

In the Matter of the Application of

HANSON AGGREGATES NEW YORK, INC.

RULING ON ISSUES AND  
PARTY STATUS

to modify, renew and transfer a Mined  
Land Reclamation Permit pursuant to  
Article 23 of the Environmental  
Conservation Law (ECL) for a mine in  
the Town of Clarendon, Orleans County

May 21, 2004

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**SUMMARY**

This matter involves the application by Hanson Aggregates New York, Inc. ("Permittee") to transfer,<sup>1</sup> renew and modify its existing permit for its quarry in the Town of Clarendon, Orleans County. This ruling finds that none of the issues proposed for adjudication by the sole intervenor, the Town of Clarendon ("Town"), meets the standards for adjudication and therefore, there is no need for further administrative hearings in this matter. Accordingly, the Town is denied party status and the matter is remanded to the Staff of the Department of Environmental Conservation ("DEC Staff") to take steps necessary to complete the environmental process and finalize and issue the draft permit in accordance with this ruling.

**BACKGROUND**

The Permittee proposes to transfer, modify and renew an existing permit for a quarry located west of Upper Holley Road in the Town of Clarendon, Orleans County. The quarry is located west of Upper Holley Road approximately 2,500 feet south of the Upper Holley Road-State Route 31A intersection.

The Permittee owns approximately 195 acres at the mine site ("site") on both the east and west sides of Upper Holley Road. According to the Permittee, there has been mining activity at this site since the early 1930's on the east of Upper Holley Road. Over the years, a series of different owners have operated the mine. Today, the portion of the mine site to the east of

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<sup>1</sup> A permit transfer is necessary because the Permittee changed its corporate name from Hanson Aggregates GLSC, Inc. to Hanson Aggregates New York, Inc. No issues have been raised regarding the transfer.

Upper Holley Road includes areas where mining has been completed, processing areas and an asphalt plant. In areas where mining has been completed, reclamation is occurring using flowable fill (a mixture of fly ash from coal-fired power plants and cement). One area has been fully reclaimed and another is in the process of being reclaimed. These areas are not subject to the instant proceeding. In 1995, after preparation of an Environmental Impact Statement ("EIS") and a DEC administrative hearing, a DEC permit was issued that authorized mining on the west side of Upper Holley Road in a new quarry. It is this quarry that is the subject of this proceeding.

Of the approximately 195 acres owned by the Permittee at the site, 140-acres have been or will be mined according to the existing Mine Land Use Plan ("MLUP") previously approved by DEC Staff. Over the next 40 years or so, the Permittee expects to mine approximately 62 acres currently unaffected by mining on the west side of Upper Holley Road. During the next 5-year permit term covered by this application, the Permittee seeks to mine an additional 9.4 acres west of Upper Holley Road, in an 18.1-acre excavation area and use a total of approximately 37.75 acres of the site for uses including mining, processing, stockpiling and berming.

The Permittee already possesses two other permits from DEC, a State Facilities Air Permit and a Stormwater permit. Neither of these permits is being renewed nor is the subject of this hearing process.

### ***The Town of Clarendon, Clarendon Falls and its Environs***

The Town of Clarendon was established in 1810 and currently has a population of approximately 3,600. Near the center of town are the Clarendon Falls ("Falls") which are an important symbol to residents. The Falls are located at the center of a small municipal park and a drawing of the Falls appears at the center of the Town's seal which is reproduced on the Town's official letterhead. According to the Town, the Falls are an important cultural resource for Town residents.

The watershed of the Falls is approximately 2,400 acres.<sup>2</sup>

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<sup>2</sup>At full mine buildout, in approximately 40 years, it is estimated that the mine will capture approximately two-thirds of the groundwater flowing to the Falls and a large share of the

In the past, the Falls must have been fed entirely by naturally occurring streams. At some point, perhaps in the 1930's, a series of ditches were dug through the farm land above the Falls by farmers seeking to drain the high groundwater levels found during the spring in the muck soils which exist in this area. By draining these soils, farmers found they could plant crops earlier. As groundwater levels drop naturally throughout the summer, the vadose (or dry) zone beneath the plant roots would increase in depth and the crops would rely on precipitation for water. At periods of high groundwater, more groundwater would be found in the ditches. During the summer, the water in the ditches would comprise more surface water from precipitation.

These ditches periodically fill with soil from the fields. Every few years the farmers dig this soil out of the ditches in a continuing effort to maintain the ditch system. The maintenance of these ditches continues through the present.

Of importance to this proceeding are two ditches.<sup>3</sup> The North Ditch (Water Index Number Ont 130-1-8-1) runs directly through the center of the mine site. The Western Ditch (Water Index Number Ont 130-1-8) runs through the western portion of the Permittee's property and would be near the edge of the mine at complete buildout, in about 40 years. These ditches are tributaries of the East Branch of Sandy Creek (6 NYCRR 847.5, item 627) and are "Class C" (6 NYCRR 701.8). Approximately 1,000 feet north of the mine these two ditches become a single ditch and the water in them flows over the Falls.

While these ditches are included in DEC's stream classification system, according to DEC Staff no permit is required for the maintenance of these ditches. No permit is required pursuant to Environmental Conservation Law ("ECL") 15-0501 (Protection of certain streams; disturbances of stream beds; permit) because these ditches are classified as Class C (see ECL 15-0501(2)). No permit is required pursuant to ECL 15-0505 (Protection of navigable waters; excavation or fill; permit) because the ditches are not 'navigable' as that term is defined in regulation (6 NYCRR 608.1(1)). DEC Staff note that if the

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surface water flowing over the Falls.

<sup>3</sup>The Town objects to the use of the word "ditch" and prefers to call these watercourses "streams". However, since the application materials, the transcripts and the briefs all use the term "ditch" to describe these watercourses, this terminology is continued in this ruling.

Army Corps of Engineers determines that an activity, such as ditch maintenance, requires a permit under §404 of the Clean Water Act that DEC would be required to issue a water quality certification. This is only after an initial determination of jurisdiction is made by the Army Corps. There is nothing in the record to indicate that the Army Corps has ever exercised jurisdiction over maintenance projects for these two ditches.

### ***The Haight Farm Spill Site***

Approximately two-thirds of a mile south of the mine site at the Haight Farm Inactive Hazardous Waste Site (Inactive Hazardous Waste Site Number 8-37-006) there was a spill of trichloroethene ("TCE") approximately 20 years ago. According to the NYSDEC Fact Sheet quoted in the draft Supplemental Environmental Impact Statement ("SEIS"), approximately 200 gallons of TCE were spilled. At the issues conference, DEC Staff stated that the amount of the spill is actually unknown because TCE could have been leaking from the spill site during the fifteen years (1969-1984) the spill site was used to store cutting oils that contained TCE.

In 1984, DEC removed 30 barrels of liquid waste stored in drums at the spill site which held approximately 1,000 gallons of TCE. All the neighboring homes affected by TCE contamination in their wells have now been connected to a municipal water line.<sup>4</sup> In 1995-6, DEC performed additional investigations to define the contamination at the spill site and to characterize offsite groundwater contamination. DEC selected a final cleanup plan in March 1998, remedial design was completed in November of that year and remedial construction occurred from April to November 1999. The remediation included removal of contaminated soils and replacement with clean fill, and the installation and use of a Dual Vacuum Extraction ("DVE") system to collect and treat contaminated groundwater and soil vapor at the spill site. Treatment with the DVE has now finished.

According to the draft SEIS, groundwater around the mine site flows from south to north. Consequently, the plume caused by the Haight Farm spill is moving toward the mine site. The

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<sup>4</sup>The Permittee reports that despite the fact it had no responsibility for the spill, it voluntarily connected more than 14 homes to the public water supply that were outside the zone of influence of its operations which pump groundwater from the quarry.

Draft SEIS concludes that the TCE has the potential to reach the quarry at some point but will be much diluted in concentration when it does and that dewatering (the pumping of groundwater to allow mining below the watertable) will not significantly accelerate the plume's movement. There is no dispute among the parties that TCE will at some point enter the quarry; however, there is no estimate in the record as to when this will occur.

### ***Dewatering at the Site***

Before October 2000, all mining at the site was done without dewatering. On October 4, 2000, DEC Staff, acting as lead agency, published a notice in the *Environmental Notice Bulletin* accepting a Final Supplemental Environmental Impact Statement ("FSEIS") on the proposal by Permittee to modify the operational plan for the mine. Shortly thereafter, DEC Staff issued a modified mining permit which allowed mining below the water table in conjunction with dewatering of the quarry. The water pumped from the mine was discharged to tributaries of the East Branch of Sandy Creek, but did not pass over Clarendon Falls. No administrative hearings were held regarding this permit modification. According to the Permittee, since the modified permit was issued on October 20, 2000, the mine has been dewatered to maintain safe, dry, working conditions.

### ***Impacts of Mining on the North Ditch and Clarendon Falls***

In July 2000, DEC Staff in Region 8 received complaints that Clarendon Falls had abruptly stopped flowing. The Town contends that mining or blasting at the mine damaged the bed of the North Ditch which caused the water in the North Ditch to run into the quarry, which stopped the flow of water over Clarendon Falls on July 14, 2000.

The Permittee disputes the Town's assertion that its operations fractured the bed of the North Ditch and caused the Falls to run dry. The Permittee does acknowledge a perturbation in the northward flow toward the Falls in the draft SEIS and offers several possible explanations for the Falls running dry. First, the Permittee states that it allowed farmers upstream of the quarry to maintain the portion of North Ditch that flows through the mine site in 1999 and if the North Ditch was damaged, it was probably this event. At the point where the North Ditch crosses the Permittee's property, the depth of overburden above the bedrock is approximately four feet.

A second possible explanation for the cessation of the flow to the Falls offered by the Permittee is that the drying of the Falls occurred due to the natural seasonal variations in groundwater levels, not related to mining. The Permittee's studies have shown that the North Ditch is in communication with groundwater and that this is the mechanism that allows it to drain the groundwater from the surrounding fields each Spring. When the groundwater levels drop, due to natural seasonal variation, and the vadose zone develops beneath the ditch, surface water entering the ditch will be absorbed into the ground and not be relayed to the Falls. To support this contention, the Permittee points to the results of a pump test undertaken in August of 2001 in which the Permittee pumped between 250 and 400 gallons per minute of water from the quarry into the North Ditch (at a point approximately 1,000 feet north of the quarry). The results of this test showed only 10 - 15 gallons of this water made it to the Falls. The Town responds that the test just showed the extent of the damage to the bed of the North Creek caused by the Permittee's blasting.

Statements made by the Permittee do seem to suggest a causal effect between its activities and the reduction in flow over the Falls. At the issues conference, the Permittee's expert stated that the July 2000 event when water entered the quarry from the North Ditch was fairly predictable because, as the mine face advanced toward the North Ditch, it could open channels allowing water to flow into the quarry.

In response to the July 2000 complaints, DEC Staff made a number of visits to the mine site, inspected blasting records and spoke to local residents. After this investigation, DEC Staff concluded that the mining activity could not have caused the problems reported at the Falls in July. To support its conclusion, DEC Staff introduced an aerial photo of the mine site taken in July 2000 (Exh. 3) which it stated supported the conclusion that hydrogeologic conditions surrounding the site had not changed and groundwater elevations were at their seasonal normal levels and there was no conduit which would allow water from the ditch system to run into the quarry.<sup>5</sup> Following DEC Staff's investigation and conclusion that the observed impact on the Falls was not caused by mining, DEC Staff issued the modified

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<sup>5</sup>The Town disputes that the photo was taken in July 2000 and disputes that the photo accurately depicts conditions before dewatering occurred. DEC Staff could not identify who took the photo (suggesting perhaps Mr. Robinson or Mr. Isselhard) and it is not entirely clear how Exhibit 3 proves DEC Staff's point.

permit on October 20, 2000 to the Permittee that authorized dewatering.

Under the terms of this modified permit, water pumped from the quarry was to be pumped out of the watershed of the Falls. This meant that less water would be available to flow over the Falls. This modified permit also envisioned the removal of an approximately 600 foot section of the North Ditch (where it passed through the quarry). The North Ditch was to then have been rerouted around the mine. Subsequent studies have revealed that the slope in the area is insufficient for this rerouting (it would require water to flow uphill). This is one of the reasons for the present modification which calls for the retention of the North Ditch, discussed more fully below.

After the modified permit was issued on October 20, 2000, the Permittee began dewatering. A few days after dewatering began there was a noticeable reduction in flow followed by a complete cessation of flow in the ditch system. Following another investigation, DEC Staff concluded that the Permittee had mined into an area of localized fractures and water from the North Ditch was flowing into the mine. This reduced the flow over the Falls. These fractures could have existed before dewatering began, but only became noticeable once pumping from the mine began. The fracture was not revealed before dewatering began nor was it foreseen in the environmental review conducted prior to the issuance of the October 2000 permit modification. This impact led DEC Staff to the conclusion that further hydrogeologic study at the site was necessary to reassess the impacts of dewatering and that additional mitigation measures were necessary.

There continue to be disputes among the parties regarding the exact timing and cause of the interruption of flow in the North Ditch and Clarendon Falls in 2000 and information in the record does not definitively resolve the issue.<sup>6</sup> However, it is

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<sup>6</sup>There is also continuing dispute among the parties regarding a November 6, 2000 letter from DEC's Region 8 Director to Congressman LaFalce (Exh 2). The letter states that DEC Staff had determined that the company had mined into a major fracture feature which was in direct communication with the North Ditch as the cause of the reduction in flow. The Town believes since this letter was in response to a letter written regarding the July 2000 event that it proves that DEC Staff acknowledged the reduction in flow occurred then. DEC Staff insist that the events in the letter refer to events that occurred in October

reasonable to conclude that at some point during the Summer or Fall of 2000, some activity of the Permittee at the site resulted in a diminution of flow of water over the Falls.

### ***Investigation and Mitigation of Impacts to North Ditch***

The Permittee began the requested additional hydrological investigations in August 2001, when the Applicant retained a consultant, the Spectra Environmental Group to perform a detailed evaluation of potential effects to the hydrogeologic regime of the site associated with dewatering activities at the mine. This analysis combined past information as well as new studies and forms the basis of the SDEIS.

Following the interruption of flow to the Falls and at the request of DEC Staff, the Permittee undertook a series of actions to maintain the flow of water to the Falls. In October 2001, the Permittee agreed to place a synthetic liner the North Ditch. This liner ran for approximately 1,500 feet on both the Permittee's property and the neighboring property downstream. The purpose of this liner was to ensure that all water flowing through the Northern Ditch from the south (outside the known or suspected area of influence of dewatering) continued toward the Falls.

In May 2003, the Permittee wrote to DEC Staff seeking temporary authorization to change the point at which water pumped from the mine was discharged. The MLUP stated that the permanent discharge point was to be outside of the Falls' watershed. The temporary discharge point was at the edge of the Permittee's property, downstream of the mine in the North Ditch. This ensured the water pumped from the mine stayed within the Falls' watershed and increase flow over the Falls.

### **APPLICATION AND PROPOSED MODIFICATIONS**

As stated above, during the next 5-year permit term covered by this application, the Permittee seeks to mine an additional 9.4 acres in an 18.1-acre excavation area and use a total of approximately 37.75 acres of the site for uses including mining, processing, stockpiling and berming. The Permittee seeks to continue dewatering during this permit term.

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2000 after dewatering had begun.

In addition, the application proposed six modifications. First, it proposed changing surface water drainage in the vicinity of the quarry. As discussed above, the existing MLUP called for rerouting the North Ditch that carries runoff from farm fields south of the mine north through the permitted excavation area. South of the mine the re-routed ditch would have trended west and then north where it would have intercepted the Western Ditch. The purpose of this re-routing was to allow the Permittee access to permitted reserves under the North Ditch. However, recent hydrogeologic observations indicate problems with the existing MLUP, including the fact that insufficient slope exists which would cause waters to flow south, potentially overflowing in existing farm fields. To address this, the Permittee proposes to modify the MLUP and retain the North Ditch and leave the permitted reserves beneath it in place. The Permittee estimates that doing this will leave approximately 500,000 tons of reserves in place at a cost of about \$1,000,000. The Permittee will blast a fifty foot cut through the North Ditch, install a conveyor and an underpass and then reconstruct the North Ditch to restore its present flow. The Town's expert applauded the Permittee's decision to not change the flow of the North Ditch.

The second proposed modification to the MLUP involves changing the location of the quarry sump. Specifically, the sump is now located in the northeast corner of the existing quarry and the modification proposes to move it to the southwest corner of the existing quarry. A second sump may be needed to dewater the portion of the mine under active excavation.

The third modification proposed by the Permittee involves the addition of diesel-powered backup emergency electrical generating equipment. The emergency backup power will be used only when line power is compromised for a significant period of time and the Permittee's equipment, such as the conveyor to be placed on the quarry floor, is threatened.<sup>7</sup>

The fourth proposed modification involves improvements to the quarry access road. This improvement includes extending the road to the western portion of the mine site. This will allow

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<sup>7</sup> DEC Staff should consider including the addition of this diesel-powered backup system as a permit requirement and clarifying that the primary purpose of this requirement is to maintain flow over the Falls (as is indicated in the briefs) and not just to protect the Permittee's equipment (as the provision now could be read).

maintenance vehicles and excavation equipment to cross an existing bridge over the North Ditch and access permitted reserves and equipment on the western side.

The fifth proposed modification involves permanently changing the dewatering discharge location. In the existing MLUP, the primary discharge point for water collected in the mine sump was east of Upper Holley Road, outside of the Falls' watershed. This discharge resulted in the water not passing over the Clarendon Falls. On the site visit, the sump was discharging into the North Ditch, north of the mine site. The observed discharge point was only temporary but with this modification is made permanent, thereby keeping the discharge within the Falls' watershed.

The sixth proposed modification involves a program to improve and line the drainage ditches around the excavation area to limit the loss of water into the mine site, which in turn, limits the pumping required to maintain a relatively dry site. In the existing MLUP, all ditches were to remain unlined. The lining of the North Ditch has already begun.

#### **PROCEEDINGS ON THE PERMIT MODIFICATION**

On March 28, 2002, DEC Staff in Region 8 received a mining permit application from the Permittee which sought to renew and modify the existing permit.

On January 3, 2003, DEC Staff sent a Notice of Incomplete Application and Notice of Determination of Significant Adverse Environmental Impact to the Permittee. In this notice, DEC Staff informed the Permittee that it was treating the instant application as a new application because of changes proposed and the hydrogeological impacts resulting from the dewatering operations approved in 2000. DEC Staff also informed the Permittee that it had determined that the proposed action may have a significant adverse impact on the environment and stated that preparation of a second Supplemental Environmental Impact Statement ("SEIS") was necessary to assess impacts inadequately addressed in the FSEIS prepared when dewatering was authorized in 2000.

DEC Staff proposed that it act as lead agency for the purposes of the State Environmental Quality Review Act ("SEQRA") and the Town participate in a coordinated review, as an involved agency (as that term is defined in 6 NYCRR 617.2(s)). The Town is an involved agency because it must issue a blasting permit

under its local zoning ordinance to the Permittee before any blasting may occur pursuant to the instant modification.<sup>8</sup> By letter dated January 14, 2003, the Town notified DEC Staff that it agreed that DEC should act as lead agency.

By notice dated February 19, 2003, DEC Staff issued a positive declaration which was published in the *Environmental Notice Bulletin* on March 12, 2003. This document stated that "data suggest that quarry dewatering operations may have had an adverse influence on groundwater and surface water in the vicinity of the quarry."

Also on February 19, 2003, the Draft Scoping Outline for this draft SEIS was released for public review. A single comment letter was received by DEC Staff, from the Town dated April 1, 2003. On May 9, 2003, DEC Staff issued the Final Scoping Outline for the SEIS. The SEIS was to focus on the evaluation of groundwater and surface water impacts associated with the proposed project modifications and to address new information on groundwater and surface water impacts discovered since dewatering operations commenced in 2000.

The five volume revised draft SEIS was received by DEC Staff on August 22, 2003. On September 24, 2003, DEC Staff accepted the draft SEIS as adequate for public review and issued a corrected Notice of Complete Application. This notice was published in the *Environmental Notice Bulletin* on October 1, 2003 and established a public comment period ending on October 31, 2003.

By letter dated October 24, 2003, DEC Staff requested additional information regarding the draft SEIS. Five comments were received during the public comment period: two from the Town, one from Betty and Charles Snook, one from Alan and Mary Isselhard, and one from Allen Robinson. On November 19, 2003, the Permittee responded to DEC Staff's letter of October 24, 2003. On November 21, the Permittee responded to the public comments received.

On January 26, 2004, this matter was referred to the Office of Hearings and Mediation Services ("OHMS") and Administrative

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<sup>8</sup>The Town has issued a blasting permit (#BP02-001) for the 8.6 acre portion of the quarry being mined under the existing permit. This permit was issued on March 21, 2002. According to the Town, a new blasting permit will be needed to cover areas in the proposed modification.

Law Judge P. Nicholas Garlick was assigned to the matter. On February 25, 2004, DEC Staff released the draft permit in this matter.

### **PUBLIC NOTICE**

A Notice of Legislative Public Hearing and Notice of Issues Conference were published on March 3, 2004 in the *Environmental Notice Bulletin* and the legal notices section of the *Batavia Daily News*.

### **LEGISLATIVE HEARING**

A legislative hearing was held on March 25, 2004 at 7:00 p.m. at the Town of Clarendon Fire Company Recreation Hall, 16159 East Lee Road, Clarendon, New York. Approximately 65 people attended and sixteen people spoke. The hearing began with the Permittee's counsel and expert summarizing the project. Next, DEC Staff stated that the proposed draft permit met permit issuance standards and DEC Staff supported issuance of the permit.

Five elected officials made statements. Susan Senecah, Special Assistant to State Senator George D. Maziarz, read a prepared statement from the Senator seeking denial of the permit because of the fragility of the area's hydrogeology and criticizing DEC Staff's review of the project. Clarendon's Town Supervisor, Richard Moy stated the Town's position, that the permit should be granted only on condition that dewatering at the quarry not be allowed to continue. Mr. Moy also stated that the Town had not been kept informed of developments regarding the quarry by DEC Staff. Town Board member Bill Campbell stated his opinion that the impact of dewatering was greater than that identified in the studies to date. Mr. Allen Robinson, another town board member, spoke of the impacts of dewatering and presented a slide show of aerial photos of the area around the mine. He also provided a series of photographs of the soybean field owned by his father, and leased to another farmer, showing areas where plants had failed to germinate. Mr. Moy and Mr. Robinson were both identified as potential witnesses for the Town in its petition.

Four people spoke in favor of the project, all of whom are associated with the Permittee. Dan Burns, a former employee of Hanson, stated that he thought the project's impact on Clarendon Falls was overstated and that in his experience the Falls dried

up every year. Jim Wilczak, an employee of the company that conducts blasting in the quarry, stated all blasting was done according to accepted mining practices. Two other employees of Hanson spoke: Richard Applegate, who lives half a mile from the mine spoke in favor of the project as did Todd Miles who noted the small turnout for the hearing and that he had felt at least two seismic tremors in the past five years, which could have caused the changes at the Falls.

Four people who own homes near the mine spoke in opposition to the proposed project. Beth Skehan, who lives along the stream at the bottom of the Falls, spoke of increased water coming over the Falls creating problems with her septic system and her fears of TCE contamination. Mary Isselhard, who lives near the mine, cited a series of concerns including her opinion that: DEC Staff had betrayed the community's trust, the current and proposed DEC permit had and would increase the spread of the TCE plume, the mine had interrupted the flow of the Falls, the mine was creating turbidity problems in surface water near the discharge, and the application contained errors of fact. Alan Isselhard also spoke about the failure of DEC Staff to update the Town regarding the permit application, that he thought DEC Staff was protecting the Permittee, and that his comments on the draft SEIS had not been responded to by DEC Staff. Betty Snook, who lives between the mine and the Falls, stated that the Falls had only run dry twice in her experience before dewatering, in 1959 and 1988 when the Permittee's predecessor was conducting a pump test. She also stated that the dewatering was causing sinkholes to develop, that the discharge from the mine water was turbid and that there were no test wells on the north side of the mine. Both Mr. Isselhard and Ms. Snook were identified as potential witnesses in the Town's petition.

Todd Thomas, another local resident spoke, but took no position on the application. He reported losing his well three and a half years ago and the quick response by the Permittee to provide an alternative supply of water. He also spoke of the cost to the community if the quarry closed.

In addition, the Town's expert witness, hydrologist Russell Urban-Mead, spoke summarizing his concerns about the application. Mr. Urban-Mead's comments are discussed in greater detail later.

In addition to the oral comments, two written comments were received, one in favor of keeping the quarry operating and the second advocating a negotiated resolution of the dispute. A petition in support of keeping the mine open was also received which contained 104 signatures. Supervisor Moy criticized some

of those circulating the petition for allegedly stating that it was the Town's position to seek closure of the quarry.

### **SITE VISIT**

A site visit occurred on March 26, 2004 at 8:00 a.m, immediately prior to the issues conference. In attendance were counsel and experts for the Permittee, DEC Staff and the Town as well as the ALJ. The site visit began at the Permittee's office, proceeded to Clarendon Falls and then to the site. The visit then included a stop at the Haight Farm site and the Robinson farm.

### **ISSUES CONFERENCE**

An issue conference was held on March 26, 2004, at 10:30 a.m. at the Clarendon Town Hall, 16385 Church Street, Clarendon, New York. By operation of law, the Permittee and DEC Staff are automatically full parties to the proceeding (6 NYCRR 624.5(a)).

DEC Staff appeared through Leo Bracci, Esq., Assistant Regional Attorney for DEC Region 8. Also present were Peter Lent, Regional Permit Administrator, Division of Environmental Permits, Region 8; Steven Army, Mined Land Reclamation Specialist II, Region 8; Linda A. Collart, Mineral Resources Supervisor, Region 8; and Valarie Woodward, Engineering Geologist II, DEC headquarters in Albany.

The Permittee appeared through Gregory Brown, Esq. and Rebecca M. Neri, Esq. of the law firm of Devorsetz, Stinziano, Gilberti, Heintz & Smith PC. Also present were Jason C. Kappel, P.G. from the Spectra Environmental Group; and Jeff Holley, Operations Manager for Hanson Aggregates.

A single petition for party status was filed by the Town on March 15, 2004. The Town appeared through Karl Essler, Esq. and Matthew Slaughter, Esq. from the law firm of Fix, Spindelman, Brovitz & Goldman, P.C. Also present were Russell Urban-Mead, CPG of The Chazen Companies, and Richard Moy, Town Supervisor, Town of Clarendon. In the audience, but not participating were several Town Board members and other people identified by the Town as potential witnesses including: Allen Robinson (a member of the Town Board), Alan Isselhard and Betty Snook.

## **POSITIONS OF THE PARTIES**

The Permittee asserts that it has met all relevant permit issuance standards and that the draft SEIS and other application materials are sufficient for DEC Staff to issue the permit. The Permittee does not dispute any terms or conditions in the draft permit.

DEC Staff asserts that, based upon review of the application materials and other data, the draft permit meets permit issuance standards and satisfies the requirements of SEQRA and that all adverse environmental impacts have been minimized to the maximum extent practicable.

The Town disagrees with the Permittee and DEC Staff, and seeks changes in the draft permit before it is issued. The Town does not seek to close the mine; however, it does seek to prohibit any future dewatering at the site. The Town contends that it has always opposed dewatering because it believed dewatering would alter the hydrogeology of the area and cause damage. The Town states in its petition that DEC Staff ignored its concerns when it issued the modified permit in 2000 that allowed dewatering to commence. Since that time, the Town asserts, irreparable damage has been done by dewatering including damage to the bed of the North Ditch which has altered the flow of water over Clarendon Falls.

The Town proposes several issues for adjudication, some of which can be divided into separate parts. For the purposes of this ruling, nine individual, unresolved issues are identified and discussed, below.

## **CLOSING OF THE RECORD**

The record closed with the receipt of reply briefs on April 23, 2004. Additional information, regarding ongoing discussions among participants at the issues conference have been received by the ALJ since this time, and where appropriate, these submissions are mentioned.

## **STANDARDS FOR ADJUDICABLE ISSUES**

The standard for determining whether any issue proposed should be adjudicated is found at 6 NYCRR 624.4(c). When DEC Staff has determined that a permit application, conditioned by a draft permit, will meet statutory and regulatory requirements (as

is the case here), the potential party proposing an issue has the burden of persuasion to demonstrate that the proposed issue is substantive and significant.

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria such that a reasonable person would inquire further (6 NYCRR 624.4[c][2]). An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit (6 NYCRR 624.4[c][3]).

In order to establish that adjudicable issues exist, "an intervenor must demonstrate to the satisfaction of the Administrative Law Judge that the Applicant's presentation of facts in support of its application do not meet the requirements of the statute or regulations. The offer of proof can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues" (Matter of Halfmoon Water Improvement Area, Decision of the Commissioner, April 2, 1982).

#### **ISSUES PROPOSED FOR ADJUDICATION**

The Town has proposed nine issues for adjudication, many of which relate to the impacts of dewatering. According to the Town, when the Permittee sought to modify its permit in 2000 to allow for dewatering, the Town Board passed a resolution requesting that DEC Staff deny the modification. After DEC Staff granted the modified permit, the Town's opposition to dewatering continued. The Town asserts that it has always opposed dewatering at the site and states that it was promised by the Permittee's predecessor, Genesee Leroy Stone Corp., that no dewatering would occur at the mine. This promise, the Town asserts, was the basis for its decision to rezone the Permittee's property on the west side of Upper Holley Road to allow mining. However, the promise not to dewater was apparently never reduced to writing or included in the zoning ordinance and is apparently

not enforceable. The Town's stated position is that it does not seek to have the permit denied or have the quarry closed, rather that DEC's authorization to dewater be deleted from the permit.

### ***Issue #1: Impacts on the North Ditch***

The Town proposes three sub-issues related to impacts the proposed project may have on the North Ditch for adjudication: (1) ensuring there is an adequate flow of water into the North Ditch; (2) preventing abrupt fluctuations in the quantity of the flow; and (3) treating the discharged groundwater so that it takes on the characteristics of surface water. Each is addressed below. The Town does not challenge the moving of the discharge point permanently into the North Ditch nor does it challenge the ditch lining program.

**Adequate flow into the North Ditch.** In its petition, the Town states that DEC's permit should not be granted unless the proposed action is altered to permanently prevent the drying of the Falls. The Town argues that when the Permittee stops pumping, due to power failure, operator error or other reasons, the amount of water flowing toward the Falls will be diminished. The Town states that additional measures must be developed and imposed to ensure that the Falls do not lose the source of its flow. The Town also believes that the permit should contain a condition requiring a minimum discharge of water to the North Ditch.

The draft permit contains two special conditions related to the issue of adequate flow into the North Ditch. These are reproduced below:

- "14. The permittee shall establish and maintain a permanent quarry sump discharge in the south-north trending drainage ditch [North Ditch] north of the mine. This discharge shall be performed in accordance with the documents approved as part of this permit. In any event, a minimum pumping rate of 250-400 gpm [gallons per minute] shall be maintained to the ditch system. If water in the sump is inadequate to achieve this rate, and/or operational conditions prohibit the minimum discharge, a written request outlining a temporary pumping alteration plan while these conditions exist shall be submitted to the Department for review and approval.

15. The permittee will not be required to continue dewatering operations or maintain a minimum discharge rate to the northern ditch [North Ditch] while the quarry is inactive, and allowed to fill with groundwater. However, the minimum discharge rate of 250-400 gpm shall continue until such time as the local groundwater table has re-established itself in the area of the quarry. For reference and purpose of this condition, the local groundwater table will be measured at monitoring well MW-10-00S."

DEC Staff argues that these conditions, along with the permanent relocation of the sump discharge to North Ditch and lining the Ditch, ensure that an adequate flow of water exists in the North Ditch and over Clarendon Falls. DEC Staff explains that this minimum pumping volume is empirically derived, based upon information gathered after dewatering began. The Town has failed to articulate why or how these provisions do not address its concerns.

**Preventing abrupt fluctuations in flow.** The Town argues that for public safety reasons and to protect aquatic life downstream steps should be taken to ensure that there will not be abrupt fluctuations in the flow of the North Ditch.

DEC Staff notes that the special permit conditions cited above (14 and 15) relating to minimum pumping volume and conditions within the pumping plan requiring the Permittee to maintain a diesel powered backup system to prevent the cessation of pumping during a power failure will prevent abrupt fluctuations in flow. The Permittee notes that the flow over the Falls has always fluctuated, naturally, as a result of seasonal changes in groundwater, drought conditions, and surface water events such as storms. In fact, the Permittee argues that its mitigation measures, including lining the North Ditch, will enhance the flow over the Falls. Again, the Town has failed to articulate why or how these provisions do not address its concerns.

**Treatment of groundwater before discharge.** The Town argues that as groundwater is pumped into the North Ditch it would not have time to take on surface water characteristics. The Town seeks a permit condition to convert or treat the groundwater into water with the characteristics of surface water. In its October 15, 2003 comments on the draft SEIS, the Town's expert suggests that the use of an artificial wetland may be warranted to add the necessary nutrients, dissolved oxygen and microfauna typically

absent from groundwater. In a related matter, the Town is also concerned that, when mining ceases at the site and the quarry is transformed into a lake, this will allow surface water to discharge into the groundwater, which would have negative impacts on groundwater quality.

The Permittee responds that the Town's argument is based upon a misunderstanding of the interaction of groundwater and surface water at the site, today. In reality, the Permittee argues that studies have shown intimate connections between the two, that groundwater discharges to surface water in the North Ditch, and that the chemical constituents of the surface water are very similar to those found in groundwater. Accordingly, the pumping of groundwater from the mine into the North Ditch will not represent a significant change in the hydrogeologic regime at the site and the existing chemical equilibrium. Regarding the impacts of surface water in the lake (which will form in the quarry once mining ceases) on groundwater, surface water now recharges groundwater in times of seasonally low groundwater. The Town has failed to address or challenge any of the conclusions presented by the Permittee.

**Ruling #1:** These proposed sub-issues are not substantive and significant. The Town has failed to make a sufficient offer of proof that the draft permit does not impose conditions that will ensure an adequate flow, prevent unreasonable fluctuations in flow, or that treatment of the discharge is necessary.

### ***Issue #2: Impacts on the Western Ditch***

The Town asserts that impacts to the Western Ditch from mining are likely and should be adjudicated. The Town raises three sub-issues regarding impacts to the Western Ditch: (1) since earlier studies that predicted no impact on the North Ditch from mining were wrong, the present studies are also suspect; (2) inadequate study has been undertaken of the site and predictable impacts; and (3) that information in the record challenges the position of DEC Staff and the Permittee that impacts to the Western Ditch are unlikely and not properly mitigated.

**Failure of earlier studies to predict impacts casts doubt on present studies.** The Town argues that the damage done to the North Ditch and the resulting diminution of flow over Clarendon Falls caused by mining at this site raises an adjudicable issue regarding potential future damage to the Western Ditch as mining

operations approach it. The Town challenges the Permittee's conclusions regarding hydrogeological conditions in the area of the Western Ditch. It argues that previous studies prepared by the Permittee in support of its 2000 modification predicted no impact on drainage and water flow patterns in the area of the North Ditch failed to disclose the presence of fractures beneath the North Ditch which impacted the flow to the Falls. Therefore, the present studies predicting no impact to the Western Ditch are similarly suspect.

As discussed above, it is likely that past mining activities have impacted Clarendon Falls and the North Ditch. These impacts have since been mitigated by moving the discharge to the North Ditch and lining it. These mitigation measures are not challenged by the Town. It should be noted that at the time of the 2000 modification, the MLUP envisioned the removal of a large stretch of the North Ditch as it passed through the mine, so efforts to protect the North Ditch at the time may have seemed unnecessary.

DEC Staff responds that the impacts to the North Ditch were inadvertent and unforeseen. DEC Staff states that following the complaints about the loss of flow over Clarendon Falls and the subsequent investigation, DEC Staff concluded that further study of the site was necessary and the impacts of dewatering needed to be reassessed. This is why a second Supplemental Environmental Impact Statement was required and this application was treated as a new application. DEC Staff notes that the Permittee has cooperated in investigating the problems and in devising mitigation measures and that no enforcement action was taken as a result.

According to DEC Staff, because the original complaints were received, DEC Staff members from Region 8 have visited the site over one hundred times. Of the over 400 mines located in the eleven county area of Region 8, no other mining application has received this much scrutiny or as detailed a review. Thus, DEC Staff asserts that considerably more information is available now than was available when the original modification was granted in 2000 and that the more recent information, combined with earlier studies, is reliable.

**Information in the record is inadequate.** The Town asserts that the Permittee's hydrogeologic studies are inadequate and that uncertainties remain regarding the future impacts from dewatering. The Town contends that more monitoring wells and pump tests are needed to provide a full evaluation.

DEC Staff responds that in reviewing this application, it reviewed information collected regarding hydrology at the site dating back fifteen years, not only the most recent studies contained in the SDEIS. The most recent studies provide important hydrogeologic information and have been completed using actual operating conditions while dewatering has been occurring. In addition to information provided by the Permittee, DEC Staff has also conducted its own independent review of groundwater flow, groundwater elevation, boring logs, monitoring information and hydrographs. Some of this information was collected by Mr. Allen Robinson who volunteered to take readings at off-site monitoring wells over the past few years. DEC Staff concludes that it has performed the most in-depth review of a mining application in Region 8 and perhaps the entire state in reviewing this application and that further study is not required.

**Information in the record shows impact to Western Ditch is more likely.** Both DEC Staff and the Permittee argue that there will be little or no impact to the Western Ditch because the Western Ditch sits atop a greater amount of overburden than the North Ditch and that the soil beneath the Western Ditch is less permeable.

The Town disputes both of these bases and states there is not enough evidence to support these conclusions. The Town challenges the conclusion regarding the depth of overburden stating that only one boring was done in this area (for the installation of monitoring well MW-4-86). This disclosed 12 feet of overburden, and broken rock fragments. The Permittee responds that the Town is ignoring the boring logs for three additional wells DDH-99-1, DDH-99-2 and MW-25-04D, which show a depth of overburden of 15, 26 and 18-19 feet respectively. The Town does not respond to this additional information.

The Town also challenges the Permittee's characterization of the soil beneath the Western Ditch as being thick impermeable soils. The Town points to statements in the draft SEIS, which indicate that both ditches on the site are in communication with groundwater. The Town also cites the observations of its expert from the site visit when he observed that the material piled along the edge of the Western Ditch (apparently from past maintenance) contained rock material which is not consistent with the Permittee's contention of impermeable soils beneath the Western Ditch. The Permittee responds that studies have shown that communication between groundwater and surface water in the Western Ditch is much less than that in the North Ditch.

According to the Town, there is no evidence that water will not drain out of the Western Ditch. Additional permit conditions are needed to require further study and, based upon the results of these studies, additional permit conditions may be necessary to prevent damage to the Western Ditch.

DEC Staff responds that, based upon its own independent review of data regarding the site, there are significant differences between the North Ditch and the Western Ditch, which make it unlikely that the Western Ditch will be impacted. Specifically, DEC Staff agrees with the Permittee that there is a greater depth of overburden beneath the Western Ditch which suggests that there is less likelihood that groundwater and surface water will commingle. Information contained in the draft SEIS and earlier studies of the site support this conclusion and show that while the site itself is relatively level, the depth of the bedrock increases from approximately four feet in the area of the North Ditch to approximately 12-16 feet near the Western Ditch. The thicker overburden in the area of the Western Ditch has been characterized in earlier studies as having a relatively low permeability, while the overburden in the area of the North Ditch has a comparatively higher permeability.<sup>9</sup>

Should unanticipated impacts occur to the Western Ditch as a result of mining, DEC Staff states that appropriate mitigation is included in the draft SEIS. The response plan proposed by the Permittee and contained in the draft SEIS would require the lining of the Western Ditch if water is observed entering the mine from the Western Ditch. Staff argues that this is appropriate mitigation and would protect the flow of water in the Western Ditch and over the Falls. DEC Staff asserts that no additional studies are needed. The Permittee concurs and states that when the mine face advances to within 75 feet from any portion of the Western Ditch, the Permittee will assess if any water is leaking into the quarry.

**Ruling #2:** These proposed sub-issues are not substantive and significant. The Town has failed to

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<sup>9</sup> Although not raised in its petition or at the issues conference, the Town in its closing brief asserts that DEC Staff is not qualified to assess potential hydrogeologic impacts because it does not have a hydrogeologist on staff. DEC Staff notes that there are no professional qualifications for hydrogeologists. The Town fails to identify what specific knowledge its expert possesses that DEC Staff mining experts don't.

provide a sufficient offer of proof that it is likely that there will be adverse impacts to the Western Ditch or allege that the proposed mitigation, lining the Ditch, would not adequately address any impacts that may occur to the Western Ditch.

***Issue #3: Permit fails to meet Regulatory Criteria***

The Town cites three regulatory provisions which it claims the present permit renewal/modification fails to meet and/or violates. DEC Staff responds that these sections, which deal with DEC Staff's approval of a reclamation plan, are not violated by the Permittee's proposed reclamation plan.

The first provision cited by the Town, 6 NYCRR 420.2, sets forth the scope of New York's regulation of mineral resources. Section 420.2(a) reads:

"This Subchapter shall be interpreted to carry out the policies of the State to foster and encourage the development of an economically sound and stable mining and mineral industry, and the orderly development of domestic mineral resources and reserves necessary to assure satisfaction of economic needs compatible with sound environmental management practices; and to provide for the wise and efficient use of the resources available for mining and to provide, in conjunction with such mining operations, for reclamation of affected lands; to encourage productive use including but not restricted to: the planting of forests, the planting of crops for harvest, the seeding of grass and legumes for grazing purposes, the protection and enhancement of wildlife and aquatic resources, the establishment of recreational, home, commercial, and industrial sites; to provide for the conservation, development, utilization, management and appropriate use of all the natural resources of such areas for compatible multiple purposes; to prevent pollution; to protect and perpetuate the taxable value of property; and to protect the health, safety and general welfare of the people, as well as the natural beauty and aesthetic values in the affected areas of the State."

DEC Staff notes that this provision parallels ECL 23-2703(1) which established the policy of the state relating to mining and charges DEC with balancing the many facets of natural resource

utilization involved. While not entirely clear, the Town seems to be challenging the balancing done by DEC Staff.

The other regulations cited by the Town, 6 NYCRR 422.3(d)(2)(iii) and 422.3(d)(2)(iv)(c), relate to reclamation plans which are defined as "a description of operations to be performed by the applicant to reclaim the land to be mined over the life of the mine. The reclamation plan shall include maps, plans, the schedule for reclamation, written material and other documents as required by the department" (6 NYCRR 420.1(r)).

Section 422.3(d)(2)(iii) reads: "Drainage. Every reasonable effort shall be made to minimize the disturbance of the prevailing hydrologic balance at and adjacent to the mine." Section 422.3(d)(2)(iii)(c) reads: "Drainage and water control features (channels, culverts, impoundments, etc.) which could be directly influenced by the effects of flooding shall be designed to protect the property, health, safety and general welfare of the people of the State. The design standards shall be such that reclamation will not have a detrimental effect on such property through an increase in the amount or rate of run-off or erosion, or by a change in the drainage pattern."

DEC Staff argues that this section is not relevant because when reclamation occurs at the site the quarry will fill with groundwater to form a lake. The lake level will be at the elevation of the pre-existing water table and experience normal seasonal fluctuations. The Town's expert acknowledges that groundwater conditions will return to pre-mining conditions following the cessation of dewatering.

Section 422.3(d)(2)(iv)(c) reads: "All water impoundments shall be constructed in a manner which allows the continuous movement of water, such as by evaporation, percolation or flow, and which precludes the creation of stagnant, or otherwise undesirable conditions."

DEC Staff responds that the requirements of §422.3(d)(2)(iv)(c) have been met by the Permittee's proposed reclamation plan. Water movement and circulation will occur by means of evaporation, percolation, groundwater flow, direct precipitation, and the routine flow of surface water through the ditch system. DEC Staff note that a majority of quarries in the state are reclaimed in a similar fashion.

The Town alleges that the Permittee has violated these provisions in a number of ways under the existing permit: first, by damaging the North Ditch; second, by reducing the flow of

water over the Falls; and third, by dramatically changing the hydrological balance in the vicinity of the quarry, including the wetlands downstream of the Falls. These violations, according to the Town are grounds for permit denial and raise an adjudicable issue. The Town asserts that the draft permit will not prevent these violations from continuing. However, the sections cited by the Town all deal with the reclamation plan, which takes effect after mining is completed and dewatering ceases. The Town's own expert asserts that once dewatering ceases, the hydrology of the area will recover entirely and everything will go back to its natural condition.

**Ruling #3:** This proposed issue is not substantive because the Town has made only general conclusory statements of violations and has failed to explain which aspects of the proposed project would not meet standards or violate these sections. Therefore, the issue will not be adjudicated.

#### ***Issue #4: Past Violations of Regulatory Standards***

The Town asserts that past actions by the Permittee involving blasting and dewatering have resulted in environmental damage that warrants denial of future authority to continue dewatering in the draft permit. As discussed above, activities undertaken by the Permittee at the mine site during 2000 likely resulted in impacts to the North Ditch and the Falls. While the exact timing and cause of the impacts is disputed among the parties, it is reasonable to conclude that the Permittee's activities did lead to a loss of flow in the North Ditch and over the Falls. The Town asserts that these impacts, which were not predicted and for which no enforcement action was undertaken by DEC Staff, are grounds to deny the instant permit application with regard to dewatering.

The Town cites three administrative decisions to support its claim that the draft permit should be denied; however, none are relevant in this matter because all relate to permit denial/revocation based upon past violations of permits or a history of criminal behavior by applicants or permittees. However, in this case, the Town makes no allegation of any past permit violations, either prosecuted by DEC Staff or not. The Town seems to be arguing that the past adverse impacts are somehow the equivalent of violations.

In the first case cited by the Town, Matter of Mt. Hope Asphalt, (Decision and Order of the Commissioner, September 7,

1995), DEC Staff sought to revoke an existing permit and deny an application for permit renewal as part of an enforcement action. The Commissioner's Order held the Respondents liable for violations of their permit and the ECL and revoked the existing permit and denied the permit application. In the second case cited by the Town, Matter of Al Turi Landfill, (Decision of the Commissioner, April 15, 1999), the Commissioner denied an application to expand an existing landfill based on the applicant's prior criminal history. The third case cited by the Town, Matter of Mohawk Tire Storage Facility, (Decision and Order of the Commissioner, October 18, 1999), involves a case where DEC Staff sought a summary abatement order for a tire storage and recycling facility. DEC Staff also sought an Order of the Commissioner revoking a permit of a facility that DEC Staff alleged presented an imminent danger to the health or welfare of the people of New York State. All of these cases cited by the Town involve situations where DEC Staff either opposed permit issuance or sought permit revocation based upon past civil or criminal violations. In this case, DEC Staff support permit issuance and the Town has not alleged any past permit violations or criminal history on the part of the Permittee and therefore these cases do not apply.

**Ruling #4:** This proposed issue is not substantive because the Town fails to make an offer of proof that past alleged environmental damage were caused by violations of either law or the permit. The cases cited by the Town are not applicable in this case and do not warrant adjudication or summary permit denial in this case.

***Issue #5: Ecological Baseline Study for Western Ditch***

An issue raised by the Town's expert in hydrogeology at the issues conference but not discussed in the Town's petition relates to the ecological condition of the Western Ditch. The Town's expert noted that the draft SEIS does not contain a habitat assessment for the Western Ditch, no assessment of endangered species, and no data regarding water quality. The Town's expert stated that a ecological baseline study should be completed for the Western Ditch. The purpose of this baseline study would be to establish what plants and animals exist in the Western Ditch and to determine its water quality. This study could then be used to measure any possible future environmental damage to the Western Ditch. The Town seeks to insert a permit condition that would require the Permittee to conduct such a baseline ecological study.

During the site visit, time was spent examining part of the Western Ditch on the Permittee's property. Unlike the North Ditch, which had been lined with a synthetic liner, the Western Ditch was in a more natural state. There was evidence of historic maintenance of the ditch in that there were regular piles of materials that had been dug out of the trench and cast to the side. These piles were covered with vegetation, indicating that it had been several years since the maintenance had last occurred. The Town's expert estimated that it had been decades since maintenance had occurred, but it is unclear whether he had the expertise to make such a judgment. To the untrained eye of the ALJ, it appeared that it certainly had been years since the last maintenance had been done, but the statement that it had been decades seemed to be an overestimation.

Both DEC Staff and the Permittee respond that this request by the Town is beyond the scope of the draft SEIS, which was required to supplement the environmental record previously developed. The focus of this draft SEIS was the evaluation of groundwater and surface water impacts associated with the proposed permit modification and to address new information on groundwater and surface water impacts discovered since dewatering operations commenced in 2000. The Draft Scoping Outline for this DSEIS was released for public review on February 19, 2003. A single comment letter was received from the Town dated April 1, 2003. The final Scoping Outline was then prepared by DEC Staff on May 9, 2003. None of these documents make reference to the need for an ecological baseline study.

The Permittee also questions the usefulness of such a study because Star Growers, Inc. ("Star Growers") has contacted the Permittee seeking permission to maintain the portion of the Western Ditch that traverses the Permittee's property. According to the Permittee, maintenance has already been done in the Western Ditch, upstream of the Permittee's property. As explained above, this maintenance does not require a DEC permit and is at the discretion of the landowner. Such maintenance would certainly affect the ecology of the Western Ditch and it is unclear if the Town would have the Permittee perform the study before or after maintenance.

**Ruling #5:** This proposed issue is not substantive because the Town has failed to show how this issue relates to any statutory or regulatory criteria.

### ***Issue #6: Surface Water Impacts from TCE Contamination***

The first issue involving TCE proposed for adjudication by the Town involves the quarry's impact on the TCE plume and possible surface water impacts. As discussed above, a spill of TCE occurred at Haight Farm which resulted in the removal of drums and contaminated soil as well as the treatment of groundwater. However, while the site itself has been remediated and the source of the TCE has been removed, a plume of TCE entered the groundwater and exists there today. This plume is migrating through natural groundwater flow toward the quarry. It is expected that when the plume encounters the area influenced by the Permittee's pumping,<sup>10</sup> the rate of migration of the plume will increase. It is further expected that at some point, TCE will be detected in the quarry sump. There is no estimate in the record as to when TCE is expected to be detected; it may occur during this permit term, it may not. Additional wells are being installed by both the Permittee and DEC Staff in an effort to better define the extent of the plume and thereby more accurately estimate when it might be detected in the quarry sump.

The draft permit contains several conditions that address the TCE issue (special conditions 6(B), 7, 8, 9 and 10). Special condition 6(B) requires testing of water from the sentinel wells which are drilled to detect the advancing plume. Special condition 7 of the draft permit requires the Permittee to test the quarry sump bi-weekly for TCE with a detection limit of 1 ug/l (ppb) and to submit the results of the monitoring to DEC Staff.<sup>11</sup> Special condition 8 requires notification of DEC Staff of the findings of the testing. Special condition 9 requires that if TCE is detected, the Permittee resample within 5 days and if the presence of TCE is confirmed, to cease dewatering immediately.<sup>12</sup> Special condition 10 prohibits the discharge of

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<sup>10</sup> The Town argues that the zone of influence from the dewatering operations is greater than that described in the draft SEIS, however, it makes no offer of proof regarding this argument.

<sup>11</sup> It is recommended that this permit condition be modified to make clear, that if a second sump is installed during the permit term, both sumps be tested on a bi-weekly basis.

<sup>12</sup> It is recommended that this permit condition be clarified to indicate that this condition takes precedence over Special condition 14, which requires the Permittee to maintain a minimum flow of water into the North Ditch which then flows over the

contaminated groundwater without a State Pollutant Discharge Elimination System ("SPDES") permit.

It is anticipated that the new sentinel wells will predict the approach of the TCE plume toward the quarry sump, allowing the Permittee time to apply for a SPDES permit. If TCE is detected in the quarry, the Permittee would cease operations and must then apply for a SPDES permit. Depending upon the concentration of TCE found in the quarry (and expected in the discharge to the North Ditch) no treatment may be necessary. While the groundwater standard for TCE is 5 ppb (6 NYCRR 703.5), the surface water standard is 40 ppb.<sup>13</sup> Therefore, if the water to be discharged contains less than 40 ppb of TCE, no treatment would be required. According to DEC Staff, this 'wait and see' approach regarding the SPDES permit application is the traditional way this type of problem is addressed by the Department.

The Town asserts that the management of TCE at the site presents a "significant public health risk" (no expert is offered to support this statement) that requires the development and implementation of additional permit conditions. The substance of these additional permit conditions is never set forth by the Town. However, the Town does assert that the Permittee should be required to apply for the SPDES permit now, as opposed to when TCE is detected at the sump (or when testing from the new and existing sentinel wells shows that detection is imminent) as contemplated in the draft permit. The Town argues that there may not be time to develop either a SPDES permit or an active remediation plan before the quarry fills with TCE-contaminated water and discharges to ground and surface waters. The Town offers no calculations to support this contention.

DEC Staff responds that based on the low levels of TCE contamination that have been detected in the sentinel wells to date and the fact that the levels do not appear to be increasing, there is adequate time for the Permittee to obtain a SPDES permit. DEC Staff also argues that the Permittee has an economic interest in timely applying for a SPDES permit because its operations will cease if TCE is detected in the sump. This would result in a loss of income and potentially, damage to the

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falls. This would reflect the intent of the parties.

<sup>13</sup>No cite for this standard was provided, but no issues conference participant challenged that this was not the applicable standard.

conveyor and other equipment on the quarry floor. Therefore, DEC Staff argues, the Permittee will make application for the SPDES permit when information from the existing and new sentinel wells suggests TCE is likely to be discovered in the sump. DEC Staff informs the Permittee that issuance of a SPDES permit may take months following application.

DEC Staff states that it is concerned about TCE contamination. The existing permit imposed a condition requiring the Permittee to drill sentinel wells (MW-10-00s and MW-10-00D) at the edge of its property to detect the plume as it approached the quarry and another permit condition required periodic testing of waters from these wells and the sump. The results of this testing have shown detections of TCE in January 2001, April 2003 and July 2003 in the sentinel wells; each of these detections showed TCE levels below the groundwater standard of 5 ppb and likely represent the leading edge of the TCE plume.<sup>14</sup> To date, no TCE has been detected in the quarry sump.

The draft permit conditions, DEC Staff asserts, provide a reasonable means to monitor any contamination that may migrate toward the site and the prohibition of any discharge from the mine once TCE has been detected without a valid SPDES permit is the proper means to manage contamination that may migrate to the quarry. The draft permit, DEC Staff argues, is the current regulatory vehicle in an evolving process of monitoring and controlling the site and incorporates the latest information and requires the production of new information, which may in turn lead to additional permit conditions.

**Ruling #6:** This proposed issue is not substantive. The Town has failed to provide a statutory or regulatory basis requiring the issuance of the SPDES permit at this time.

#### ***Issue #7: Air Impacts from TCE***

A second issue related to TCE asserted by the Town is that there may be air emission impacts associated with TCE once it

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<sup>14</sup> DEC Staff report that while substantial remediation has occurred at the source of the Haight Farm spill, the leading edge of the plume needs to be better defined. Efforts to accomplish this are ongoing including the installation of additional sentinel wells by both the Permittee and DEC, pursuant to the state superfund program.

reaches the quarry. The Town contends that contamination risks due to airborne contamination of TCE exist and are not properly addressed in the draft permit. The Town does not offer the testimony of an expert on this issue. Rather, the Town notes that TCE is a probable human carcinogen and that air exposure to small quantities of TCE may cause headaches, lung irritation, dizziness, poor coordination and difficulty concentrating. The Town does not indicate at what levels these symptoms may occur nor does it provide any calculations to show that such levels may occur in the vicinity of the mine once TCE enters the quarry.

The Permittee contends that this proposed issue is not adjudicable because the Town has failed to provide a scientific basis for this claim or an adequate offer of proof. At the issues conference, the Permittee's expert stated that using DEC's Air Guide 1, he had modeled how much TCE it would require to exceed airborne contaminant levels. The results of this modeling showed that all of the water entering the quarry (approximately 2.2 million gallons per day) would have to have a TCE concentration of 250 ppb, a level fifty times existing groundwater standards.

DEC Staff asserts that the Town has failed to meet its burden of proof because it has failed to identify an expert on air quality impacts. DEC Staff argues that it has reviewed the Town's concerns and concluded that air quality impacts from TCE once it enters the quarry are unlikely to be significant due to the low concentrations of TCE detected near the quarry. Other factors cited by DEC Staff to show the Town's concern is unwarranted are the fact that any contaminated groundwater will be further diluted when it enters the quarry, the distance of the plume from the Haight Farm site and the fact that remediation has been completed at the site of the spill.

**Ruling #7:** This issue is not adjudicable because it is not substantive. The Town has failed to cast sufficient doubt on the Permittee's ability to meet the regulatory standard of airborne concentrations of TCE.

### ***Issue #8: Impacts on Agricultural Lands***

The Town also proposes as an adjudicable issue the impact of the quarry on neighboring agricultural lands. Specifically, the Town argues that the pumping by the Permittee is drawing down the groundwater levels beneath farmland through undiscovered fissures in the bedrock and thereby impacting the crops grown. At the issues conference, the Town indicated that it was concerned with

the impact on about ten acres of farm land owned by Gerald Robinson, the father of Allen Robinson. The Town attempted to quantify the impact economically by estimating that the ten acres, which are leased by Gerald Robinson to Star Growers, could produce approximately \$4,000 per year in soybeans (gross). The offer of proof made by the Town included photographs of the area in question (Legislative Hearing Exh. 1) taken by Allen Robinson, statements he made at the Legislative Hearing (including statements that a cistern at the edge of the field in question had run dry) as well as the testimony of the Town's hydrogeologic expert.

At the issues conference, DEC Staff and the Permittee agreed on the following language to mitigate impacts on these agricultural lands. Subsequently, the Town stated that this condition was acceptable to the Town and that, based upon conversations with the Robinsons, this condition was acceptable to them as well. The permit condition reads:

"If impacts occur at the existing cistern on the property now owned by Gerald Robinson as determined by a decline in water levels in monitoring wells 14-99 greater than seasonal fluctuations identified in other monitoring wells at the site, and if those declines are in phase with operation of the quarry sump, then the permittee shall (a) provide a source of recharge to the cistern; or (b) develop a new cistern; or (c) provide an alternate water supply source to replace the cistern."

In addition, DEC Staff has committed to monitor the water levels in well 14-99 on a monthly basis for a period of one year after issuance. After that time, presumably Mr. Robinson or his agent will monitor the well. Well 14-99 is located on the Robinson property and is just yards from the cistern and the edge of the field the Town is concerned about.

DEC Staff argues that, based upon its independent review, the Town's claimed impacts on agricultural lands are not the result of dewatering. Monitoring data collected from well 14-99 indicate that the Robinson's field is outside the zone of influence of the pumping from the mine; therefore, groundwater levels in the area of the field are unaffected by dewatering. Even if groundwater levels were lowered, this would not explain the damage to the crops in the field. This is because although groundwater levels in the area are high for a short period during the spring, as the year wears on a vadose zone normally occurs

between the surface and the water table. Planting only occurs once the groundwater drops below the surface, and the crops planted in the fields would not have roots deep enough to reach the water table as the groundwater dropped naturally, so any damage to crops could not be the result of impacts on groundwater elevations. Further, DEC Staff notes that the Town is attempting to assert an economic loss that may accrue to Mr. Gerald Robinson. Mr. Robinson did not choose to participate in this proceeding, although his son, as a member of the Town Board did.

The Permittee argues that the Town has failed to raise an adjudicable issue because the issue is based upon the possibility that undiscovered fractures exist in the bedrock that would cause groundwater to drain from these agricultural lands. The Permittee points to data from monitoring well 14-99 that indicate that fluctuations in groundwater levels in this well are consistent with seasonal trends observed in other wells and that there is no evidence that the well is being influenced by dewatering at the sump. In addition, the Permittee reports frequent communications with Star Growers, the current lessee of the Robinson property, and that no complaints have been received regarding the vitality of the crops grown in the fields adjacent to the mine. In fact, the Permittee states that Star Growers have asked the Permittee's help in lowering the groundwater levels in the North Ditch in the Spring to facilitate planting.

**Ruling #8:** This proposed issue is not substantive. The Town has failed to identify an applicable statutory or regulatory criteria such that a reasonable person would inquire further. In addition, the Town has failed to show that groundwater levels beneath the field are dropping due to pumping and even if they are, it has failed to provide a link between the alleged crop damage and the lowered water table.

#### ***Issue #9: Wetlands Impacts***

The ninth issue asserted by the Town is that the mine site may include freshwater wetlands larger than 12.4 acres which would require that a DEC wetlands permit be issued pursuant to Article 24 of the ECL ("state wetland"). The bases of the Town's claim are a series of statements in the Permittee's application documents. The Town does not identify exactly where on the site this wetland may be (by map or other description) nor has the Town had a wetlands expert walk the site.

The evidence of the existence of this state wetland cited by

the Town includes a statement in the draft SEIS citing a 1993 study that there are seven wetlands on the quarry site under the jurisdiction of the federal Army Corps of Engineers ("federal wetlands") located on the Permittee's property on the west side of Upper Holley Road. Of these, two are located in the limit of the excavation area (it is unclear if these wetlands have already been destroyed through mining that has occurred to date). The draft SEIS also states that the Permittee's predecessor obtained the necessary federal permits to affect these wetlands (which have since expired) and that the Permittee is in the process of reinstating these federal permits. In addition, the Town also cites statements in the draft SEIS regarding the high groundwater levels in the spring and the presence of muck soils as proof that a state wetland may exist at the site of the mine. This wetland might contain rare, threatened or endangered species. In its reply brief, the Town identifies Barbara Beall of the Chazen Companies as its potential expert witness on this issue and includes a copy of her resume.

The Permittee argues that the Town has failed in its offer of proof to establish an adjudicable issue relative to the presence of a state wetland on the site. The Permittee also states that the original 1989 Environmental Impact Statement for the mine expansion included an assessment of plants and animals on the site and none of the those found on the site were listed as rare, threatened or endangered.

During the site visit, the ALJ and others walked across the western portion of the mine site from the bridge across the access road to the Western Ditch and then to the check dam on the North Ditch. During the visit, one small patch of Phragmites was observed in the distance. While the site visit did not traverse the entire site, the Town's expert did not seek to explore the rest of the site for wetlands nor draw the ALJ's attention to any wetland features.

**Ruling #9:** The Town has failed to identify a substantive issue for adjudication. The Town has made an inadequate offer of proof regarding the presence of a state wetland at the site, and therefore has failed to show that ECL Article 24 regulatory criteria are applicable to this project. Accordingly, the Town has failed to create sufficient doubt about the Permittee's ability to meet state wetland statutory or regulatory criteria that would warrant further inquiry.

## **RESOLVED ISSUES**

In addition to the issues discussed above, the Town proposed several other issues which were either resolved or withdrawn. These are discussed below.

***Resolved Issue #1: Removal of Liner in North Ditch***

The Town sought to have a permit condition included that would have required the Permittee to remove the liner from the North Ditch when all mining was completed at the site. The Permittee agreed. Language reporting this agreement will be included in the amended MLUP.

***Resolved Issue #2: Check Dam Protocol***

The Town also sought to have in place a protocol for how the Permittee would manage the check dam. The check dam is a series of wooden boards that are placed in the North Ditch upstream (to the north) of the discharge point for water from the quarry. These boards are put in place to ensure that water discharged from the mine flows towards, rather than away from the Clarendon Falls at times of low water. The Permittee stated that the protocol had been developed and was included in the MLUP. Discussions among the issues conference participants occurred following the issues conference.

On May 11, 2004, the Permittee notified the ALJ that discussions were underway regarding the operation of the check dam. The following day, DEC Staff announced that agreement had been reached among all the issues conference participants to additional permit language to read:

"Under the terms of the mined land use plan approved by this permit, the permittee is required to maintain a check dam in the south-north trending ditch [North Ditch] which crosses the site. To facilitate the drainage of agricultural fields on the Robinson property south of the site during the spring planting season under high groundwater conditions, and until such time as those fields are drained adequately for planting to occur, the permittee shall maintain the check dam in place and pump water accumulating in the ditch south of the dam to the ditch north of the dam. Permittee shall otherwise operate the check dam in accordance with the terms stated in the approved mined land use plan for the site."

According to DEC Staff, this language is also acceptable to the Robinsons. While not explicitly withdrawn, it appears that this issue has been resolved.

***Resolved Issue #3: Additional Testing for TCE***

The Town sought to have additional testing for TCE done at the mine sump. Under the proposed permit, the Permittee is required to test samples of water in the sump for TCE on a bi-weekly basis. The Town sought to have split samples taken four times a year and independently tested, not at its expense. In response, DEC Staff suggested that it conduct sampling twice a year and memorialized its commitment in a letter dated March 31, 2004 from Assistant Regional Attorney Leo Bracci to the ALJ. The relevant sections of that letter are reproduced below.

"DER [Division of Environmental Remediation] has agreed to add the sump to our sampling program for the Haight Farm Site which currently calls for semi-annual volatile organic compound (VOC) sampling of its monitoring wells. We will use VOA method 524 for drinking water with our standard QA/QC protocols. We will coordinate our sampling so that we can obtain splits with Hansen Quarry on their sump and we will split with the quarry when we sample [wells] 10-00S&D, MW25-04 S&D and MW 26-04 S&D. We will conduct this sampling until the site is off the registry or until it is determined that the plume is no longer advancing. Other reason for this activity to stop would be budgetary (if sufficient funds are not available in the Program to have the sampling and analysis done)."

DER will report the results of these tests to DEC's Region 8 mining staff. DEC Staff stated that quarterly sampling was not justified and that sampling twice a year, once in the Spring, when groundwater levels were high, and one in the Fall, when groundwater levels were low, was sufficient. Additional testing would not produce more useful information or be cost-effective. To ensure DEC Staff has access to the sump, a new permit condition has been added to require the Permittee to allow DEC Staff on the site for such purpose. The Town has agreed that independent testing of the sump twice a year is adequate and has withdrawn its request for testing four times a year.

***Resolved Issue #4: Testing Well 14-99 for TCE***

The Town also sought to have samples from well 14-99 tested for TCE. Both the Permittee and DEC Staff objected stating that this well may not have been constructed in a manner that would produce meaningful results. In addition, since samples from other, new wells would show the extent of the plume in the area of 14-99, this was not needed. Upon review of this information, the Town withdrew this issue.

#### ***Resolved Issue #5: Turbidity***

The Town proposed two sub-issues relating to turbidity, both of which have been resolved. The first sub-issue dealt with enforcement of existing permit conditions (carried forward in the new permit) relating to the quality of discharges from the quarry sump. Specifically, the Town alleged that these discharges had, on occasion, been excessively turbid. The Town withdrew this sub-issue recognizing it as an enforcement issue, but reserved its rights to take any appropriate action in the future if enforcement was considered inadequate.

The second sub-issue related to turbidity dealt with the Town's concern that silt was entering the quarry sump from the eastern rim of the quarry. The Town reported on April 15, 2004 that an agreement in principle had been reached with the Permittee to address this issue. This sub-issue is also now resolved.

#### **APPEALS**

At the issues conference, the Permittee contended that it had only about 30 days of reserves left to be mined in the area and that without the issuance of the new permit, approximately 14 employees of the mine would be laid off.

Pursuant to 6 NYCRR 624.6(e) and 624.8(d), these rulings on party status and issues may be appealed in writing to the Commissioner on an expedited basis. While 6 NYCRR 624.6(e)(1) provides that such appeals are to be filed with the Commissioner in writing within five days of the disputed ruling, this time frame may be modified by the ALJ, in accordance with 6 NYCRR 624.6(g), to avoid prejudice to any party.

Accordingly, any appeals must be received at the office of the Commissioner no later than 4:00 P.M. on Friday, June 4, 2004, at the following address: Commissioner Erin M. Crotty, NYS Department of Environmental Conservation, 625 Broadway, Albany,

New York 12233-1010. Any replies must be received no later than 4:00 P.M. on Friday, June 11, 2004 at the same address.

The parties are to transmit copies of any appeals and replies to all persons on the service list at the same time and in the same manner as they are sent to the Commissioner, with two copies being sent to my address. Service by fax is not authorized.

Albany, New York  
May 21, 2004

\_\_\_\_\_/s/\_\_\_\_\_  
P. Nicholas Garlick  
Administrative Law Judge

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