construction of berms around the proposed modification area, plantings in a field immediately north of Warner Hill Road, relocation of the primary crusher into an excavated area of the modification area, construction of a conveyor belt and tunnel under Rickard Hill Road (to move material from the modification area to the existing site, eliminating truck movement for this purpose across Rickard Hill Road), and tree plantings on reclamation benches.

SOS assert that the Applicant's visual assessment is flawed and contains an omission, because it only accounts for the modification area, and not the existing facility. Because the existing site will not be completely reclaimed, SOS argue that the VIA should address both the modification area and the existing site. Consequently, SOS contend that the DEIS is in error in asserting that 85% of potential views within the study area will be completely blocked by topography or intervening vegetation.

In sum, SOS contend that the entire facility should have been evaluated for visual impacts, not only the modification area, because a person viewing the viewshed will not separate out the modification area from the existing mine. (As noted above, the Commissioner has denied the SEQR ungrandfathering petition.)

The Department's VIA policy requires that line-of-sight profiles, or a digital viewshed may be used to determine if a significant property is within the potential viewshed of the proposed project. VIA policy at 5. SOS argue that Applicant's VIA methodology is flawed and does not support Applicant's conclusion that 85% of views will be screened. SOS contend that photographs used in Applicant's VIA may not be representative of actual views from the respective locations; and further, that Applicant improperly omitted line-of-sight cross sections in the VIA. In furtherance of its position, SOS's proposed visual assessment expert, Richard Smardon, Ph.D., re-photographed most of the viewpoints.

Additionally, SOS assert an omission in the VIA, in that the VIA does not address the landscape survey and the cultural and

historic landscape values identified in the Comprehensive Plan. SOS stressed the importance of secondary visual impacts of the mining operation as they relate to local preferences established in the regional character of the area and the regional viewsheds.

SOS identified secondary visual impacts to include dust impacts, movement of materials and trucking, which SOS assert have adverse aesthetic impacts on sensitive receptors such as the high school complex and open space area, both of which are immediately adjacent to the existing mine.

Similarly, the Village contend that Applicant has provided no sense of historic significance for particular resources that are identified, such as Lasell Park, Old Stone Fort, the Iroquois museum and Central Bridge Community Park. As a result, the Village argue that Applicant has provided no discussion of the historic or cultural significance of these receptors to the community.

Applicant contends that the Old Stone Fort and Depot Lane are not in the viewshed of the existing mine or the modification area. Moreover, Applicant asserts that because Schoharie Creek is at an elevation 150 feet lower than the existing quarry and modification area, visual impacts are de minimis or non-existent due to the angle of viewing; one sees the horizon or sky, not the quarry.

The Village contend that the DEIS contains only six photographs¹⁸ of views from within the Village historic district, which is inadequate to characterize adverse visual impacts to these resources. The Village cite the VIA Policy, which provides that "[m]any places have been recognized for their beauty and designated through Federal or State democratic political processes, reinforcing the notion that environmental aesthetic values are shared. Recognition of aesthetic resources also occurs at local levels through zoning, planning or other public means." VIA Policy at 1.

Further, the Village cite the Town and Village of Schoharie Comprehensive Plan, (adopted January - February, 1997), in the section on Development Issues, Goals, Objectives and Policy Recommendations, which states that, "[r]esidents highly value the area's scenic, historic, and rural/small town character." DEIS

¹⁸ The six photographs are 43 (Orchard Street), 44 and 45 (Grand Street), 46 (Main Street [NYS Route 30]), 47 (from Village, depicting Rickard Hill Road) and 48 (Schoharie High School).

Appendix K, Comprehensive Plan at 52. This section also identifies the goal to, "[m]aintain and enhance the unique features of the community that make Schoharie a quality place. Maintain the rural, small town character of the Town and Village." Id. The Comprehensive Plan also provides the following objectives and recommendations regarding visual, scenic and historic resources:

"Identify those locations within the Town and Village that are a high priority for open space, natural resources, or farmland protection efforts..."

"To help identify scenic views, participate in New York State's Scenic Byway Program, at least to follow its recommended steps of completing an inventory of important scenic locations."

"Scenic roads can be designated as such through the Town's zoning law or other local law and would require that a road's character be maintained in any future development of roadway upgrading..."

Id.

In view of these provisions of the VIA Policy and the Comprehensive plan, the Village contends that the DEIS does not adequately characterize potential adverse visual impacts to these Village historic district resources.

However, Applicant contends the reason only six views from the Village historic district are in the DEIS, is because other locations within the historic district have no view of the modification area. Those other views are blocked by surrounding buildings, structures or other obstructions in the Village.

SOS proposed an adjudicable issue requesting that mitigation and reclamation plantings use native and indigenous species to the extent practicable. Department Staff stated that this is normally done to the extent practicable, and that success and survivability of plantings normally are monitored during site inspections. During the issues conference, Applicant agreed to defer to Department Staff on the species to be used for mitigation and reclamation plantings.

In sum, SOS contend that the Department will be unable to make findings required pursuant to 6 NYCRR 617.11 and that line-of-sight cross sections and additional simulations are required for this project given the regional character and landscape of

the area, as described more fully in the Comprehensive Plan. If adjudicated, SOS would show, through their proposed visual impact expert, that for the viewpoints analyzed by Applicant, substantially more of the project is visible from those sites than as presented in the Applicant's DEIS VIA. SOS's proposed expert, Dr. Smardon, states he evaluated approximately half of the 65 photo locations in the Applicant's VIA. These adverse visual impacts, SOS contend, will affect quality of life in the Town and Village and adversely affect the residential, agricultural and tourism features of the area.

The Village, citing *Matter of St. Lawrence Cement* Commissioner Decision, assert that visual impacts to historic structures are the subject of independent jurisdiction of the Department, and that the OPRHP letter does not end the Commissioner's inquiry and responsibilities under SEQR to make findings pursuant to 6 NYCRR 617.11. The Village contend that dust plumes resulting from blasting events create adverse visual impacts. Additionally, the Village contend that these dust plumes travel off-site, and therefore constitute a violation of the permit for the existing mine and are indicative of potential adverse visual impacts of the proposed modification project. Applicant asserts that regulation of fugitive dust at a mining site is a performance based standard, pursuant to 6 NYCRR 422.2(c)(4)(i).

Applicant concludes that SOS, the Town and the Village have not provided any study or analysis for consideration; they have not prepared any viewshed maps, digital terrain monitoring, line-of-sight sections or photographic simulations.

RULING #26: As discussed in the community character ruling, Department Staff's consideration of local visual impacts as a component of community character requires Department Staff's identification of local visual impacts separately as a SEQR visual impacts issue. As with the community character issue, I find that the participation of the Town, the Village and SOS in adjudication of SEQR visual impacts issues identified to exist between Department Staff and Applicant, can make a meaningful contribution to the record. These parties may participate in adjudication of the SEQR local visual impacts issue.

I. Noise

The Department has issued a guidance on noise, "Assessing and Mitigating Noise Impacts", DEP-00-1, revised February 2, 2001

(the "Noise Policy"). Applicant's noise analysis is DEIS Appendix D, and potential noise impacts are addressed in DEIS Section 4.2.2.3.

SOS contend that pursuant to SEQR (6 NYCRR 617.11) and the Noise Policy, ambient baseline noise should have been monitored, in the absence of mining activity at the existing quarry, whereas Applicant's background noise monitoring included activities at the existing quarry. SOS further contend that L90 on a 10-minute interval should have been measured; not LEQ, as was utilized in Applicant's noise analysis. (LEQ is considered to be directly related to the effects of sound on people since it expresses the equivalent magnitude of the sound as a function of frequency of occurrence and time. Noise Policy at 7. L90 is the sound pressure level ["SPL"] that is exceeded 90% of the time over which the sound is measured. Noise Policy at 8.) Because mining would cease with exhaustion of resources under the existing MLRL permit, SOS contend that Applicant should not be afforded the benefit of comparing the proposed modification project to the existing baseline including noise generated by the existing mining activities. The Town and Village join SOS in asserting proposed noise issues.

In support of its position, SOS conducted its own noise monitoring to demonstrate the difference between ambient sound levels (without existing mining operation) and background sound levels (including existing mining operation). SOS First Supplemental Petition, June 4, 2007, Attachment D.

The Village notes that the Noise Policy does not have the force of statute or regulation, but is a policy that allows for flexibility in application to particular circumstances.

Department Staff have accepted Applicant's noise analysis and have determined that, as conditioned by the Draft MLRL Permit, potential noise impacts have been mitigated to the maximum extent practicable. Department Staff state that it is common practice to include all existing noise in the ambient measurement, which would include noise from the existing mine. Further, Department Staff state that LEQ is the measurement that is most commonly used in evaluating noise impacts attributable to mining.

Applicant states that the noise analysis was conducted consistent with the Department's Noise Policy and has been accepted by Department Staff. Therefore, Applicant concludes that no adjudicable issue has been identified regarding L90 and LEQ.

RULING #27: No substantive and significant issue requiring adjudication has been identified regarding ambient noise methodology in Applicant's noise analysis.

SOS contend that pursuant to SEQR (6 NYCRR 617.11) and the Noise Policy, noise receptors should have been located at the project's property line where it abuts residential or other sensitive receptors. For example, with respect to noise modeling at Lasell Park, SOS contend that Applicant erred in placing the receptor at the pavilion rather than at the property line between the modification area and Lasell Park.

The Noise Policy provides that appropriate receptor locations may be either at the property line of the parcel on which the facility is located or the location of use or inhabitation on adjacent property. Noise Policy at 13. The Noise Policy also states that the most conservative approach utilizes the property line. Id.

Department Staff merely noted that Applicant's noise analysis is consistent with the Noise Policy and is acceptable to Department Staff. For example, Department Staff accepted Applicant's proposal to locate the Lasell Park receptor at the pavilion, as that is where most Park users tend to congregate. Further, Department Staff noted that noise levels at the Lasell Park property line may be calculated from the pavilion receptor location data.

RULING #28: No substantive and significant issue requiring adjudication has been identified regarding location of noise receptors.

SOS contend that Applicant erred in failing to place ambient monitors at the same location as sensitive receptors. SOS contend that ambient monitor locations A3 and A4 were placed farther away from the existing quarry area than several residential receptor locations are in relation to the modification area.

In addition, the Town and Village contend that some ambient monitor locations were located at a much lower elevation than the corresponding receptor locations. For example, ambient monitor A6, the Town and Village contend, is at an elevation 150 feet lower than corresponding receptor location R4. They assert that the appropriate methodology would have been to locate the ambient monitors at the corresponding receptor locations. The Town and Village assert that it is especially important to locate the

ambient monitors at the corresponding receptor locations due to the complex terrain that exists in this project area.

Applicant contends that ambient monitors were appropriately and conservatively located. Using ambient monitors A3 and A4 as examples, Applicant asserts that monitors A3 and A4 are in an area with several different potential receptors; that if these monitors were located closer to the project site property line, it would have increased noise contribution from the existing quarry, resulting in a higher ambient level. Applicant explained that occupied receptor locations that were publically available were identified, such as the pavilion at Lasell Park. As noted above, Department Staff state that Applicant's noise analysis is consistent with the Noise Policy and is acceptable to Department Staff.

RULING #29: No substantive and significant issue requiring adjudication has been identified regarding elevation or location of ambient noise receptors.

Draft MLRL Permit, SC #15 provides that ". . . [t]he permittee shall keep all noise emission increases above ambient noise levels at 5 dBA or less at the receptors as per the Noise Analysis [DEIS, Appendix D]." SOS contend that their noise monitoring data shows that the existing mine produces noise levels in excess of the decibel limits identified in SC #13, and this indicates that noise exceedences will occur at similar levels if mining is authorized to continue in the modification area.¹⁹ SOS note that Table 15 of its noise analysis shows that existing operations exceed the proposed "ambient plus 5 dBA" standard, registering noise levels in the upper 60 dBA to lower 70 dBA range with respect to one-hour LEQ sound levels.

SOS contend that disagreement exists regarding the level of ambient noise, and further, SOS's data shows, using the existing mine as an analogue for the proposed modification area, that Applicant will not be able to comply with Draft MLRL Permit, SC #15 which limits noise levels to ambient levels plus a maximum of 5 dBA. In conclusion, SOS state that their noise data uses the more conservative methodology, as expressed in the Department's Noise Policy.

Applicant contends that SC #15 is a performance based standard, and moreover, that the SOS monitoring point near the

¹⁹ The proposed SOS noise expert is Andrew C. Carballeira, of Cavanaugh Tocci Associates, Incorporated.

intersection of Prospect and Eastern Avenues is skewed by truck traffic. Department Staff state that no violation of noise standards has been noted at the existing facility, and that Staff is reviewing SOS's noise data as it may apply to the permit modification application.

RULING #30: Based upon SOS's noise monitoring, showing exceedences of SC #15, if it were applicable to the existing operation, it is reasonable to inquire further, in the adjudicatory hearing, whether potential noise impacts will comply with SC #15. A substantive and significant issue requiring adjudication.

SOS contend, based upon observations of its members, that rock drilling, hauling and dumping were minimized on days when Applicant conducted its noise analysis. Department Staff were not present during the data collection. However, Applicant states that if maximum mining activities were not occurring during ambient noise data collection, this would result in a more conservative ambient noise value.

SOS also contend that operations in the modification area will significantly alter the character of noise generated; that by relocating mining activities to the modification area, the character of the sound field in the vicinity of residential receptors will vary from that which they currently experience. The imposition of industrial sounds, argue SOS, will change the balance of the normally existing natural sound scape and that of industrial (mining activity) noise.

In Applicant's view, these potential impacts have been identified and discussed in the DEIS, and will be mitigated to the maximum extent practicable. Applicant notes that SOS have not identified any statute or regulation that will not be met. Again, Department Staff state that Applicant's noise analysis is consistent with the Noise Policy and is acceptable to Department Staff.

RULING #31: No substantive and significant issues requiring adjudication have been identified.

J. SEQR Traffic

SOS contend that there is an inextricable link between Applicant's production capacity of the facility and impacts attributable to the number of heavy trucks on the roads. SOS contend that with approval of the permit modification

application, production capacity will increase resulting in an increase in the number of heavy trucks on local roads and additional adverse traffic impacts.

Department Staff explained that the Department's mining program does not regulate production capacities, except indirectly by regulating hours of operation.

Applicant asserts that no increase in production capacity will occur as a result of the proposed modification. The primary crusher at the existing facility, a Nordberg 4248, is rated at 800 tons per hour ("TPH"), and would continue in use under the proposed permit modification. New additional equipment for the proposed modification includes a tertiary cone crusher, Hewlitt Robbins 1300, rated at 125 TPH; a tertiary impact crusher, rated at 400 TPH; and a conveyor, rated at 125 TPH, that would run from the primary crusher to and under the two tertiary crushers (traveling in a tunnel underneath Rickard Hill Road). Applicant concludes that the modification would result in a reduction in maximum production capacity, because the conveyor, rated 125 TPH, would effectively limit production capacity - - down from the primary crusher's 800 TPH capacity in the existing operation.

In fact, what SOS is concerned about is whether the existing facility has increased production over the years (as SOS contend), and whether the modification would result in further increased production up to the facility's maximum production capacity. However, Applicant has declined to reveal its actual production output for the existing facility, stating that such information is confidential proprietary information and further, that production output is dependent upon marketplace demand.

Applicant concludes that traffic is not an area of relevant concern because no increase in maximum production capacity will occur; only the will be increased.

Department Staff concur with Applicant's characterization of the proposed modification, that this is an expansion of an existing mine which has existing production capacities and existing truck routes, which are not proposed to change; only the will change if the permit modification is granted, increasing by an additional 69-acre.

RULING #32: No substantive and significant issue requiring adjudication has been identified.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis.²⁰ Ordinarily, expedited appeals must be filed with the Commissioner in writing within five days of the disputed ruling.²¹ Allowing additional time for the filing of appeals and replies, as authorized by 6 NYCRR 624.6(g), any appeals must be received by the Commissioner (Executive Office, N.Y.S. Department of Environmental Conservation, 625 Broadway, Albany, New York, 12233-1010 [Attention: Assistant Commissioner Louis A. Alexander]) before 3 p.m. on August 21, 2008. All replies to appeals must be received before 3 p.m. on September 12, 2008.

One copy of each appeal or reply must be filed with the Commissioner. In addition, send one copy of any appeal and reply to the Chief Administrative Law Judge and two copies of any appeal and reply to the Administrative Law Judge. Participants who use word processing equipment to prepare their brief and/or reply must also submit a copy of their appeal and/or reply to the Administrative Law Judge in electronic form, by E-mail attachment formatted in either Adobe Acrobat, WordPerfect for Windows or Microsoft Word for Windows.

Alternatively, parties may file electronically via E-mail to "laalexan@gw.dec.state.ny.us," "jtmcclym@gw.dec.state.ny.us," and "kjcasutt@gw.dec.state.ny.us," to be followed by one paper copy to the Commissioner and the Chief ALJ and two paper copies to the ALJ by first class mail, all postmarked by the date(s) specified above. This alternative service will satisfy service upon the Commissioner, Chief ALJ and the ALJ.

In addition, send one copy of any appeal or reply to each person on the distribution list for this case. The participants shall ensure that transmittal of all filings is made to the ALJ and all others on the distribution list at the same time and in

²⁰ 6 NYCRR 624.8(d)(2).

²¹ 6 NYCRR 624.6(e)(1).

the same manner as transmittal is made to the Commissioner. No submissions by facsimile/telecopier will be allowed or accepted.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.



Kevin J. Casutto
Administrative Law Judge

Dated: July 23, 2008
Albany, New York

To: Attached Cobleskill Stone Products, Inc.,
Distribution List (dated July 8, 2008)