

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of the -

Application for a State Facility Permit for Air Pollution Control pursuant to Article 19 of the Environmental Conservation Law ("ECL") and Title 6 of the New York Compilation of Rules and Regulations ("6 NYCRR") Parts 201, et seq.; a State Pollutant Discharge Elimination System ("SPDES") Permit pursuant to ECL Article 17 and 6 NYCRR Parts 750-758; an ECL Article 15 Protection of Waters Permit; a Section 401 Water Quality Certification pursuant to 6 NYCRR Part 608; a Mined Land Reclamation Law Permit Modification pursuant to ECL Article 23 and 6 NYCRR Parts 420 to 426; and a Freshwater Wetlands Permit pursuant to ECL Article 24 and 6 NYCRR Part 663,

- by -

ST. LAWRENCE CEMENT COMPANY, LLC,

Applicant.

Permit Application No. 4-1040-00011/00001

COMMISSIONER'S DETERMINATION
REGARDING AN EXCLUDED ACTION UNDER
ARTICLE 8 OF THE ENVIRONMENTAL CONSERVATION LAW

September 8, 2004

COMMISSIONER'S DETERMINATION
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St. Lawrence Cement Co., LLC ("SLC") owns and operates a mine in the Town of Greenport, Columbia County (the "Greenport mine") that has been heretofore excluded ("grandfathered") from the requirements of the New York State Environmental Quality Review Act ("SEQRA" or "Act"). SLC proposes to construct a new cement manufacturing facility at the location of the Greenport mine, to undertake associated product transportation activities, and to modify the Greenport mine's existing permit (the "proposed project").

This Decision addresses whether, in light of the foregoing, the Greenport mine should continue to be grandfathered for purposes of SEQRA review of the proposed project.

For the reasons that follow, I have determined that it is still practicable to modify the proposed project, which includes the Greenport mining operation, in such a way as to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative. Therefore, I exercise my authority pursuant to section 8-0111(5)(a) of the Environmental Conservation Law ("ECL") to

ungrandfather the Greenport mine. Accordingly, the mine and its operation shall be subject to SEQRA review with respect to the proposed project.

BACKGROUND

The Greenport mine is currently operated pursuant to a Mined Land Reclamation Law ("mining") permit which provides for the operation of a 1,222-acre limestone and shale mine on property owned by SLC. SLC proposes to locate a 2.2 million metric ton dry process cement manufacturing facility within the boundaries of the Greenport mine. The facility would consist of a raw mill system, kiln feed blending silo, preheater/precalciner tower, rotary kiln, clinker cooler, finish mill system and associated balance-of-plant systems and facilities.

The draft permit for the proposed SLC cement manufacturing facility would modify SLC's existing mining permit, allowing for an increase in the rate of extraction and a revised sequence of mining phases. See Issues Conference ("IC") Exh. 12(a)(i), at 1 ("Description of Authorized Activity").

In my First Interim Decision, I reserved decision as to whether I would exercise my authority pursuant to ECL 8-

0111(5) (a) to ungrandfather the mine in whole or in part, and directed that a record on the grandfathering issue be developed. First Interim Decision, December 6, 2002, at 16-17. In that decision, I noted that the New York State Department of Environmental Conservation ("DEC" or "Department") had treated mining operations at the site as grandfathered, but that "it is necessary to determine whether the mining operation should retain its heretofore exemption from SEQRA in light of the new activities proposed to be undertaken at the mine site." Id. at 15.

In directing that a decision-making record be developed, I set forth certain matters to be addressed, including:

- a review of the mining permits and activities preceding November 1, 1978;
- a comparison of the proposed mining operation, including modifications to the mining permit, to the pre-SEQRA operation;
- the applicability of the potential effects of mining operations and other components of the proposed project, and whether SEQRA must be applied to both the mine and these other project components, to enable the Department to take the required "hard look" at potentially adverse environmental impacts and to

require permit conditions as necessary to mitigate the potentially adverse environmental impacts; and

- a review of whether the proposed change in the level of operations, from the pre-SEQRA period to the present, amounted to a substantial change in the level of operations. Id. at 17-18.

Hearings on the grandfathering issue took place on February 25 and 28, and March 4, 5 and 6, 2003.¹ Administrative Law Judges Helene Goldberger and Maria Villa ("ALJs") issued a Recommended Decision and Hearing Report dated June 12, 2003 ("Recommended Decision"), a copy of which is attached to this Decision. The ALJs recommended that I exercise my discretion, pursuant to ECL 8-0111(5)(a), to ungrandfather the operation of the Greenport mine for purposes of SEQRA review of the proposed project.

The ALJs found that such ungrandfathering was necessary in order to adequately assess the mining impacts of SLC's application, because the mining operation is inextricably

¹ Whether an adjudicatory hearing is required prior to invoking ECL 8-0111(5)(a) depends upon the circumstances of each case. In this matter, I concluded that such a hearing was required to develop the necessary record with respect to the grandfathering issue. In other instances, there may be information sufficient for the Commissioner to decide whether to ungrandfather an action without the need for an adjudicatory hearing.

intertwined with the proposed cement manufacturing facility and associated product transportation facilities. The ALJs, upon reviewing the history of mining operations, concluded that the proposed mining operation would be both qualitatively different (as part of the larger proposed project) and quantitatively greater (in terms of the mining extraction rate) than the pre-SEQRA operations that were undertaken at the site. The ALJs' Recommended Decision presented a comprehensive analysis which reviewed the grandfathering language in ECL 8-0111(5)(a), the legal concept of substantial change, the purposes served by grandfathering, and general principles of zoning law.

Comments dated June 30, 2003 on the Recommended Decision were received from Department staff, SLC and jointly from Friends of Hudson and Hudson Valley Preservation Coalition ("intervenors").

Department staff, in its comments, agreed with virtually all of the findings of fact and procedural history that the ALJs presented in the Recommended Decision. However, Department staff argued that the rate of extraction and zoning principles should not be considerations in determining whether to ungrandfather a mining operation. Department staff took the

position that the Greenport mine should retain its grandfathered status.

SLC disagreed with the ALJs' Recommended Decision and argued that the mine, in its entirety, is SEQRA-grandfathered and, as a result, no basis exists to review the mining operation under SEQRA. SLC reiterated various arguments that it presented during the hearings. According to SLC, the mine is grandfathered based on the Department's pre-SEQRA approvals for the mining operation, and because mining operations at the Greenport mine were undertaken prior to SEQRA's enactment. SLC argued that pre-SEQRA submissions to the Department and a 1990 consent order confirmed the grandfathered status of the Greenport mine. SLC disputed the various rationales on which the ALJs relied to justify their recommendation.

Intervenors supported the ALJs' recommendation to ungrandfather the Greenport mine, but raised two concerns. First, they argued that the Recommended Decision lacked a clear articulation as to the extent of the mining activity that should be considered grandfathered. In addition, intervenors objected to any limitation on their ability to raise issues in this proceeding as to the Greenport mine's impacts on undisturbed

areas, even where those activities were previously considered grandfathered.

Based on my review of the record, including but not limited to the arguments advanced by the various parties, I hereby adopt the ALJs' Recommended Decision, subject to my comments below.

DISCUSSION

SEQRA was enacted in 1975, and was implemented in phases from August 1, 1976 to November 1, 1978. See ECL 8-0117. SEQRA is intended, in part, to promote "efforts which will prevent or eliminate damage to the environment and enhance human and community resources." ECL 8-0101.

In order to avoid duplicative and potentially burdensome regulatory review, actions undertaken or approved prior to the effective date of the Act were generally excluded from SEQRA review. This exclusion is not without limitation, however. Section 8-0111(5)(a) of the ECL provides that the DEC Commissioner may "ungrandfather" an action which otherwise would be excluded from the Act. The statutory language reads, in pertinent part:

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

"(a) Actions undertaken or approved prior to the effective date of this article, except:

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

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

ECL 8-0111(5) (a) (footnote omitted). See also section 617.5(c) (34) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") (incorporating comparable language in SEQRA regulations).

For purposes of the ungrandfathering analysis, ECL 8-0111(5) (a) requires that the "action" first needs to be defined, followed by a determination whether the action was undertaken or approved prior to the effective date of the Act. If the action was not undertaken or approved prior to the effective date of the Act, it is not grandfathered and, accordingly, it is subject to SEQRA. See, e.g., Relocation of Portion of County Road No. 61,

Commissioner's Determination, June 23, 1986, at 1-2 (because the project was not approved prior to June 1, 1977, proposed road location does not qualify as an action excluded from compliance with SEQRA).

If, however, it is determined that the action was undertaken or approved (or both undertaken and approved) prior to the effective date of the Act, the express terms of the ECL allow the DEC Commissioner to ungrandfather the action "where it is still practicable either to modify the action in such a way to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative." ECL 8-0111(5) (a) (i).

In addition, the New York State Court of Appeals has stated that circumstances may exist where a change in the level of operation is "so substantial" that it would be "sufficient to remove an activity from the exclusion clause of ECL 8-0111 (subd 5, par [a], notwithstanding that the basic nature of the activity remains unchanged." Matter of Salmon v Flacke, 61 NY2d 798, 798 (1984). See also Matter of Guptill Holding Corp. v Williams, 140 AD2d 12, 16 (3d Dept), appeal dismissed and lv denied, 73 NY2d 820 (1988).

Historical Background of the Greenport Mine

The ALJs, in their Recommended Decision, present a thorough and detailed review of the history of mining operations and the regulatory process with respect to the Greenport mine. See Recommended Decision, Findings of Fact #1-37. The record of the grandfathering hearing includes, in part, three volumes of documents relating to the status of the mine from 1949 to the late 1990's. Grandfathering Hearing ("GF"), Exh. 1 (volumes 1A, 1B, and 1C).

The historical record is relevant to the determination of whether the actions relating to the Greenport mine were either undertaken or approved prior to the effective date of the Act and the extent to which the proposed project represents a significant change to the mine and its operation. The terms "undertaken" and "approved" are independent and must be individually and separately analyzed, which the ALJs have done in evaluating the mining and regulatory history of the Greenport mine.

- Activities "Approved"

The Greenport mine has been used as a quarry since at least the early 1900's. In the 1930's, Universal Atlas Cement ("UAC"), a division of United States Steel Corporation, began mining at the site. Following adoption of the State's Mined Land

Reclamation Law (which became effective on April 1, 1975), the Department began processing permits by requiring mine operators to submit mine application materials in phases. In April 1975, UAC submitted a mining application to the Department. See GF, Exh. 1, Tab 73.

In January 1977, UAC informed the Department that it would not pursue its mining permit based on the pending sale of the mining operation to Independent Cement Company, a subsidiary of SLC.² GF, Exh. 1, Tabs 91 & 92. On February 1, 1977, UAC and SLC closed on the sale of the mine to SLC. In January 1978, SLC submitted an application to the Department for "transfer" of UAC's mining permit, although no permit had been issued to UAC. GF, Exh. 1, Tab 111. SLC's application noted that the mine was not in operation. Id. The Department issued a mining permit to SLC on December 29, 1978. GF, Exh. 1, Tab 128.

SLC presented evidence of ongoing communications and correspondence between Department staff and SLC from the time that SLC purchased the mine until the permit was issued, and has argued that these documents demonstrate that no lapse in

² For purposes of this decision, subsidiary Independent Cement Company will be referred to as SLC.

operating authority occurred for the Greenport mine. However, no mining permit was in effect on November 1, 1978.

- Activities "Undertaken"

In reviewing whether the activity was "undertaken," the analysis should consider the historical activities at the mine, and not be limited to the period of the late 1970's when SEQRA became effective. The scope of the mining operation over time, including but not limited to the rate of extraction, must be evaluated.

As noted, the Greenport mine has been used as a quarry at least since the early 1900's. Although no information is available on production rates up to the late 1930's, the production rate from 1938 to 1942 was in the range of approximately 400,000 to 500,000 tons per year. See, e.g., Recommended Decision, Finding of Fact #12. In the 1960's to the early 1970's, there were a few years when the amount of limestone excavated was about 1,000,000 tons per year. See, e.g., Recommended Decision, Findings of Fact #13 & #14.

In 1976, UAC closed down its operation at the Greenport mine, and no production occurred from 1977 to 1980. Recommended Decision, Finding of Fact #15. From the time that SLC purchased

the Greenport mine in 1977 until November 1, 1978, Colarusso & Sons ("Colarusso"), a mining company located on lands northeast of the Greenport mine, used portions of the site to store dynamite, stockpile materials, and operate a lime plant. Colarusso also used the quarry's roads to transport materials. Although mining is defined in ECL 23-2705(8) to include more than the extraction of rock, the activities conducted by Colarusso, as set forth in this record, do not qualify as the continuation of mining at the site. Following UAC's shutdown of operations in 1976, no operations of any significant nature recommenced until the early 1980's.

- Grandfathered Status of the Greenport Mine

Although Department staff initially took the position that the Greenport mine was subject to SEQRA, by the late 1980's, Department staff agreed to treat the mining operation as grandfathered. GF, Exh. 1, Tabs 150, 159. Since that time the Greenport mine has been treated as grandfathered, although certain related actions have been reviewed under SEQRA. See Recommended Decision, Findings of Fact #35 and #36, at 22-23.

Because the Greenport mine has previously been treated as grandfathered by the Department, I consider it appropriate for purposes of this decision to assume it as grandfathered. Thus, it

is necessary to consider whether the Greenport mine should be ungrandfathered in the context of the proposed project. The site history as developed in the hearing record and as summarized above demonstrates that the proposed project, including the anticipated level of mining operations, is significantly greater in size and more extensive in scope than any activity that UAC conducted or that SLC proposed to conduct at the site prior to the effective date of SEQRA.

Commissioner's Ungrandfathering Authority

As noted, even where an action is determined to have been undertaken or approved prior to the effective date of SEQRA, the Commissioner has the authority to ungrandfather the action "where it is still practicable either to modify the action in such a way to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative." ECL 8-05111(5)(a)(i).

This authority has been invoked on at least three occasions. In those instances, the potential environmental impacts of the projects under review were central to the determination. Commissioner Peter Berle, in Matter of City of Rochester "The Marketplace" (Commissioner's Decision, June 13, 1978), invoked the provisions of ECL 8-0111(5)(a) and required an

environmental impact statement with respect to a proposed regional shopping center. The Commissioner noted that the project had the potential for a number of short-term and long-term environmental effects at and near the project site. He referenced the project's regional magnitude and environmental significance, and concluded that it "was the kind of project that the Legislature intended should be analyzed through the environmental impact statement process." Id. at 5.

Similarly, Commissioner Robert Flacke ungrandfathered a resource recovery facility project where the potential existed for significant adverse environmental effects at or near the project site. Matter of the Environmental Committee of the Rome-Floyd Residents Association, Commissioner's Decision, October 16, 1981 ("Rome-Floyd"). In Rome-Floyd, the Commissioner stated that the possible adverse effects of the project should be thoroughly analyzed. Even though substantial amounts of money had been expended in connection with the project, the Commissioner determined that the project was still at a stage where mitigation measures could be designed for the project and incorporated into governmental reviews and decisions. Id. at 4-5. See also Matter of Proposed County Office Building and Demolition of Youman's House, Commissioner's Determination, June 24, 1980

(ungrandfathering by Commissioner Flacke as action might still be modified to allow for mitigation).

Previous Commissioner decisions have concluded that ungrandfathering pursuant to ECL 8-0111(5)(a) is appropriate "only . . . when special overriding environmental concerns are present and it is still practical to mitigate the action." See, e.g., Matter of Development of the Hunt Club, Commissioner's Determination, January 21, 1987 at 1. In the matter currently before me, both circumstances are clearly present. As reflected in the Recommended Decision and the record of this proceeding, there are special overriding concerns with respect to a range of environmental issues including, in part, the operation of the Greenport mine. In addition, it is still practical at this stage of the administrative proceeding to mitigate the action or to choose a feasible and less environmentally damaging alternative.

Factors Supporting Ungrandfathering of the Greenport Mine

Among the reasons that support ungrandfathering the Greenport mine are the mine's relationship to the proposed project, the need to ensure that the full range of mitigation for

the proposed project is considered, and the magnitude of change in the mining operation as it relates to environmental impacts.³

SLC proposes an extensive manufacturing facility and associated operations in the Town of Greenport and the Village of Hudson in the Hudson River Valley. The project includes the construction and operation of a dry process cement manufacturing facility which will require various Department permits, as well as modification of the mining permit for the Greenport mine.

SLC maintains that the Greenport mine is an ongoing permitted operation, and should not be considered part of the proposed project. I disagree. The Greenport mining operation is a key component of SLC's large-scale expansion of activities and development at this location. The mine will be an integral part of this project, which would involve a significantly larger and more extensive manufacturing operation than has ever been contemplated at this site. The mine will provide limestone and

³ The ALJs, in the Recommended Decision, reviewed principles of zoning law in their analysis. See Recommended Decision, at 30-31. Department staff and SLC in their June 30, 2003 comments on the Recommended Decision indicated that zoning principles have no bearing on any "ungrandfathering" analysis. Although zoning concepts may provide useful analogies in evaluating "ungrandfathering" issues, the ALJs in the Recommended Decision indicated that zoning law does not control and I do not find it necessary to consider principles of zoning law in reaching my decision.

other rock for the proposed cement manufacturing process, with a substantial proposed increase in the extraction rate, both in terms of tonnage and percentage. See Recommended Decision, Finding of Fact #40. The mine cannot be considered separate because it was previously permitted.⁴

Although various elements of the proposed project, that is, the mine, the cement manufacturing plant, the conveyor and the dock activities, may be similar (although not in scale) to elements of the prior operation at the Greenport mine, the magnitude of the proposed project not only makes for a considerably larger operation than any considered or conducted previously at this site, but it has the potential for significant adverse environmental impacts.

The ALJs identified several potential significant adverse environmental impacts with respect to SLC's proposed project. See Initial Rulings of the Administrative Law Judges on Party Status and Issues, December 7, 2001 ("ALJs' Issues

⁴ It should be noted that a fundamental principle of SEQRA is that the "whole" or "entire" action should be reviewed, and that segmentation of an action (except in special circumstances) should be avoided. See, e.g., The SEQR Handbook, November 1992, at 21-22. This principle is relevant here where the mining operation is one component of a larger plan, because of the statute's requirement that all potential environmental impacts associated with a proposed project be evaluated.

Rulings") (identifying a number of issues for adjudication). In my First Interim Decision, I determined that, among other issues, noise and traffic were substantive and significant and should be adjudicated. First Interim Decision, at 19-23.

I have also reviewed the remaining issues that were raised on appeals from the ALJs' Issues Rulings. In my Second Interim Decision, which I am issuing today, I have determined that several other issues are to be adjudicated.

If the mining operation relating to this proposed project were considered grandfathered, its impacts would be outside the scope of SEQRA review. As a result, except for mitigation voluntarily accepted by SLC, the Department's ability to impose permit conditions to mitigate significant adverse impacts to the maximum extent practicable would be limited or precluded. By applying SEQRA to the mining operation, potentially significant adverse environmental impacts will be thoroughly analyzed and mitigated to the maximum extent practicable to ensure that a sound balance is reached among economic, social and environmental factors.

Considerable attention in this proceeding has been directed to the increase in the mine's extraction rate. The

proposed project contemplates an extraction rate of 6.7 million tons per year. The Draft Environmental Impact Statement ("DEIS") for the proposed project states that the Department viewed historical permitting documents as imposing a limit on the rate of mining at the Greenport mine of 2.0 million tons per year. DEIS, GF Exh. 25, p. 8-3. Whether or not that has been the limit, extraction rates for the mine in recent years have not approached anywhere near that 2.0 million ton per year figure. Approximate extraction rates from 1995 to 2000 ranged from 481,000 to 773,000 tons per year, with an estimated 500,000 tons in calendar year 2001.

Year to year variability in the rate of extraction is to be expected in mining operations, in light of market demand, seasonal fluctuations, and other factors. An increase in the rate of extraction, by itself, does not necessarily support the ungrandfathering of a mine. In this instance, however, the magnitude of the increase is a consideration. No mining activity has occurred at the site that even approaches the level that SLC now proposes (that is, an extraction rate of 6.7 million tons per year), and no applications were filed, prior to the pending request, for mining activity anywhere near this magnitude. Using as a benchmark the excavation rate of 2.0 million tons per year (a level which has not been attained), the proposed extraction

rate of 6.7 million tons per year represents an increase of 4.7 million tons, or more than 300 percent per year. Both the increase in terms of tonnage and percentage are substantial.

Nevertheless, it is not only the magnitude of increase in percentage and amount of tonnage that is relevant. The importance of that increase in creating or contributing to potentially significant adverse environmental impacts must also be considered.

SLC, as part of the DEIS on the proposed project, evaluated the potential environmental effects of mining operations. See, e.g., DEIS, GF Exh. 25, Chapters 13 ("Traffic and Transportation"), 14 ("Air Quality and Meteorology"), and 15 ("Noise"); DEIS, GF Exh. 26, Appendix A, at A-19 to A-35.⁵ A number of short-term and long-term impacts were identified. The increased extraction rate was seen to potentially affect air quality, traffic and transportation, wildlife (due to temporary displacement) and noise. See id. The ungrandfathering of the Greenport mine will ensure that the potentially significant adverse mine-related impacts will be subject to the comprehensive

⁵ SLC, in its preparation of the DEIS, maintained, however, that the Greenport mine was not part of the actions and approvals associated with the proposed project for which the environmental impact statement was being prepared. DEIS, GF Exh. 26, at A-1.

environmental review of SEQRA, including its mandate to mitigate adverse environmental impacts.

SLC takes the position that the rate of mining activity was not limited by prior permits and that the projected increase should not be a basis to ungrandfather the mine. However, the substantial increase in the extraction rate and the extent to which it is connected to potentially adverse environmental impacts must be taken into account. The proposed increase in mining activity was never reviewed or approved prior to the effective date of SEQRA, nor was the level of the associated potential environmental impacts previously evaluated under SEQRA.⁶

"Ungrandfathering" the mining operation would not lead to any unreasonable delay in this proceeding. The adjudicatory

⁶ In support of its grandfathering argument, SLC references an October 4, 1990 consent order ("consent order") that was entered into with the Department. As I noted in my First Interim Decision, I am not persuaded by SLC's contention that the Greenport mine is excluded from SEQRA pursuant to the terms of the 1990 consent order. See First Interim Decision, at 18.

The consent order states, in pertinent part: "nothing in this agreement shall preclude (1) the future application of SEQRA upon the circumstances set forth in ECL 8-0111[5][a](i) and (ii) as they may apply; or (2) other common law or statutory pronouncements relating to 'ungrandfathering' under SEQRA." Accordingly, the consent order expressly recognizes that future circumstances may justify the application of SEQRA. IC Exh. 12b, at 2.

proceeding has not been completed and remains at a stage where it is still practicable to modify the action to mitigate potentially adverse environmental effects or to choose a feasible and less environmentally damaging alternative.

SLC argues that the ALJs' Recommended Decision did not identify any specific mitigation proposals. The only matter before the ALJs, however, was whether the mining operation was subject to the grandfathering provision of SEQRA or whether it should be ungrandfathered pursuant to the Commissioner's authority. Proposals for additional mitigation, in light of the ungrandfathering of the Greenport mine, are dependent upon the adjudicatory process, including the disciplined requirements of SEQRA review, as well as agreements among the parties.

Scope of Ungrandfathering of Greenport Mine

Based on my review of the submissions and the arguments presented, I invoke my authority to ungrandfather the Greenport mine with respect to the review of the proposed project.

Intervenors have suggested that, if the mining operation is ungrandfathered, a new environmental review of the proposed project should be undertaken. In their comments on the Recommended Decision, intervenors argue that they were precluded

from raising issues concerning the Greenport mine's impact on undisturbed areas.

I disagree with intervenors. SLC prepared a DEIS that addresses a range of environmental issues with respect to the proposed project, including those related to the mining operation. As SLC stated, its environmental assessment in Appendix A of the DEIS "describes the overall effects of mining operations as well as an assessment of the increase in mining production." DEIS, GF Exh. 26, Appendix A, at A-19. In Appendix A, SLC discussed the potential impacts of the mining operation that it had identified. Any or all of these impacts could have been challenged by intervenors during the issues conference.

Intervenors were not limited in any way as to the issues that they could have raised in their petitions for party status with respect to the mining operation. At the issues conference, intervenors had a full and fair opportunity to raise any objections or propose any issues with respect to the potential impacts of the mining operation and SLC's evaluation of mining impacts, whether or not they were included in the DEIS. Accordingly, the ungrandfathering of the Greenport mine, by

itself, does not provide intervenors with an additional opportunity to raise new issues for adjudication in this proceeding.⁷

Similarly, there is no need to revisit my First Interim Decision with respect to issues that I determined would not be subject to adjudication. Potential impacts of the mining operation may, however, be considered in connection with any issues that I determine should be adjudicated, assuming that

⁷ Intervenor, in their comments on the Recommended Decision, specifically reference the need to consider mining impacts on wetlands, archeological sites, habitat and wildlife. See Joint Response to the ALJs' Recommended Decision, June 30, 2003, at 17. As noted, SLC's position is that the mine, in its entirety, is grandfathered. However, each of the issues that intervenors reference was discussed by SLC in the DEIS. See DEIS, Appendix A, at A-29 to A-30 (addressing wetland impacts), at A-20 to A-21 (noting, with respect to archeological sensitive areas, that investigation and documentation would be undertaken in consultation with the State Historic Preservation Office and mitigation measures developed as required), and at A-33 to A-35 (addressing habitat and wildlife impacts). Intervenor were clearly on notice of SLC's environmental analysis, and were not precluded from seeking to raise adjudicable issues regarding potential impacts on these resources.

On August 18, 2004 SLC held a press conference in which it indicated that aspects of the project would be redesigned to address certain impacts. SLC must submit any project modifications to the Department for consideration. The modifications would then be considered in the permit review process and be subjected to all applicable reviews.

If any project modifications result in new or additional environmental impacts not previously considered, the Greenport mine and its operation shall be evaluated in the context of such new or additional impacts.

these impacts were appropriately raised at the issues conference and fall within the scope of the issue as I define it.

I recognize that adjudicatory hearings have already been completed on the issues of traffic and noise. The consideration of both of these issues included the impacts of the current mining operation. As to the issue of noise, existing ambient conditions of the project site, including the mining operation, were established. Any increases in noise arising from the proposed project were to be evaluated to determine whether a substantial adverse change would result. See, e.g., DEIS GF Exh. 25, § 15.9; DEIS, GF Exh. 26, Appendix A, at A-25 (noting that noise associated with mining activities was considered in the evaluation of project-related noise).

With respect to traffic, existing conditions of the roadway system, traffic volumes, and levels of service were used in evaluating potential impacts from the proposed project. See, e.g., DEIS, GF Exh. 25, at Chapter 13 (analyzing existing traffic and transportation operating conditions for the project area). The impacts, therefore, from the current mining operation are being considered in the adjudication of these two issues, as well as any potential mitigation measures. Accordingly, there is no need to reopen the adjudicatory hearing on the noise or traffic

issues in light of this decision to ungrandfather the Greenport mine.⁸

PROCEDURAL OBJECTIONS

SLC raised two procedural objections in its comments on the Recommended Decision. First, SLC argues that the ALJs erred in excluding Exhibits C ("Mining Permit Application of New York Trap Rock Corporation") and D ("Addendum to Negative Declaration & Full Environmental Assessment Form Part 3 -- Calverton Industries Sand Mining and Solid Waste Management Facility Project") that were submitted with SLC's original post-hearing brief dated May 7, 2003. The ALJs sustained intervenors' objections with respect to these two exhibits, on the grounds that the acceptance of evidence was complete and that these documents were not in the nature of evidence of which the ALJs could take judicial or official notice. The ALJs also noted that the submission of this new material in post-adjudicatory hearing briefs deprived Intervenors of the opportunity to subject the

⁸ My determination that there is no need to reopen the hearings on noise and traffic is based on the permit application that is currently before me. This Decision, however, does not preclude reopening the hearing on the traffic issue or the noise issue to the extent that modifications to the project result in traffic or noise impacts not previously considered.

documents to cross-examination and was unfair. Recommended Decision, at 12-13.

In the hearing on the grandfathering issue, the parties had ample opportunity to present documentary evidence, and all other parties were entitled to cross-examine and otherwise challenge the evidence presented. Submitting exhibits for the first time in a post-hearing brief precluded the other parties from addressing the weight and relevance of the evidence at hearing and in accordance with hearing procedures. Accordingly, the ALJs properly excluded the two exhibits to ensure the fairness of the adjudicatory hearing process. See Recommended Decision, at 12-13. Moreover, where, as here, the ALJs authorized the filing of briefs, the Department's regulations expressly state that briefs "must not refer to or contain any evidentiary material outside of the record." 6 NYCRR 624.8(a)(6). Therefore, Exhibits C and D, which were material outside the record, were properly excluded. In light of the foregoing, I do not need to reach the question of whether the ALJs could have taken judicial or official notice of the two documents pursuant to 6 NYCRR 624.9(a)(6).

SLC also argues that the ALJs erred in not receiving Exhibit 12 (which provides a summary of the history of the

Greenport Mine) and Exhibits 24a-f (which, according to SLC, confirms Department staff's position that the Greenport mine has and should remain grandfathered). I have examined the exhibits in question and the ALJs' reasoning as set forth in the Recommended Decision at page 10, and I affirm the ALJs' ruling not to receive these two exhibits. In any event, even if the two exhibits had been received into the record, my review of the two exhibits indicates that neither contains any information that would have altered my decision to ungrandfather the Greenport mine.

SLC also challenges the ALJs' ruling which limited the hearing record to the pre-1978 activities at the Greenport Mine and what was approved prior to November 1, 1978, but precluded testimony and evidence on impacts. As noted by the ALJs, the inquiry was to address whether SEQRA applies to the mining operation, and to review such matters related thereto, including the scope of mining processes, volume of material extracted and processed, the area that was mined and related facts. See, e.g., GF Transcript, at 239-241. The ALJs' ruling correctly reflects the intent of my First Interim Decision and the record that I directed to be developed. Accordingly, the ALJs' ruling is affirmed.

CONCLUSION

Based upon this record, I conclude that the Greenport mine should be ungrandfathered and subject to SEQRA review in connection with the review of the proposed project. This will allow the opportunity to fully assess potentially adverse environmental impacts arising, in whole or in part, from the mining operation at a point when it is still practicable to modify the action so as to mitigate those impacts or to choose a feasible and less environmentally damaging alternative.

Accordingly, I invoke the authority under ECL 8-0111(5)(a) to ungrandfather the Greenport mine with respect to the proposed project. The operations of the Greenport mine shall be considered in the SEQRA review of the proposed project, and shall be subject, in accordance with the requirements of SEQRA, to mitigation measures that would avoid or minimize adverse environmental impacts to the maximum extent practicable.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

By: _____/s/_____
Erin M. Crotty, Commissioner

Dated: September 8, 2004
Albany, New York