

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

In the Matter

- of the -

Application for Modifications to a Mined Land Reclamation
Permit Authorizing the Operation of a Sand and Gravel
Mine in the Town of Fishkill, County of Dutchess,
Pursuant to Title 27 of Article 23 of the
Environmental Conservation Law

-by-

SOUTHERN DUTCHESS SAND & GRAVEL, INC.,

Applicant.

DEC Project No. 3-1330-00047/00006

DECISION OF THE DEPUTY COMMISSIONER

December 19, 2006

DECISION OF THE DEPUTY COMMISSIONER¹

Southern Dutchess Sand & Gravel, Inc. ("applicant") has applied to the New York State Department of Environmental Conservation ("Department") for two modifications of its existing mined land reclamation permit which authorizes the operation of a sand and gravel mine in the Town of Fishkill, Dutchess County, New York ("site").

Applicant seeks to modify its permit to allow for the excavation of 22 acres below the water table within the existing permitted mine area which will result in the creation of a 22 acre lake on the site ("proposed mine expansion"). Applicant also seeks to modify its permit to incorporate a variance from the buffer requirements of part 422 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") in order to maintain and use approximately 185 linear feet of existing roadway along the eastern portion of the site and to plant trees for visual screening ("variance").

The matter was referred to the Office of Hearings and

¹ By memorandum dated February 25, 2005, then acting Commissioner Denise M. Sheehan delegated decision making authority in this matter to Deputy Commissioner Carl Johnson. The memorandum was forwarded to the service list for this proceeding by letter dated March 1, 2005.

Mediation Services and assigned to Administrative Law Judge ("ALJ") Richard R. Wissler. In my interim decision dated March 9, 2006, I determined that the following issues relating to the proposed mine expansion should be adjudicated: (a) matters relating to the adequacy of applicant's proposed spill prevention, control, and countermeasure plan ("SPCC plan") for the site; and (b) potential impacts to Clove Creek and unnamed tributaries of Clove Creek as a result of applicant's proposed stormwater diversion plan, including erosion impacts, stormwater volumes and velocities, and impacts on trout. No objections were raised to applicant's request for a variance. Parties to the adjudicatory hearing included Department staff, applicant, the Village of Fishkill ("Village"), and Fishkill Ridge Caretakers ("FRC").

In addition to the issues identified for adjudication, I directed that, based on the record developed at the adjudicatory hearing with respect to the proposed stormwater diversion plan, Department staff advise the ALJ in writing whether the negative declaration on the proposed mine expansion that Department staff issued on January 9, 2002 pursuant to the State Environmental Quality Review Act (ECL article 8 ["SEQRA"]) should be amended or rescinded. I also directed that FRC, the Village and applicant be afforded an opportunity to respond to

Department staff's determination.

On July 18, 2006, following completion of the adjudicatory hearing, Department staff circulated a revised draft permit (denominated as #2)("revised draft permit #2"). Revised draft permit #2, which would grant the variance and authorize the proposed mine expansion, incorporates amended language to address, among other things, revisions made to the SPCC Plan that were addressd at the hearing.

ALJ Wissler prepared the attached hearing report in which he recommends that the requested modifications to the permit be approved. Based on my review of the record, I hereby adopt the Hearing Report of ALJ Wissler as my decision in this matter subject to the comments that follow.

Adequacy of the SPCC Plan

I concur with the ALJ that applicant's SPCC plan, as amended to address potential spills that might occur during mining activity below the water table (see Adjudicatory Hearing Exhibit ["Exh"] 2 & Exh 2A [amended pages]), is reasonable and will minimize any adverse environmental impacts from spills that might arise from mining operations at the site (see section 23-2713[1][a] of the Environmental Conservation Law ["ECL"]; 6 NYCRR

422.2 [a], [c][4]). The SPCC Plan sets forth the protocols that would be implemented in the event of any spill, based on the location of the spill (see Exh 2, § 8.4 & Exh 2A, at 19-20 [outlining the emergency response that would be implemented to address spills in the fuel operations/fuel staging area, in the on-site garage [repair/maintenance operations], and in the areas of mining, both on land and below the water table]).²

Applicant's witnesses provided credible evidence as to the sufficiency of the SPCC plan for its mining activities. During the adjudicatory hearing, considerable attention was focused on spills to water that could potentially occur during mining below the water table. Specifically, the testimony addressed whether the material spilled would float on the surface of the water (such as is likely with petroleum products) or would sink (such as antifreeze). Applicant presented evidence on the procedures it would implement in the event of any spill of petroleum products in the water-based area of mining. During the hearing, FRC's witness acknowledged that the proposed technology to address a petroleum spill to water was appropriate (see, e.g.,

² Because applicant chose to prepare its SPCC plan in conformance with the federal regulations that govern spill prevention control and countermeasure plans (see part 112 of title 40 of the Code of Federal Regulations), I need not reach the question whether those regulations apply to the activities being conducted at the site (see Exh 2, at 1.1).

Adjudicatory Hearing Transcript ("Tr"), at 507 [referring to applicant's proposed use of booms as an "excellent recovery technology"]).

In contrast to petroleum products, antifreeze used in the internal combustion engines of certain mining equipment is a dense non-aqueous phase liquid. Accordingly, it would not float if accidentally released to the waters of the excavated area but would tend to sink and mix with the receiving waters.

The hearing report concludes that, in light of the small amount of antifreeze in any of the engines, such a spill would be extensively diluted by the receiving waters and would not pose any significant threat. More importantly, as the testimony indicates, the likelihood of any such spill is quite remote. The antifreeze to be used in the mining operation will be contained within the working equipment, and it will be present in small amounts, similar to the amounts used in an automobile or boat. Furthermore, the bulk storage of antifreeze would be relatively minimal. Such storage would consist of only approximately 55 gallons which would be located in the on-site garage, at some distance from the water-based mining operation (see, e.g., Tr, at 541). FRC's witness acknowledged that he could not foresee a situation where any discharge of antifreeze

from machinery on the site would be a problem (see Tr, at 508).

FRC, however, argued that the SPCC Plan was deficient because it did not address potential spills on US Route 9 to the east of the site and did not provide for the monitoring of stormwater flows from Cranesville Block Company, a facility located across the road from the site. FRC suggested that a massive spill on the highway alongside the site, or contamination in stormwater flows from the operations at Cranesville Block Company or other nearby facilities, could contaminate the site and should be addressed in the SPCC Plan.

I agree with the ALJ that a spill prevention, control, and countermeasure plan is meant to address potential spills occasioned by the activity being or to be conducted by the facility that is preparing the plan. Moreover, FRC failed to offer any evidence that its concerns were anything but speculation. In particular, with respect to Cranesville Block Company, the record indicates that the facility's industrial process water is not physically connected to its stormwater discharges (see, e.g., Tr, at 408-409, 559-600), nor is there any known concrete material in its discharge flows (see, e.g., Tr, at 544-545). Accordingly, based on this record, it is not necessary to revise the SPCC plan to address those concerns.

Impacts to Clove Creek and its Unnamed Tributaries

Stormwater runoff from US Route 9 and other property in the vicinity currently enters the site and may be a potential source of surface and groundwater pollution particularly in light of the water-based mining operation being proposed and the lake that would result. To address the potential impacts of such off-site stormwater runoff, applicant has proposed to divert that runoff from the site. Pursuant to applicant's proposed stormwater diversion plan, it will redirect the flow southerly along the west side of US Route 9 through a proposed culvert pipe and an existing ditch to an unnamed tributary of Clove Creek.

Applicant submitted a report dated October 6, 2004 ("Tributary Assessment Report") (see Exh 8) and a supplement to that report dated April 14, 2005 (see Exh 9) that evaluated potential impacts from the proposed stormwater diversion plan. The record demonstrates that the proposed diversion would not exacerbate any erosion of the existing drainage ditch or result in any significant impairment of the water quality of Clove Creek or its tributaries (see, e.g., id.; see also Tr, at 143-146, 373-374).

The record also demonstrates that the stormwater diversion plan would not result in any significant adverse

impacts to the trout in Clove Creek (see, e.g., Exh 11 [study entitled "Effects of Cranesville Stormwater Diversion on Clove Creek Trout"]).

Negative Declaration

Department staff previously determined that the proposed mine expansion would not have a significant effect on the environment and that an environmental impact statement would not be required. Accordingly, Department staff issued a negative declaration on January 9, 2002. Following the adjudicatory hearing, Department staff reconsidered its original determination, taking into account new information presented during the proceeding including but not limited to applicant's proposed stormwater diversion plan. On May 25, 2006, Department staff circulated an amended negative declaration which reaffirmed its earlier determination. Applicant, by letter dated June 9, 2006, and FRC, by submission dated June 13, 2006, commented on the amended negative declaration.

Upon review of the record and giving due consideration to FRC's objections to the amended negative declaration, I conclude that Department staff has identified the relevant areas of environmental concern, taken the requisite "hard look," and presented a reasoned elaboration in support of the amended

negative declaration.³ In that regard, it provides a detailed review of potential impacts to water resources arising from the mining operations at the site. Accordingly, the negative declaration is rational and not affected by any error of law (see 6 NYCRR 624.4[c][6][i][a]).

I hereby direct Department staff to file and publish the amended SEQRA negative declaration in accordance with the applicable SEQRA regulations. I further direct Department staff to issue a mined land reclamation permit to applicant consistent with this decision and revised draft permit #2, with copies provided at the same time to the Village of Fishkill and Fishkill Ridge Caretakers.

NEW YORK STATE DEPARTMENT
OF ENVIRONMENTAL CONSERVATION

/s/

By: _____
Carl Johnson
Deputy Commissioner

Dated: December 19, 2006
Albany, New York

To: Service List

³ I note that the narrative in the amended negative declaration refers in certain instances to NYS Route 9, when it should have referred to US Route 9. Any such references to the road designation are to be corrected prior to the final issuance of the amended negative declaration.

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for Modifications to its Mined Land Reclamation
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Gravel Mine in the Town of Fishkill, County of
Dutchess, pursuant to Article 23, Title 27
of the Environmental Conservation Law.

DEC Application No. 3-1330-00047/00006

HEARING REPORT

- by -

/s/

Richard R. Wissler
Administrative Law Judge

BACKGROUND

Project Description and Location

The Applicant currently has a Mined Land Reclamation Permit, issued by the Department, authorizing the mining of sand and gravel from approximately 50 acres of a 76 acre parcel it owns on US Route 9, in the Town of Fishkill, Dutchess County, New York. The Applicant has made two applications to modify this existing Mined Land Reclamation Permit. One of the permit modification applications seeks to expand the previously approved mining limits downward to include excavation of a 22 acre lake within the footprint of the existing permitted mine. Mining of this expansion area will involve the removal of approximately 2,000,000 cubic yards of sand and gravel during an estimated operational period of 10 to 20 years. The other permit modification application seeks a variance from the buffer requirements of part 422 of the Mined Land Reclamation regulatory provisions of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) to maintain and utilize approximately 185 linear feet of existing roadway located within the required 25 foot buffer along the easterly property boundary, and to plant trees within 7,100 square feet of undisturbed land within the 25 foot buffer area to provide visual screening of the mine site from US Route 9. As part of these applications, the Applicant proposed a drainage diversion plan, dated October 17, 2003, and revised August 11, 2004, to divert stormwater flows from a neighboring parcel located on the east side of US Route 9, owned by Cranesville Block Company, to an unnamed tributary of Clove Creek which flows into Putnam County. These stormwater discharges presently flow in a westerly direction across and beneath US Route 9, over the property of a contiguous landowner and onto the Applicant's property. As a result of the diversion plan, stormwater flows from Cranesville Block Company will be captured after flowing in a westerly direction under US Route 9 and then directed south along the westerly side of US Route 9 through a high density polyethylene (HDPE) pipe, a distance of approximately 1230 feet, to an existing drainage ditch and thence to an unnamed tributary of Clove Creek which flows into Putnam County.

Permit Modifications Required

The Applicant applied for the aforementioned modifications to its current Mined Land Reclamation permit issued pursuant to the provisions of Environmental Conservation Law (ECL) article 23, title 27 and 6 NYCRR parts 420 through 425.

SEQRA Status and Determination of Completeness

Pursuant to 6 NYCRR part 617 of the implementing regulations for ECL article 8 (State Environmental Quality Review Act - SEQRA), DEC, as lead agency, determined that neither of the proposals will have significant impact on the environment. Accordingly, DEC issued a SEQR Negative Declaration on January 9, 2002, as to the mine expansion application, and a SEQR Negative Declaration on October 11, 2002, as to the variance application.

As will discussed hereinafter, the determination as to non-significance with respect to the modification seeking to expand the previously approved mining limits downward to include excavation of a 22 acre lake within the footprint of the existing permitted mine, was reevaluated upon a review of the proposed stormwater diversion plan and the record developed during the adjudicatory hearing. Following this review, Department Staff issued an Amended SEQRA Negative Declaration as to this modification proposal on May 25, 2006.

Procedural History

Pursuant to notice, a legislative public hearing was held on April 3, 2003, at the Town Hall of the Town of Fishkill, and an issues conference convened the following day, April 4, 2003, at the same location. The issues conference was reconvened on September 17, 2004, in order to consider the drainage diversion plan proposed by the Applicant.

On April 20, 2005, the ALJ filed a ruling on issues and party status. This ruling was the subject of subsequent appeals by the parties.

APPEAL OF ALJ's RULING AND COMMISSIONER'S INTERIM DECISION

Appeals of the ALJ's issues ruling were filed by the Applicant, Department Staff and Fishkill Ridge Caretakers, Inc. By Interim Decision, dated March 9, 2006, Deputy Commissioner Carl Johnson determined that certain issues would proceed to adjudication and that, moreover, from the record so adduced certain other matters were to be resolved, as follows:

First, based upon the record to be developed at the adjudicatory hearing with respect to the proposed stormwater diversion plan, Department Staff is to reconsider and reevaluate its SEQRA negative declaration of January 9, 2002, amending or rescinding it as may be appropriate. Prior to the close of the record, the parties are to be advised of Department Staff's

redetermination and are to be afforded the opportunity to respond in writing. (Interim Decision of March 9, 2006 [hereinafter, ID] at 9-10.)

Second, the adequacy of the proposed spill prevention and response plan is an issue, particularly with regard to corrective measures to be undertaken to prevent or address spills in the excavated lake. In this context, sub-issues (a) through (d) of the ALJ's ruling as to impacts to the Clove Creek aquifer are to be adjudicated. As to sub-issue (i) of the ALJ's ruling, information regarding monitoring well placement, testing and response protocols is also to be provided in the context of the adjudication of the spill prevention and response plan. From this record, the adequacy of the permit condition proposed by staff can be evaluated. (ID at 23-26.)

Third, as to the ALJ's ruling regarding impacts to the Clove Creek aquifer, sub-issues (f), (g) and (h) will not be adjudicated. The aquifer studies as therein contemplated are unnecessary since (1) in its analysis and development of the draft permit Department Staff assumed a direct hydrogeologic to the aquifer, (2) Department Staff considered and evaluated the spill prevention and response measures proposed, and (3) FRC's offer of proof presents "only speculative and generalized concerns, and is insufficient to advance a review of the aquifer and its properties to adjudication." (ID at 23.)¹

¹ Ruling Five of the issues ruling provided: "FRC has raised substantive and significant issues with respect to potential impacts to the Clove Creek aquifer occasioned by the Applicant's proposal to mine below the water table. Issues have been raised with respect to (a) the types of the mining equipment to be used in mining below the water table, (b) the organic and inorganic compounds to be used in their operation, (c) the location of that equipment during mining operations in the waters of the 22 acre pond, (d) the type and nature of contaminants that could be introduced into the aquifer as a result of mining below the water table, (e) the adequacy of the proposed spill prevention and response plan, (f) the location and thickness of the layers of the aquifer beneath the Applicant's site, (g) the direction and velocity of groundwater flows through the aquifer, (h) the boundaries of the zone of influence, cones of depression and zone of contribution of the wells in the Village's Clove Creek well field, and whether, if at all, those boundaries intersect with the Applicant's site, and (i) the appropriate design and placement of monitoring wells, and the adequacy of testing and response protocols. All of these issues are significant inasmuch as they raise doubts as to the Applicant's ability to meet regulatory standards, that is, its ability to engage in the proposed mining activity without compromising water quality standards in the Clove Creek aquifer, requiring further inquiry. All of these issues are significant inasmuch as they could result in the imposition of other or more stringent permit conditions, a major modification of the proposed action, or could result in a denial of the requested permit modification."

Fourth, as to potential impacts to unnamed tributaries of Clove Creek as a result of the proposed stormwater diversion plan, the Tributary Assessment Report submitted by the Applicant on the appeal of the issues ruling should be reviewed by all parties and commented upon by them during the development of the adjudicatory hearing record. (ID at 28-29.)

Fifth, potential impacts to trout occasioned by the proposed diversion plan are to be considered and evaluated as part of the record developed during the course of the adjudicatory hearing on the plan. (ID at 30.)

Sixth, the ALJ's ruling granting full party status to FRC is upheld. (ID at 31.)

ADJUDICATORY HEARING

The adjudicatory hearing was convened on May 3, 2006, at Sierra Suites, Fishkill, New York, concluding on May 4, 2006.

The Applicant was represented by David A. Engel, Esq., now of the firm of Nolan & Heller, LLP, Albany, New York. The Department was represented by Steven Goverman, Esq., Assistant Regional Attorney, DEC Region 3, New Paltz, New York. The intervenor Village of Fishkill was represented by Gregory D. Supple, Esq., of the firm of Lyons & Supple, Wappingers Falls, New York. The intervenor Fishkill Ridge Caretakers was represented by Martus Granirer, Esq., New City, New York.

The witnesses who testified on behalf of the Applicant were Robert C. LaFleur; Roy T. Budnik, Ph.D. and James D. McLaren, Ph.D.

The witnesses who testified on behalf of Department Staff were Ronald Pierce, a senior aquatic biologist with the Department's Region 3 office and Richard Baldwin, Regional Engineer with the Department's Region 3 office.

Testifying on behalf of the Village of Fishkill was Michael Wolfert.

Testifying on behalf of the Fishkill Ridge Caretakers was Donald W. Groff, Ph.D.

POST-HEARING PROCEEDINGS

Amended SEQRA Negative Declaration of May 25, 2006

In accordance with the Deputy Commissioner's direction of March 9, 2006, Department Staff reviewed its original SEQRA negative declaration of January 9, 2002. In so doing, Department Staff took into account the proposed stormwater diversion plan, the record of the adjudicatory hearing developed with respect thereto and the proposed amendments to the Applicant's spill prevention and response plan. After this review, Department Staff filed an Amended Negative Declaration, dated May 25, 2006, stating that the Department, as lead agency, had determined that the proposed action would not have a significant effect on the environment and that a draft environmental impact statement would not be prepared.

This amended negative declaration was provided to the parties for their review and comment. By letter dated June 9, 2006, the Applicant indicated its agreement with Department Staff's negative declaration, as proposed, and saw no basis for its change or amendment.

Fishkill Ridge Caretakers (FRC) filed its objections to the Amended Negative Declaration in a brief dated June 13, 2006. Citing Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337 (2003) in support, FRC argued that declarations of non-significance are to be annulled if the lead agency errs in either of three ways, namely, if it "fails to identify a relevant area of environmental concern, or fails to actually take the required 'hard look,' or fails to make a reasoned elaboration of the bases for its decision." (Comments of Fishkill Ridge Caretakers, June 13, 2006, at 4.) The Department committed two of these three errors, FRC insists, when it rendered the amended negative declaration, in that

1. It failed to identify the risk that the Clove Creek diversion would become a conduit through which highway spills would enter the watercourse and the aquifer.
2. Its purported "hard look" at the potential impacts of Cranesville discharges on the watercourse, although accompanied by a serious scientist's report, relied entirely on conjecture: there is no data on the Cranesville discharges.

In view of the forgoing, asserts FRC, the amended negative declaration should be rescinded.

**Amendments to the Spill Prevention, Control
and Countermeasure Plan**

Based upon matters adduced during the adjudicatory hearing, the Applicant proposed certain amendments to the Spill Prevention, Control and Countermeasure Plan to address potential spills occurring during water-based mining operations. These amendments were received on May 22, 2006, as Applicant's Exhibit 2A.

Closing Briefs, Replies and Close of the Record

The parties submitted closing briefs on or about August 3, 2006, and reply briefs on or about August 10, 2006. The hearing record closed on August 17, 2006, upon receipt of the reply briefs by the ALJ.

APPLICABLE REGULATORY PROVISIONS

Environmental Conservation Law (ECL)

In delineating the general functions, powers and duties of the Department and the Commissioner, ECL 3-0301(1)(I) provides that the Commissioner "shall have power to provide for prevention and abatement of all water, land and air pollution"

In the written description of the mined land-use plan required by ECL 23-2713, an applicant is directed to articulate what measures are "to be taken to minimize adverse environmental impacts resulting from the mining operation."

**Title 6 of the Official Compilation of Codes, Rules
and Regulations of the State of New York (6 NYCRR)**

Section 422.2(a) of 6 NYCRR directs that the mining plan shall indicate "the applicant's proposed method of mining including proposals for minimizing the effect of mining on the environment and on the property, health, safety and general welfare of the people of the State."

Section 422.2(c)(4)(iii) of 6 NYCRR directs that the applicant provide a description of its proposed method for minimizing the effect of its mining operation on the people of the State to the extent necessary to achieve compliance with

applicable regulations, including those regulations relative to water quality and the protection thereof, as well as those relating to the protection of fish and aquatic environment.

In determining the significance of an action for SEQRA purposes, 6 NYCRR 617.7(a),(b) and (e) provide that

(a) The lead agency must determine the significance of any Type I or Unlisted action in writing in accordance with this section. [and that] ... (2) To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.

(b) For all Type I and Unlisted actions the lead agency making a determination of significance must: ...

(2) review the EAF, the criteria contained in subdivision (c) of this section and any other supporting information to identify the relevant areas of environmental concern;

(3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment; and

(4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation.

(e) Amendment of a negative declaration.

(1) At any time prior to its decision to undertake, fund or approve an action, a lead agency, at its discretion, may amend a negative declaration when substantive:

(i) changes are proposed for the project; or

(ii) new information is discovered; or

(iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that no significant adverse environmental impacts will occur.

(2) The lead agency must prepare, file and publish the amended negative declaration in accordance with section 617.12 of this Part. The amended negative declaration must contain reference to the original negative declaration and discuss the reasons supporting the amended determination.

**SPDES General Permit For Storm Water Discharges
Associated With Industrial Activity Except
Construction Activity, Permit No. GP-98-03**

This document delineates the jurisdictional requirements for these permits, including the need for and the procedures to be followed in obtaining coverage under the general permit and provides essential definitions.

FINDINGS OF FACT

1. Southern Dutchess Sand & Gravel, Inc., with offices at 44 Elm Street, Fishkill, New York 12524 (the Applicant), currently has a Mined Land Reclamation Permit, issued by the Department, authorizing the mining of sand and gravel from approximately 50 acres of a 76 acre parcel it owns on US Route 9, in the Town of Fishkill, Dutchess County, New York.
2. The Applicant has made two applications to modify this existing Mined Land Reclamation Permit.
3. The first permit modification application seeks to expand the previously approved mining limits downward to include excavation of a 22 acre lake within the footprint of the existing permitted mine. Mining of this expansion area will involve the removal of approximately 2,000,000 cubic yards of sand and gravel during an estimated operational period of 10 to 20 years.
4. The second permit modification application seeks a variance from the buffer requirements of part 422 of the Mined Land Reclamation regulatory provisions of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) to maintain and utilize approximately 185 linear feet of existing roadway located within the required 25 foot buffer along the easterly property boundary, and to plant trees within 7,100 square feet of undisturbed land within the 25 foot buffer area to provide visual screening of the mine site from US Route 9.
5. As part of these applications to modify its existing permit,

the Applicant proposed a drainage diversion plan, dated October 17, 2003, and revised August 11, 2004, to divert stormwater flows from a neighboring parcel located on the east side of US Route 9, owned by Cranesville Block Company, to an unnamed tributary of Clove Creek which flows into Putnam County. These stormwater discharges presently flow in a westerly direction across and beneath US Route 9, over the property of a contiguous landowner and onto the Applicant's property. As a result of the diversion plan, stormwater flows from Cranesville Block Company will be captured after flowing in a westerly direction under US Route 9 and then directed south along the westerly side of US Route 9 through a high density polyethylene (HDPE) pipe, a distance of approximately 1230 feet, to an existing drainage ditch and thence to an unnamed tributary of Clove Creek which flows into Putnam County.

6. Mining below the water table is common in the State of New York and over 300 permits have been issued by the Department for such activity. Many of these permitted sites are in close proximity to well traveled public highways and to public water supplies and the aquifers which supply them.
7. Two types of mining equipment would be utilized at the site for conducting mining operations below the water table, mechanical equipment and hydraulic equipment.
8. Mechanical equipment would include backhoes with extended booms and cranes with booms using either a drag line or clam shell. This equipment would be used to gather material from the bottom of the mining excavation below the water table and bring that material to the surface for stockpiling adjacent to the excavation.
9. Mining material thus extracted would be dewatered as a result of being brought to the surface and would continue to drain while stockpiled. All water draining from the material would remain in the mined area, eventually flowing back into the excavated lake.
10. The mechanical equipment would be either land based or water based depending upon the size and depth of the resulting excavated lake and the method of extraction most appropriate to the circumstances.
11. Hydraulic equipment would be barge-mounted and floated within the excavation area. It would have a suction head extending to the base of the excavation through which mined

material would be brought to the surface.

12. The decision to use either mechanical or hydraulic equipment or some combination of both will depend upon which method or combination thereof will result in the most efficient extraction of the mined material at any given time.
13. Operation of both the mechanical and hydraulic equipment below the water table will primarily require diesel fuel and hydraulic fluid, as well as lesser amounts of motor oil, antifreeze and lubricating grease. These same compounds are presently at the site and used by the equipment utilized in the current above the water table mining operation.
14. All of these compounds, with the exception of antifreeze, are light non-aqueous phase liquids (LNAPL) and will float if released to the waters of the lake created as a result of the proposed mining excavation.
15. During normal mining operations, all of these compounds will be contained within the mechanical or hydraulic systems for which they are intended and only in such quantities as are required for the operation of their respective systems. Additional quantities of these compounds are located at the facility's storage and maintenance area, situated away from the excavation area and the site of the proposed lake.
16. Maintenance and repair of equipment is conducted in the various shops located in the maintenance area of the facility and solvents used in the cleaning and repair of equipment are confined to this area as well.
17. Antifreeze used in the internal combustion engines of some of the equipment is a dense non-aqueous phase liquid (DNAPL) and will not float if accidentally released to the waters of the proposed lake, but will tend to sink and mix with the waters of the lake. The largest amount of antifreeze used in any of the engines is approximately ten gallons. Recovery of antifreeze spilled in the water of the proposed lake would be difficult, if not impossible. However, even if the spill amounted to ten gallons, its extensive dilution by the waters of the proposed 22 acre lake would preclude such a spill from posing any significant threat to the Clove Creek aquifer.
18. The Applicant has prepared a document entitled Spill Prevention, Control, and Countermeasure Plan which discusses the various fuels and fluids used at the site and their

storage. The Plan also includes protocols for spill prevention and control and provides for the training of facility personnel in their proper implementation.

19. Section 8 of the Plan, entitled "Spill Control and Countermeasures," addresses the initial actions to be taken in the event of a spill, reporting the spill and the removal of contaminated media.
20. As originally drafted, Subsection 8.1, entitled "Initial Actions," only addressed the initial actions to be taken by facility personnel in handling a spill situation. Moreover, Subsection 8.4 of Section 8, entitled "Responses to Specific Spill Sources," contained protocols to be followed in responding to specific potential spill sources. Three potential spill sources were envisioned, (a) the spill of diesel fuel in the fueling operations/fuel staging area; (b) the spill of diesel fuel, lubricants, solvents, or paint in the garage where repair equipment repair and maintenance operations occur; and (c) the spill of diesel fuel or hydraulic fluid in the mine area. As was clear from the language of the original draft Plan, this last scenario addressing spills in the mine area only focused upon spills occurring on land during mining operation, not spills occurring on or in the water during mining operations below the water table.
21. The Applicant has amended Section 8 in two respects. First, Subsection 8.1 entitled "Initial Actions," in addition to the steps to be taken by facility personnel in addressing a spill, now provides that the Applicant will retain the services of a professional spill cleanup contractor that can respond to the site within one hour of notification. Second, Subsection 8.4 entitled "Responses to Specific Spill Sources," now contains specific protocols to be followed in responding to a diesel fuel or hydraulic fluid spill within the water area of the mine excavation. This Subsection also requires that spill response equipment such as a containment boom, sorbent materials and a dinghy for their deployment be maintained on site.
22. The Village of Fishkill is the owner and operator of a municipal water supply well field located approximately one mile north of the Applicant's site. Both the Applicant's facility and the village's well field overlies the Clove Creek aquifer. The Village has entered into an agreement with the Applicant, dated April 7, 2003, providing for the placement of monitoring wells on the Applicant's property,

as well as an easement allowing the Village access to the Applicant's property to monitor those wells. As part of the agreement, the Applicant will drill three monitoring wells on the mine site, one upgradient of the site facilities where fuels and fluids are stored, and two downgradient of those facilities and along the northerly extreme of the proposed lake. The wells will be constructed of two-inch diameter PVC pipe with 15 feet of PVC screen, 5 feet of screen above the water table and 10 feet of screen below the water table. The wells will be competent and will be redrilled in the event that clay lenses or other physical impediments preclude their placement in the immediate locations proposed in Exhibit A annexed to the agreement. The wells will be monitored on a quarterly basis by Village employees only and the samples taken tested for volatile organic compounds and for semi-volatile compounds using USEPA methods 8260 and 8270, respectively. The Village will have the right to visually inspect the wells on a monthly basis. In the event of an unsatisfactory water test or other physical calamity or natural disaster that could threaten the wells, the Village will have the right to inspect the site on 24 hours notice to the Applicant.

23. The Cranesville Block Company is located on an approximately 9 acre parcel on the east side of US Route 9, opposite the Applicant's property which is located on the west side of US Route 9. This 9 acre parcel is part of a larger sub-basin comprised of approximately 65 acres.
24. Stormwater flows from the Cranesville property flow to a settlement detention pond located on the property. This pond is capable of retaining the stormwater flows from a 2-year storm event. When this parameter is exceeded, stormwater runoff overtops the detention pond and flows through a culvert to the west side of US Route 9 and into a drainage way which currently empties into the Applicant's mine site. It is at the point where these stormwater flows first exit to the west side of US Route 9 that the Applicant proposes to capture this flow and divert it entirely away from its property and into the proposed diversion system.
25. Cranesville Block Company has previous applied for and is currently covered under the State Pollutant Discharge Elimination System (SPDES) General Permit for stormwater discharges associated with industrial activity, Permit No. GP-98-03. The permit does not require sampling of stormwater effluent. The Department has no record indicating that Cranesville Block Company has ever been out

of compliance with the terms of its SPDES general permit for stormwater discharge.

26. The Cranesville Block Company has a recycle area on its site where its trucks are washed. In this area also are placed the solid materials periodically dredged from the stormwater detention pond and from various catch basins located at the site. Truck wash water from the recycle area is captured, filtered and reused. Solid materials collected in the recycle area are considered potential product and used in the company's process. The recycle area does not drain into the stormwater detention system, they are separate systems.
27. The entire Clove Creek drainage basin in the area of the Applicant's mine, including the sub-basin in which the Cranesville Block Company is located, is approximately 12.6 square miles, extending over more than 8000 acres. The slopes and topography of the Cranesville sub-basin are similar to the slopes and topography found throughout the larger encompassing Clove Creek basin.
28. The proposed drainage diversion will capture the stormwater flows from an area of approximately 220 acres, accounting for approximately 2.7% of the total stormwater flows generated within the greater 12.6 square mile Clove Creek drainage basin.
29. As part of the diversion plan, stormwater flows overtopping the Cranesville Block Company and flowing west through a culvert beneath US Route 9 will be directed south along the westerly side of US Route 9 through a 24 inch high density polyethylene (HDPE) pipe a distance of 1230 linear feet to an existing roadside drainage ditch.
30. This existing roadside drainage ditch runs south along the immediate westerly side of US Route 9 approximately 400 feet and, except for a section which runs through a culvert beneath a driveway for approximately 80 feet, is exposed to the elements for its entire length, capturing stormwater runoff from US Route 9, as well as neighboring properties. The ditch is covered in grasses and weedy vegetation. As part of the diversion, this existing ditch will be deepened and widened.
31. All of the road frontage along that section of US Route 9 contiguous to the proposed diversion is zoned for residential and commercial purposes.

32. After running 400 feet along US Route 9, the existing drainage ditch turns to the west and flows approximately 0.3 miles to an unnamed tributary of Clove Creek. The ditch meanders somewhat through brush and woods over the first half of its run westerly from US Route 9 until it reaches a culvert over which passes a now abandoned agricultural road. At this point, the ditch no longer meanders and becomes straighter and more channelized. This section of the drainage ditch has existed for approximately 50 years and appears to have been created to provide irrigation to, or drainage from, then existing agricultural uses. A spoils berm follows this section of the ditch.
33. At the point at which the drainage ditch meets an unnamed tributary of Clove Creek a small delta has formed, created by the deposition of sediments carried through the ditch.
34. Assuming maximum flow through the proposed stormwater diversion to the unnamed Clove Creek tributary, runoff volume would increase from 37.4 cubic feet per second (cfs) to 52.92 cfs. However, based upon a typical cross section of the drainage ditch and allowing for the retardance occasioned by the ditch's bed and banks, the velocity of the water will increase from 4 feet per second (fps) to 4.5 fps. Thus, while volume will increase 44%, velocity will increase 12%.
35. Except for stiff clay in the area of the culvert passing beneath the abandoned agricultural road, the bed of the ditch is gravel.
36. There is little evidence of erosion since the ditch's creation as shown by the uniformity of the width and depth of the ditch, little observed slumping of its banks or the topple of trees due to undercutting, and its relative straightness as it follows the spoils berm.
37. The drainage ditch is not a significant source of sediment and will not itself contribute significantly to turbidity in Clove Creek.
38. While the waters of Clove Creek and its tributaries are clear, high levels of turbidity are commonly observed in them during precipitation events. However, within a day or two, sediments causing the turbidity settle out and the clarity of the water is restored.
39. Clove Creek is classified as a Class C(TS) trout stream.

40. No section of the existing drainage ditch from US Route 9 to the delta formed at its confluence with an unnamed tributary of Clove Creek is utilized as trout habitat.
41. Clove Creek is braided in the area of the existing drainage ditch, sending off both intermittent and permanent side channels. The existing drainage ditch flows into one of these side channels, rather than into the main channel of the creek. This side channel receives less than one third of the total flow of the creek.
42. Observations made of reaches of this side channel 100 meters above its confluence with the existing drainage ditch and 100 meters below that confluence showed little difference, indicating no significant alteration of the side channel as a consequence of flows received from the existing drainage ditch.
43. A survey conducted by the Department in 1993 indicates that this area of Clove Creek supports a naturally reproducing population of brown trout. Field observations confirm that the side channel into which the existing drainage ditch flows provides adequate, though not optimal, habitat for brown trout.
44. Given the relatively short duration of elevated levels of turbidity experienced in Clove Creek during and after precipitation events, any effects on trout would be limited to temporary behavioral effects. Such behavioral effects could include temporary abandonment of cover, increased activity, increased respiration, or reduced feeding. The fish would revert to typical behavior upon restoration of normal water clarity.
45. Since the stormwater flow attributable to the proposed diversion is limited to 2.7% of the total stormwater flow received by this section of Clove Creek, the relative contribution of turbidity from the proposed diversion would also reflect this proportion. Moreover, sediment loading from the drainage ditch to Clove Creek would also reflect this ratio.
46. There is no evidence of fine particle deposition of silt and clay from the existing drainage ditch into the side channel of Clove Creek. Both the existing drainage ditch and the delta function as sediment traps for fine particles transported in the stormwater flows through the ditch.

DISCUSSION

Changes to Spill Prevention Plan

As originally proposed, the Spill Prevention, Control, and Countermeasure Plan addressed only potential spills from the proposed mining activity occurring on land. (Transcript of Adjudicatory Hearing of May 3 and 4, 2006, at 67; hereinafter abbreviated T and page number.) Pointing out that spill prevention plans are "living documents that change with the nature of the operation," the Applicant proposed various amendments to the Plan to address potential spills occurring during the water based phase of excavation below the water table. (T at 55-56 and 67-69.) These amendments were drafted, provided to all parties and received as Applicant's Exhibit 2A on May 22, 2006. As noted in Findings of Fact 18 through 21, above, the Applicant has amended subsection 8.4 of its spill plan entitled "Responses to Specific Spill Sources," by adding specific protocols to be followed in responding to a diesel fuel or hydraulic fluid spill within the water area of the mine excavation. As noted in Finding of Fact 21, this Subsection requires that spill response equipment such as a containment boom, sorbent materials and a dinghy for their deployment be maintained on site. Moreover, Subsection 8.1 of the spill plan which delineates the initial actions to be taken in the event of any spill whether land or water based, now requires that a spill response contractor be retained that can reach the Applicant's site within one hour of notification, on an as needed basis.

In its closing brief, Fishkill Ridge Caretakers (FRC) takes no exception to the language of the spill plan amendments proposed by the Applicant. However, FRC does express concern that the plan does not address potential spills occurring on US Route 9 and entering Clove Creek through the proposed diversion, nor does the plan require the monitoring of flows from Cranesville Block into the diversion. (Post-Hearing Brief of Intervenor Fishkill Ridge Caretakers, August 3, 2006, at 2.) Neither of these concerns is within the purview of this Applicant's spill prevention, control and countermeasure plan.

Section 422.2(a) of 6 NYCRR directs that the mining plan shall indicate "the applicant's proposed method of mining including proposals for minimizing the effect of mining on the environment and on the property, health, safety and general welfare of the people of the State." Moreover, Section 422.2(c)(4)(iii) of 6 NYCRR directs that the applicant provide a description of its proposed method for minimizing the effect of

its mining operation on the people of the State to the extent necessary to achieve compliance with applicable regulations, including those regulations relative to water quality and the protection thereof, as well as those relating to the protection of fish and aquatic environment.

As part of its obligation to conduct its mining activity in an environmentally sound manner consistent with these regulatory requirements, the Applicant has prepared a spill prevention, control and countermeasure to address potential spills of petroleum and other fluids caused by its proposed mining activity. The Applicant has drafted its spill plan so that it comports with the requirements of 40 CFR 112. (See, Applicant's Exhibit 2, Certification of Brian W. Doyle, P.E., and Section 1.1.) The clear import of both state and federal regulatory provisions with respect to such plans is that a spill prevention, control and countermeasure plan is site specific, unique to a facility and its particular operations. It is not intended to address spills caused by third parties occurring off its premises. Such off premises third party spills would include spills occurring on US Route 9 where none of the Applicant's proposed mining activity will occur, even if such spills were to occur on that section of US Route 9 contiguous to the eastern border of the Applicant's property or immediately contiguous to the existing drainage ditch. Moreover, monitoring the flows of stormwater from third party Cranesville Block, which will now be diverted completely away from the Applicant's mine site, is equally inappropriate for inclusion in the spill prevention, control and countermeasure plan prepared by the Applicant for the mining activities conducted solely on its site.

With the changes proposed, the spill prevention, control and countermeasure plan addresses spill prevention in both the context of mining on land and beneath the water table. As amended and as provided in Permit Conditions 1, 2(c), 18, 19, 20 and 21, it is to be implemented as a condition of the mining activity authorized by the permit. Given the Applicant's proposed mining activity, the plan is appropriate, adequate and reasonable and comports with the Department's requirements under 6 NYCRR 422.2.

Monitoring Wells

As noted in Finding of Fact 22, above, the Village of Fishkill has entered into an agreement with the Applicant, dated April 7, 2003, providing for the placement of monitoring wells on the Applicant's property, as well as an easement allowing the Village access to the Applicant's property to monitor those

wells. (Applicant's Exhibit 4.) As part of the agreement, the Applicant will drill three monitoring wells on the mine site, one upgradient of the site facilities where fuels and fluids are stored, and two downgradient of those facilities and along the northerly extreme of the proposed lake. The wells will be competent and will be redrilled in the event that clay lenses or other physical impediments preclude their placement in the immediate locations proposed in the agreement. The wells will be monitored on a quarterly basis by Village employees only and the samples taken tested for volatile organic compounds and for semi-volatile organic compounds using USEPA methods 8260 and 8270, respectively. The Village will have the right to visually inspect the wells on a monthly basis. In the event of an unsatisfactory water test or other physical calamity or natural disaster that could threaten the wells, the Village will have the right to inspect the site on 24 hours notice to the Applicant.

At the outset it should be noted that this agreement is between the Village and the Applicant. The Department is not a party to this agreement, nor is the agreement a condition of the proposed permit. However, the draft permit does direct, at Permit Condition 8, that "All necessary precautions shall be taken [by the Applicant] to prevent contamination of Clove Creek by silt, sediment, fuels, solvents, lubricants, debris or any other pollutant associated with mining and mining procedures."

The clear intent of the agreement between the Applicant and the Village is to ensure that the monitoring wells will be appropriately placed and, by its express terms, repositioned if site geology so mandates. Sampling of the wells will be in accordance with established USEPA protocols.

The agreement has been reviewed by the Village's engineer and is satisfactory to the Village. With the adoption of the proposed changes to the spill plan, the Village has no opposition to the granting of the permit. (T at 570.)

Proposed Stormwater Diversion

Effects on Clove Creek

As part of the proof adduced at the adjudicatory hearing, the Applicant introduced a report entitled Tributary Assessment, Clove Creek Watershed Route 9 at Dutchess/Putnam County Line, dated October 6, 2004. (Applicant's Exhibit 8.) This Tributary Assessment was supplemented by an additional report entitled Supplemental Analysis, dated April 14, 2005, which focused on the 400 foot section of the drainage way running from the abandoned

agriculture road to the delta formed at its confluence with the side channel of Clove Creek referred to in Findings of Fact 32 and 33, above. (Applicant's Exhibit 9.) Prepared by Roy T. Budnick, Ph.D., the assessment report and its supplement were reviewed by the parties and were the subject of comment and inquiry made by the parties during the adjudicatory hearing, as had been directed by the Deputy Commissioner Johnson in his Interim Decision of March 9, 2006. In these assessment studies, Dr. Budnick concluded that the proposed diversion of stormwater flows from the Cranesville Block facility to an unnamed tributary of Clove Creek would not have a significant impact on the water quality of Clove Creek. He stated six reasons as the basis for his opinion. These reasons are as follows (Applicant's Exhibit 8 at p. 7.):

- "1. The detention basin on the Cranesville property was designed to preserve water quality by retaining turbid runoff from frequent storms (2-year storm and smaller). Only a portion of the runoff from storms with a predicted recurrence interval of 10 years or greater will be released by that facility.
- "2. The discharge from the detention basin is subject to a SPDES permit for stormwater only. The company does not have a permit to release industrial waste water.
- "3. Stormwater from the detention basin will be discharged at the time when Clove Creek is already carrying large amounts of suspended sediment and other pollutants. Therefore, the effect of a small amount of additional turbidity on the stream will be negligible, in comparison to that created by the large volume of suspended sediment now reaching the creek from the watershed in Philipstown.
- "4. Suspended sediment moves relatively rapidly through the tributary and through Clove Creek. Observations made only 2 days after a significant rainfall event revealed clear water in both systems.
- "5. The banks of the ditch are composed of soils with low erosion potential soil, supported by fine roots from vegetation growing on the terrace. As a result, the banks of the drainage ditch are

relatively stable with only minor amounts of erosion in the decades since the ditch was created.

- "6. The average flow velocity within the ditch is calculated to increase by only about 12% during storm events. However, as shown by Leopold and others (1964) flow rates [at] the edge of a stream are lower than this in the middle. Therefore, there would be only a very small increase in the erosive forces on the banks."

Summing up his findings, Dr. Budnick concluded (Id. at 8.):

"The unnamed tributary conveys turbid stormwater from upland areas to the creek under current conditions. However, the drainage way itself is not a significant source of sediment. There will not be a meaningful increase in streambank erosion as a result of the project, because of the site specific channel and hydrogeologic characteristics of the stream. The diversion project will not measurably increase the sediment loading of Clove Creek and will not produce adverse impacts on the watershed."

Dr. Budnick's conclusions and the reasons articulated in their support are not refuted by the proofs asserted in this record.

With regard to the Applicant's proposed activity, stormwater flows from the Cranesville facility will now be diverted completely away from the Applicant's site, precluding their introduction into the Clove Creek aquifer through the excavated lake.

Moreover, flows from the Cranesville facility will be captured immediately on the west side of US Route 9 and confined to a 24-inch HDPE pipe for a distance of 1,230 feet until exiting that closed conduit and flowing into the existing drainage ditch. No accidental spill occurring on US Route 9, at least for the 1,230 feet enclosed by the HDPE pipe, could possibly find its way into the proposed stormwater diversion. The only place on US Route 9 where an accidental spill could occur and enter the diversion is along the existing length of the exposed drainage ditch, a drainage way that remains the same as it has always been for perhaps more than 50 years. Accordingly, the risk of third party spills on US Route 9 occurring and entering Clove Creek through the diversion remains the same as it has for decades and

is not a subject for inclusion in this Applicant's permit. While Condition 8 of the proposed permit requires the Applicant to take all reasonable steps it can to protect the aquifer, this mandate does not extend to policing the actions of third parties using US Route 9.

Effects on Trout and Trout Habitat

FRC expressed concern that stormwater effluent from the Cranesville facility might be alkaline and elevate the pH of stormwaters captured by the diversion. If the pH level was significant, perhaps greater than a pH of 9, such could increase the pH of the waters of Clove Creek, a trout spawning stream as classified by the Department, to the detriment of the fish. (See, e.g., T at 343 and 390.) However, no evidence or data was provided by FRC in support of this concern.

The record here indicates that the Cranesville facility does have an area on its site where trucks are washed and materials dredged from its stormwater detention pond and catch basins are placed. However, the truck wash water is captured and recycled and the dredged materials are incorporated in its concrete manufacturing process. (T at 559-560.) Moreover, this recycle area does not drain into the stormwater detention system, they are separate systems. (Id.) Thus, even if water from the recycle area was of such alkalinity as might raise the pH of that water, it is not entering the stormwater collection system on the site and, accordingly, will not be a constituent of any flow captured by the proposed stormwater diversion. Stormwater effluent from Cranesville is not presently sampled and there is nothing in this record to indicate whether or not the pH level of those flows exceeds water quality standards. However, even if elevated pH levels in the stormwater effluent were detected, this would be an enforcement matter for the Department as against Cranesville Block and not a subject for inclusion in any mining permit issued to the Applicant.

As part of its proof, the Applicant called James B. McLaren, Ph.D., an expert in fisheries and aquatic ecology. In addition, the Applicant introduced a report prepared Dr. McLaren entitled, Effects of Cranesville Stormwater Diversion On Clove Creek Trout, dated May 1, 2006, and based upon his personal field studies of the creek and its environs. (Applicant's Exhibit 11.)

Concurring with Dr. Budnick, Dr. McLaren observed that while maximum flow through the drainage ditch as a result of the proposed diversion could increase 44% from 37.4 cfs to 52.9cfs, maximum flow velocity would only increase 12% form 4.0 fps to 4.5

fps. (Applicant's Exhibit 11 at p. 7.) "Those velocities," he stated, "would not affect trout spawning beds." (T at 347.) Ronald Pierce, a fisheries biologist and expert in fisheries management with the Department's Region 3 office, also concurred with Dr. McLaren's assessment of the effect of increased flow velocities on trout spawning occasioned by the proposed diversion. (T at 373.)

Dr. McLaren's assessment reached four major conclusions (Applicant's Exhibit 11 at p.7.):

- "1. Although the Clove Creek habitat might be considered suboptimal for trout in the area of the [Applicant's] mine, there is evidence of natural reproduction occurring for brown trout in at least some reach of the stream and trout are established in the creek, along with other coldwater/warmwater fish species.
- "2. There presently is no evidence of substantial sediment deposition in the Clove Creek channel where it receives runoff through the drainage ditch, since it has a bed load and sediment composition that is comparable to creek channels that are upstream or laterally distant.
- "3. The incremental increase in turbidity and sediment loading to Clove Creek from stormwater runoff from the proposed diversion should be negligible (e.g., <2.7%) based on the size of the Cranesville property's subwatershed area relative to the overall watershed area above the study reach.
- "4. Any effects of short-term exposure of juvenile and adult trout to elevated turbidity in Clove Creek would be restricted to behavior effects, and the fish would revert to typical behavior upon restoration of normal water clarity in the matter of one to a few days following a storm event."

These conclusions were not refuted by the intervenors. The record herein supports the conclusion that the proposed diversion will not have a significant impact on trout or trout habitat in Clove Creek.

Amended Negative Declaration

On May 25, 2006, Department Staff issued its amended SEQRA negative declaration. As is apparent from a reading of declaration, Department Staff made its determination upon due consideration of the proposed stormwater diversion plan and after the benefit of the thorough examination of the plan occasioned by the adjudicatory hearing.

As noted above, FRC objected to the amended negative declaration. Citing Matter of New York City Coalition to End Lead Poisoning, Inc. v. Vallone, 100 N.Y.2d 337 (2003), FRC argued that declarations of non-significance are to be annulled if the lead agency errs in either of three ways, namely, if it "fails to identify a relevant area of environmental concern, or fails to actually take the required 'hard look,' or fails to make a reasoned elaboration of the bases for its decision." (Comments of Fishkill Ridge Caretakers, June 13, 2006, at 4.) The Department committed two of these three errors, FRC insists, when it rendered the amended negative declaration, in that

1. It failed to identify the risk that the Clove Creek diversion would become a conduit through which highway spills would enter the watercourse and the aquifer.
2. Its purported "hard look" at the potential impacts of Cranesville discharges on the watercourse, although accompanied by a serious scientist's report, relied entirely on conjecture: there is no data on the Cranesville discharges.

The record in this matter does not support the position asserted by FRC. As discussed above, the possibility that a spill by a third party on US Route 9 could enter the pre-existing exposed drainage way is speculative and not a matter for inclusion in this Applicant's spill prevention, control, and countermeasure plan or any proposed mining permit. Moreover, there is no evidence in this record to suggest further data with respect to Cranesville Block's stormwater effluent, nor an evaluation of that data, is required.

The review of the record in this matter makes clear that Department Staff has taken the requisite "hard look" mandated by SEQRA and that there is no basis to conclude Department Staff's amended SEQRA negative declaration in this matter of May 25, 2006, was in any way irrational or otherwise affected by an error of law. Matter of Merson v. McNally, 90 N.Y.2d 742, 751-52, 665 N.Y.S.2d 605, 609-610 (1997); see also

Matter of Jackson v. New York State Urban Development Corp., 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986).

Requested Variance

The Applicant seeks a variance from the buffer requirements of 6 NYCRR 422.2 to maintain and utilize approximately 185 linear feet of existing roadway located within the required 25 foot buffer along the easterly property boundary, and to plant trees within 7,100 square feet of undisturbed land within the 25 foot buffer area to provide visual screening of the mine site from US Route 9. This request remains unopposed by any party.

CONCLUSION

The project, when operated in accordance with the Department's proposed draft permit, comports with the requirements of 6 NYCRR 422.2(a) inasmuch as the Applicant has proposed a method of mining which includes measures to be implemented to minimize the effect of the mining operation on the environment and on the property, health, safety and general welfare of the people of the State.

RECOMMENDATION

I recommend that the permit for this project, as drafted by Department Staff and reflecting the modifications sought by the Applicant, be issued and that the Amended Negative Declaration of May 25, 2006, be published in the Environmental Notice Bulletin in accordance with 6 NYCRR 617.7(e)(2).