

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

In the Matter

-of-

The Application of **ST. LAWRENCE CEMENT COMPANY, LLC**
for permits to construct and operate a cement manufacturing facility
in the City of Hudson and Town of Greenport, Columbia County

DEC No. 4-1040-00011/00001

RECOMMENDED DECISION & HEARING REPORT - GRANDFATHERING ISSUE

-by-

Helene G. Goldberger
Administrative Law Judge

Maria E. Villa
Administrative Law Judge

June 12, 2003

PROCEEDINGS

Background and Project Description

In April 2001, St. Lawrence Cement Co., LLC (SLC) applied to the New York State Department of Environmental Conservation (Department or DEC) for permits to construct and operate a cement manufacturing facility in the Town of Greenport and City of Hudson. This facility would produce approximately 2.6 million U.S. tons of clinker per year and would be located on property owned by SLC. In the Town of Greenport, SLC owns a 1222-acre mine east of U.S. Route 9 and west of Newman Road, an inactive conveyor trestle that extends across Route 9, and an office and laboratory west of Route 9. Included also in SLC's land holdings in Columbia County is a dock on the east side of the Hudson River in the City of Hudson. SLC proposes to locate the cement manufacturing facility within the mine, to develop a new conveyor system to transport product to the docks and for receipt of raw materials, and to mine the limestone to make cement.¹ SLC proposes to close its operating cement kiln in Catskill and to remove the remnants of the old Universal Atlas Cement plant that are located at the Hudson dock and at the Route 9 location. The applicant also intends to remove the Catskill facility's bunker silos along the Hudson River, as well as a stack at that plant.

To construct and operate this facility, among other government approvals, SLC must obtain a state facility permit for air pollution control, Environmental Conservation Law Article (ECL) 19 and Parts 201, *et seq.* of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR); a state pollutant discharge elimination system permit (SPDES), ECL Article 17 and 6 NYCRR Parts 750-758; an Article 15 Protection of Waters permit and Section 401 Water Quality Certification, 6 NYCRR Part 608, a mined land reclamation permit modification, Article 23 and Parts 420-426; and a freshwater wetlands permit, ECL Article 24 and 6 NYCRR Part 663.

The Department is lead agency under the State Environmental Quality Review Act (SEQRA - ECL Article 8) and a draft environmental impact statement (DEIS) has been prepared by the applicant. As lead agency, DEC must also make a finding that the proposed project is consistent with the State's coastal policies. Executive Law, Article 42; 19 NYCRR Part 600; 6 NYCRR Section 617.11(e). DEC accepted the DEIS as complete and available for review on May 2, 2001.

The Department published a combined notice of hearing and complete application and notice of determination of review - prevention of significant deterioration in the May 2, 2001

¹ For a more detailed description of this project and the initial permitting proceedings, see Initial Rulings of the ALJs dated December 7, 2001. 2001 WL 1587361.

Environmental Notice Bulletin. The applicant published these notices in the May 4, 2001 edition of *The Independent* and the May 4, 2001 edition of the *Register Star*. Written comments from the public were accepted by the Department through July 2, 2001.

Two sessions of a legislative hearing were convened on June 20, 2001 at Columbia-Greene Community College with a combined attendance of approximately one thousand people. One hundred twenty-one people spoke, out of which 15 supported the project. The Office of Hearings and Mediation Services (OHMS) received approximately 982 comments by the July 2, 2001 deadline. Of these, 561 letters opposed the facility and 421 supported it.

A preliminary issues conference was convened on June 21, 2001 to identify the application, distribute the draft permits, and to discuss pending issues with respect to disclosure. The issues conference participants embarked on site visits on June 22, 2001 and August 16, 2001. The issues conference proceeded on July 18-July 31 and August 15, 2001 to address petitions filed by the intervenors with the participation of Friends of Hudson (FOH) represented by Jeffrey S. Baker, Esq. of Young, Sommer, Ward, Ritzenberg, Wooley, Baker & Moore, LLC, the Hudson Valley Preservation Coalition (HVPC) (comprised of Scenic Hudson, Inc., Natural Resources Defense Council [NRDC], Historic Hudson, Inc., Hudson Antique Dealers Association, Hudson River Heritage, Citizens for the Hudson Valley, Clover Reach, the Concerned Women of Claverack, and Riverkeeper, Inc.) represented by Marc S. Gerstman, Esq., The Olana Partnership (TOP) represented by John W. Caffry, Esq., the Town of Greenport represented by George A. Rodenhausen, Esq. of Rapport Meyers Whitbeck Shaw & Rodenhausen LLP, the City of Hudson represented by Jason Shaw, Esq. of the Rapport Meyers law firm, Massachusetts Department of Environmental Protection (MDEP) represented by Robert Bell, Chief Regional Counsel, the Berkshire Regional Planning Commission represented by Elisabeth Goodman, Esq. of Bernstein, Cushner & Kimmell, P.E., Columbia Hudson Partnership represented by Edward McConville, Esq., the Village of Athens represented by Mayor David M. Riley, the County of Columbia represented by John M. Leonardson, Deputy County Attorney, the New York State Preservation League represented by William A. Hurst, Esq. of McNamee, Lochner, Titus & Williams, P.C., the National Trust for Historic Preservation represented by Autumn Rierson, Esq., and NRDC represented by Albert Butzel, Esq.

Staff was represented by Regional Attorney Robert Leslie and SLC was represented by Thomas S. West, Esq., Robert J. Alessi, Esq., Yvonne E. Marciano, Esq., Michael Peters, Esq. and Frederick B. Galt, Esq. of LeBoeuf, Lamb, Greene & MacRae, LLP.

On December 7, 2001, Administrative Law Judges (ALJs) Helene Goldberger and Maria Villa of DEC's OHMS completed their ruling that identified certain issues for adjudication, determined that other proposed issues were not suitable for adjudication, required supplementation of certain matters, directed revision of the draft permits in conformity with the ruling and with stipulations entered into during the issues conference, and identified which petitioners should be granted party and *amici* status respectively. Appeals were subsequently filed.

Post-issues ruling submissions

In January 2002, SLC submitted to the ALJs and the issues conference participants its coastal zone consistency determination (CZCD) that it had provided to the Department of State (DOS).² Exhibit 33. On June 27, 2003, SLC filed a supplemental report to this determination entitled “SLC Greenport Project Visible Plume Reduction & Minimization.” Ex. 39. This submission included a one page correction to the CZCD. Id.

On March 21, 2002, pursuant to the December 7, 2001 issues ruling, SLC provided the ALJs and the issues conference participants with: (1) the SLC Catskill Facility’s Part 231 compliance certification; (2) a revised fugitive dust management plan; (3) the design for the dock impoundment; and (4) a pied-billed grebe survey. In the cover letter that accompanied these items, Mr. West explained that the January coastal zone submission is responsive to the issues ruling concerning the Village of Athens’ local waterfront revitalization program. In this communication, attorney West also clarified that based upon its appeal of the directives by the ALJs with respect to these matters, SLC was **not** supplementing the record as to: (1) identification of emission reduction credits; (2) an alternatives analysis of the Catskill site; (3) the noise mitigation plan; (4) the record of compliance form; (5) the truck traffic permit condition; and (6) air pollution impacts to Olana.

Also in response to the December 2001 issues ruling, on March 21, 2002, DEC staff submitted: (1) a revised consolidated draft permit; (2) a revised SPDES permit; (3) a revised air permit; (4) staff’s clarification with respect to analyses on PM₁₀ emission rates, CO emission rate (compliance with Part 257-4), and SO₂ emissions/compliance with sulfur limits in fuel (Part 225). This draft permit is identified as Exhibit 23 in the hearing record. Among many others, included in the revised permit is a condition (M.39) that memorializes SLC’s agreement to revise

² In response to this submission, on June 18, 2002, Mr. Gerstman, on behalf of HVPC, FOH, and TOP submitted to the ALJs their comments in response to SLC’s CZCD. These comments, which found SLC’s consistency determination to be inconsistent with New York State’s Coastal Zone Management Program, were filed with the Department of State. Ex. 38. By cover letter dated October 17, 2002, Mr. West provided to the OHMS a copy of SLC’s reply to the intervenors’ submission that was filed with DOS.

its mined land use map to eliminate mining of Becraft Ridge.³

On July 26, 2002, SLC submitted a revised joint permit application (JPA) to the Army Corps of Engineers with copies to this Department that included, *inter alia*, an economic impact analysis by Ernst & Young (attachment 18 to the JPA). Ex. 30b. On August 29, 2002, Mr. West filed a revised version of the Ernst & Young report. The ALJs replaced pages 4, 8, 54, 57 and 61 of the report with the amended pages supplied by SLC.

Commissioner's August 5, 2002 Ruling

On August 5, 2002, Commissioner Erin Crotty issued a ruling authorizing supplemental appeals of issues based upon her finding that the ALJs' direction requiring the submission of supplemental information and revised permit conditions with respect to certain issues left open the possibility of further review and a second issues conference. 2002 WL 18240984. The Commissioner determined that because these issues had been thoroughly addressed in the issues conference there was no need for a second issues conference. However, to ensure that all parties had ample opportunity to appeal any issues for which there had been supplementation or which had been addressed in revisions to the draft permit, the Commissioner directed that supplemental appeals be filed.⁴

In response, on September 18, 2002, FOH filed its supplemental appeals of the ALJs'

³ In a letter dated August 26, 2002, SLC counsel Marciano confirmed this commitment that is conditioned on SLC's receipt of the permits for the Greenport Project, all administrative and judicial appeals being resolved relative to those permits, SLC electing to proceed with the project and subject to SLC's reservation that such a permit condition would not affect the grandfathered status of the remainder of the mine. In addition, Ms. Marciano submitted the revised mining plan map and reclamation plan map reflecting this change. Exs. 40a-c.

⁴ The supplemental appeals, however, were limited to the record of these proceedings as it existed prior to the first issues ruling and not based upon supplementation. This was clarified in a letter from then-Assistant Commissioner Jo Anne W. Di Stefano to the issues conference participants dated August 9, 2002.

issues ruling.⁵ As part of this appeal, FOH submitted to the Commissioner its draft comments on the revised air permit. Exhibit A to 9/18/02 brief. In addition, in its appeal, FOH reiterated the arguments in its petition that the following matters should be subject to adjudication: (1) PM₁₀ modeling; (2) fugitive dust management plan; and (3) SO₂ analysis for coal.

By letter dated September 16, 2002, John Caffry, Esq., on behalf of TOP, explained that his client was not making a supplemental appeal but wished to have the Commissioner note that the Becraft Ridge issue was almost resolved. Mr. Caffry stated that as long as the revised maps submitted by SLC were incorporated into the draft permit, this matter would be settled. In addition, TOP maintained that two issues remained that required supplementation of the issues conference record: air pollution impacts to Olana, and the role of the Office of Parks, Recreation and Historic Preservation in light of the lack of a recommendation from that agency on the project. In addition, TOP noted its appeal of the ALJs' rulings on coastal policies relating to the visual impact of the project on Olana.

Based upon the clarification letter of August 9, 2002 by then-Assistant Commissioner Di Stefano as to the limits and purpose of the supplemental appeals, in his letter of September 18, 2002 to the Commissioner, Marc Gerstman, Esq., on behalf of HVPC, stated that HVPC would not be filing a supplemental appeal.

On October 18, 2002, SLC and DEC staff submitted their replies to FOH's supplemental appeals.

Catskill Pipeline Project

By letter dated August 28, 2002, SLC counsel West informed the ALJs and the issues conference participants of "(1) the recently commenced importation of cementitious material via truck to SLC's existing Catskill Facility, and (2) a proposed project to construct a new material transport pipeline and related equipment (the "New Pipeline") at the Catskill Facility to replace the ongoing truck importation." Mr. West explained that SLC applied to the Department for a modification to its Catskill facility air permit and a freshwater wetlands permit to handle barge deliveries of cementitious materials to the Catskill dock and the transfer of this material to the existing silos via a new pipeline. Mr. West represented that the barge and pipeline would allow

⁵ Chair Michael Vertitis of the City of Hudson Planning Commission submitted to the OHMS a copy of a letter dated September 13, 2002 that he had sent to Vice President Phillip Lochbrunner of SLC. The letter provides a list of items that it requests SLC provide with respect to elements of the project located in the City of Hudson. Although Mr. Vertitis states in his cover letter to the OHMS that the submission is in response to the Commissioner's August 5 ruling, it does not constitute a supplemental appeal.

for the replacement of the delivery of GranCem® by truck - a product produced at SLC's Camden, New Jersey facility. The truck traffic generated currently by this process was not addressed in the DEIS for the Greenport project. The letter also explained that the use of GranCem® is a substitute for the use of ordinary portland cement (OPC) and thus, would not increase outbound traffic. And, therefore, if the Greenport plant is permitted, "for every truckload of GranCem® that leaves the Catskill Facility, one less truck load of OPC would leave the Greenport Facility." Mr. West further explained that this does not mean less OPC would be produced, but that displaced OPC would be marketed outside the Capital Region, and transported by barge.

In response to SLC's applications for this project, staff released a revised draft negative declaration dated August 19, 2002. By copy of its letter dated September 9, 2002 to Environmental Analyst Wendy DuBois of DEC's Region 4 office, FOH counsel Baker informed the ALJs of its opposition to DEC's issuance of permits related to the Catskill pipeline project and requested that the negative declaration be rescinded. FOH argued that this project should be considered part of the Greenport project. FOH contended that this distribution activity violates local zoning, that GranCem® is an addition to the market, not a substitute for OPC, with potential for increasing truck traffic, and that the Department improperly determined to issue a wetlands permit for HS-101, a Class I wetland. Accordingly, FOH argued that this project should be consolidated with the review process for the Greenport facility.

In letters dated September 9, 2002 and September 11, 2002, respectively, HVPC and TOP concurred with FOH's comments. TOP also explained its concern that SLC's conversion of certain Catskill facility elements in the pipeline project would preclude their removal for additional mitigation of visual impacts on Olana. HVPC maintained that the Catskill project had significant consequences for the Greenport project.

By letter dated October 23, 2002, SLC provided additional information to DEC staff based upon DEC Environmental Analyst Wendy DuBois's request of September 16, 2002 regarding the pipeline project. Included in this material are SLC's responses to the comments of FOH, HVPC, and TOP.

By letter dated November 1, 2002, Mr. West informed Ms. DuBois of the Town of Catskill's determination that SLC did not require a special use permit pursuant to local zoning laws.

Because staff did not refer this matter to the ALJs, we have declined to consider it as part of the Greenport proceedings. See, Transcript (TR), December 17, 2002 meeting, p. 32.

December 6, 2002 Interim Decision

On December 6, 2002, a first interim decision (ID) was issued by Commissioner Erin Crotty. 2002 WL 31930486. In this ID, the Commissioner held that the applicant's use of Albany Airport National Weather Service meteorological data for air pollution modeling was not adjudicable. With respect to economic impacts, Commissioner Crotty decided that this issue too need not be addressed in an adjudicatory hearing. Instead, in the event that there were determined to be unmitigated impacts, she would undertake the balancing mandated by SEQRA based upon the DEIS, together with the intervenors' comments and the responsiveness summary. ID, p. 26.

In addition, the Commissioner found that the applicant need not supplement the record: (a) by identifying the source of its emission reduction credits at this time; (b) by providing an alternatives analysis with respect to the Catskill plant site; and (c) by submitting a completed record of compliance form. The Commissioner did find that the following matters required adjudication: (1) air pollution impacts to Olana; (2) grandfathering of the mine⁶; (3) noise; and (4) traffic (in the event that the parties cannot come to an agreement on a contingency condition).

In a memorandum dated December 20, 2002 (following the December 17, 2002 transcribed conference with the issues conference participants), then-Assistant Commissioner Di Stefano clarified that the Commissioner would address all appeals and supplemental appeals of the parties not decided in her first interim decision in a second ID. Pursuant to the decision and the conference held with the ALJs and Assistant Commissioner Di Stefano on December 17, 2002, SLC produced: (a) its analysis of air emission impacts to Olana (Ex. 41a); (b) the Greenport project noise mitigation plan (Ex. 41b); and (c) a proposed traffic contingency plan permit condition (Ex. 41c). These three items were provided to the parties on January 24, 2003. With respect to the traffic condition, due to the inability of the parties to reach an agreement, ALJ Wissler of the OHMS was designated as mediator to facilitate resolution.⁷

The ALJs also directed that issues conference participants notify the ALJs by January 24 as to whether they intended to continue to participate in the proceedings and whether they

⁶ Due to the potential for this issue's impact on other pending matters in this proceeding, the Commissioner directed that this proceeding be expedited.

⁷ By letter dated June 9, 2003, Mr. Baker informed the Commissioner that the parties were at an impasse with respect to the scope of the traffic issue.

sought to be involved in the upcoming hearing on grandfathering.⁸ In addition, the parties were directed to complete discovery on the grandfathering issue by January 10, 2003.

FOH Request for Redetermination on LAER Determination for NO_x

By letter dated February 4, 2003, FOH wrote to Michael Higgins of DEC's Region 4 Division of Environmental Permits asking that staff reconsider its determination that selective non-catalytic reduction (SNCR) satisfies the lowest achievable emission rate (LAER) standard for nitrogen oxide (NO_x) emissions from the cement plant that is part of SLC's proposed Greenport project.⁹ This request was based upon a report by FOH's engineering consultant, Camp Dresser & McKee, that found that SCR is a technologically feasible alternative that will achieve higher NO_x reductions. SLC responded by letter dated February 19, 2003 in which Mr. West argued that the experience at the Solnhofer plant in Germany referenced in the report was not relevant to DEC's determination on LAER. By letter dated April 17, 2003, Robert Bell, counsel to MDEP, provided Mr. Higgins with comments on the Camp Dresser & McKee report, concluding that SCR was applicable to the Greenport project and that DEC staff should reassess

⁸ Those who chose not to respond were alerted by the ALJs that they would be dropped from the service list. Accordingly, the County of Columbia, the Berkshire Regional Planning Commission, and the Columbia Hudson Partnership were deleted from the service list. By letter dated April 3, 2003, the ALJs were informed that Christopher Amato, Esq. is now representing the City of Hudson Planning Board. In response to an inquiry by ALJ Goldberger to Mr. Amato as to whether the City of Hudson was included in this representation, the answer was affirmative.

⁹ In the December 7, 2001 issues ruling, the ALJs determined that the adequacy of SLC's NO_x LAER analysis was appropriate for adjudication "because there is a reasonable doubt as to whether the phase-in is necessary, whether the emission limits set by staff in the draft permit are sufficiently stringent, and why SNCR is not proposed for the alkali bypass." Issues Ruling, p. 25. SLC and DEC staff appealed this ruling and it is pending before the Commissioner for decision. However, the issue of whether selective catalytic reduction (SCR) is a preferable technology was not before the ALJs and therefore has not been previously addressed in these proceedings.

the SNCR determination.¹⁰

Allegations of *Ex Parte* Communications

During the hearing on the issue of grandfathering, while conducting his direct examination of Mr. Steven Potter, Chief of the Resource Development Section in the DEC Division of Mineral Resources, Mr. West produced a document that the ALJs marked for identification as Exhibit 12. When asked to identify the document, Mr. Potter revealed that he had written the memo with the assistance of Mr. Al Hewitt of the DEC regional mining staff. TR 370-380. The document was a review of the history of the Greenport mine. During a *voir dire* examination by Mr. Gerstman, Mr. Potter explained further that the document had been prepared for the Division Director Bradley Field because “the Commissioner had some questions about the St. Lawrence Cement mine history.” TR 381.

Because Mr. Hewitt had worked with DEC staff in the course of these proceedings, FOH and HVPC argued that there had been improper *ex parte* communications in violation of State Administrative Procedures Act (SAPA) § 307(2). SAPA provides that “. . . employees of an agency assigned to render a decision . . . in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate.” This section of law goes on to state that the decisionmaker can consult with agency members who are not involved in the case under consideration.

As a result of the objections of FOH and HVPC to the introduction of the document and also to the communications that gave rise to it, the ALJs agreed to bring this matter to the Commissioner’s attention and the document was not admitted into evidence. On March 5, 2003, ALJ Goldberger read into the record of the proceedings Commissioner Crotty’s directives in response. The Commissioner did not find that there had been any improper *ex parte*

¹⁰ With respect to the draft air permit generally, by letter dated May 8, 2003, from DEC Project Manager Michael Higgins to Steven Riva, Chief, Permitting Section, U.S. Environmental Protection Agency (EPA), staff informed EPA of the changes it intends to make to the draft air permit based upon the June 29, 2001 comments received from EPA (Issues Conference Exhibit 55) and discussions among EPA and DEC staff members and SLC. In this letter, staff informs Mr. Riva that it intends to re-notice the draft air permit for public comment after the Commissioner makes her determination on the pending matters on appeal from the ALJ’s issues ruling in this hearing process. On June 3, 2003, the OHMS received a copy of a letter sent to staff by SLC (and carbon copied to the service list in this proceeding) regarding additional technical information it has developed with respect to particulate matter.

communications. However, in the interest of ensuring that all of the information that was provided to her office on the issue of grandfathering and the mining issue be made available to the hearing participants for their review and response, the Commissioner directed the ALJs to request Department staff have Division Director Field produce documents he prepared for the decisionmakers, including materials prepared by involved staff. In addition, she directed the ALJs to request that Mr. Field appear at the hearing to answer questions related to this matter. TR 600-601.

Staff produced documents and on March 19, Mr. Field appeared at the hearing to answer questions.¹¹ In the course of his testimony, Mr. Field explained that the documents in question were prepared with the assistance of various staff members, including Mr. Hewitt. These materials were prepared in response to questions from then-Assistant Commissioner Di Stefano to aid the Commissioner in rendering decisions in this matter. Transcript of Hearing on Allegations of *Ex Parte* Communications (EPC TR), pp. 31 - 42. As a result of Mr. Field's reference to other versions of documents than those presented, Mr. Gerstman requested that all of the documents in Mr. Field's files on SLC be produced. EPC TR 101.

Because Mr. West continued to seek introduction into evidence of the November 7, 2002 memorandum marked as Exhibit 12 as well as related documents marked Exhibits 24a - f, Mr. Baker argued that FOH should have the opportunity to review all the related information in staff's files. EPC TR 104-105, 114-115. Accordingly, the intervenors were directed to submit a discovery request to staff by March 20 with which staff was to comply by March 28. EPC TR 115-117. In response, staff produced certain documents as well as a "privilege log" that identified a number of documents and e-mails that it was seeking to withhold based upon the deliberative privilege. A conference call was convened on April 3, 2003 in response to the request of Mr. Baker and Mr. Gerstman to address the staff's denial of access to these documents. ALJ Goldberger directed the staff to produce the documents for *in camera* review and by memorandum dated April 3, 2003, the ALJs directed the staff to release the documents with a few redactions.

At the April 8, 2003 hearing, the parties concluded their questioning of Mr. Field. Mr. Baker, on behalf of FOH, reiterated previous requests made by his client, HVPC, and the applicant to the Commissioner to identify those individuals in the Department who would be relied upon in these proceedings as advisors so that there would be a clear delineation between

¹¹ During these special proceedings, Michael Naughton, Esq., of the DEC's Division of Legal Affairs, represented Mr. Field.

involved and uninvolved staff to prevent any inadvertent *ex parte* communications.¹² EPC TR 134-135. ALJ Goldberger advised the parties that she had made that request in the past and had not received a response; she encouraged them to make the application in writing. EPC TR 135. The ALJs made no determinations regarding whether there had been improper *ex parte* communications.

Mr. Gerstman also objected to the involvement of Mr. Field as either a substantive witness or future advisor based upon his prior actions. EPC TR 135-136. ALJ Goldberger noted that the Commissioner had already determined that the proper remedy for any questions with respect to this matter was to have Mr. Field testify and to produce the relevant documents. Therefore, Mr. Gerstman's request was denied. Mr. Gerstman also explained that HVPC had not determined that the *ex parte* matter was cured; this intervenor was preserving its objections.

Over further strong objections by the intervenors, SLC counsel West proceeded to question Mr. Field so as to establish a basis to move the aforementioned materials into evidence. EPC TR 139-151. ALJ Goldberger determined not to allow these documents into evidence based largely on two considerations. First, the documents contained many unattributed factual statements relating to information that was contained in other parts of the record that had already been created, such as Exhibit 1 and the DEIS. Second, to the extent that the documents offered opinions on whether or not the mine should be grandfathered and to what extent, these were the views of one individual, albeit the Division Director, and therefore, were not relevant. EPC TR 145-146, 150. The parties remained free to argue these positions in their post-hearing briefs that followed the close of this proceeding.

The Grandfathering Hearing

In the December 6, 2002 Interim Decision, the Commissioner determined that in order to decide the question of whether SLC's mining operation should continue to receive grandfathering protection pursuant to ECL § 8-0111(5)(a) in light of the proposed project, she required more information on what activities transpired at the mine prior to the effective date of SEQRA - November 1, 1978. ID, pp. 12-18.

The adjudication of the grandfathering of the Greenport mine occurred on February 25

¹² While the applicant joined in this request, Mr. West made SLC's position clear that it did not find the staff or the decisionmakers had engaged in any inappropriate *ex parte* communications. Rather, Mr. West stated that the decisionmakers had the discretion to rely upon the assistance of uninvolved staff in these proceedings. EPC TR 11.

and 28, and March 4-6, 2003. The hearing was held in the Greenport Town Hall.¹³

The permit applicant, St. Lawrence Cement, Co., LLC, was represented at the adjudicatory hearing by Thomas S. West, Robert J. Alessi, Elizabeth Dailey McManus, and Yvonne Marciano, Esqs. of LeBoeuf, Lamb, Greene & MacRae, LLP.

DEC staff was represented by Robert Leslie, Regional Attorney of the Department's Region 4 office in Schenectady.

Friends of Hudson was represented by Jeffrey S. Baker and Robert Muscato, Esqs. of Young, Sommer, Ward, Ritzenberg, Wooley, Baker & Moore, LLC.

The Hudson Valley Preservation Coalition was represented by Marc S. Gerstman, Esq. of Albany, New York and Warren P. Reiss, Esq. of Scenic Hudson.

The following witnesses testified as each party presented its direct case on the grandfathering issue:

– For the applicant, Paul H. Griggs, Jr., principal geologist, president, Griggs-Lang Consulting Geologists, Inc.; Edward Bovich, former president of Independent Cement Corporation (ICC); Matthew W. Allen, of Saratoga Associates; Joseph Meadows, financial officer, SLC; Michael P. Lee, president and CEO, AKRF, Inc.; Steven Potter, Chief of the Resource Development Section in the DEC Division of Mineral Resources; and Bradley Field, DEC Division Director, Mineral Resources.

– For the staff, Joseph Moskiewicz, DEC Mined Land Reclamation Specialist II, Region 7.

– For FOH, Mark P. Millspaugh, P.E., president and chief engineer of Sterling Environmental Engineering.

– For HVPC, Albert W. Butkas, former principal environmental analyst and regional permit administrator, DEC, Region 8.

The applicant commenced with its case, though some witnesses were taken out of order to accommodate schedules.

¹³ The ALJs are grateful to the Town and its personnel for extending their hospitality through the use of the Town Hall during these proceedings.

At this proceeding, the ALJs took into evidence Exhibits 1-23 with the exception of the document marked as Exhibit 12 discussed above at pp. 8-9. The series of Exhibits 24a-f were also not entered into evidence. During these proceedings, ALJ Villa created a revised exhibit list that includes the exhibits taken into evidence during this specific hearing as well as the foundation documents from the issues conference such as the DEIS, permit applications, draft permits, etc. Attached to this ruling is a copy of that list.

As part of a memorandum from the ALJs dated April 15, 2003, the parties were sent a list of corrections that ALJ Goldberger made to the hearing transcript and were asked to provide additional corrections. Based upon information sent by e-mail by Elizabeth Dailey McManus on May 5, 2003 with respect to the transcript of Mr. Meadow's testimony, ALJ Goldberger made the noted correction.

At the conclusion of the hearing, the parties were directed to file post-hearing briefs by May 6, 2003 and replies two weeks after the circulation of the ALJ's report on this matter.¹⁴ Briefs from the applicant, staff, and a joint brief by FOH and HVPC were received by the OHMS on May 6, 2003.

By letter dated May 8, 2003, FOH objected to SLC's submission of certain documents in a compendium provided with its memorandum of law. The grounds for FOH's objection (which was joined by HVPC in a letter dated May 9, 2003) to the documents identified as Exhibits C and D are that the record is closed as to the grandfathering hearing and that the submission of these materials at this time denies the intervenors an opportunity to challenge their validity or inquire as to their relevance through cross-examination.

SLC counters that these documents - a mining permit application concerning New York Trap Rock Corporation and an addendum to a negative declaration in Calverton Industries Sand Mining and Solid Waste Management Facility Project - are being submitted as part of a record that has not closed yet (reply briefs are not due until two weeks from distribution of this recommended decision) so that the intervenors can address them in the reply briefs. Moreover, SLC argues that these documents are publicly available and citing to 6 NYCRR § 624.9(a)(6) maintains that the "ALJ or commissioner may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the department."

In a letter dated May 9, 2003, FOH responded that official notice should not be taken of these documents as they do not relate directly to these proceedings. Moreover, FOH argues that 6 NYCRR § 624.9(a)(6) requires that "[w]hen official notice is taken of a material fact not

¹⁴ The Commissioner granted the request made by the parties at the April 8 hearing for a recommended decision pursuant to 6 NYCRR § 624.13(2).

appearing in the evidence in the record and of which judicial notice could not be taken,” the parties are to be given an opportunity to dispute “. . . its materiality.”

We sustain the objections of FOH and HVPC to SLC’s submission of Exhibits C and D as part of its memorandum of law. The materials submitted by SLC are not in the nature of evidence of which we can take judicial or official notice. They are not reflective of information which is of common knowledge within or without the Department. Rather, they are documents that contain partial information concerning mining permit applications of other facilities. In addition, their introduction would not provide an adequate opportunity for the intervenors to challenge them. While it is true that the record on the grandfathering matter is not closed, the portion of the record with respect to the acceptance of evidence is complete. All parties were given an expansive opportunity to present witnesses and documentary evidence over the seven days of hearing. We do not find that there is any reason to extend this opportunity after the close of the hearing.

While the documents submitted by SLC are publicly available, that does not necessarily make them relevant or probative. To the extent that they are relevant, these documents involve other mining operations and the documents are not necessarily reflective of all the facts involved in those circumstances or Department policy. We agree that to allow these materials into the hearing record at this stage would only open the door to further introductions by the parties. Finally, the lack of opportunity for the intervenors to subject these documents to cross-examinations is unfair.

Exclusion of Environmental Impacts of Past Practices at the Mine

At the commencement of the hearing on February 25, 2003, while providing the order of SLC’s witnesses, Mr. West explained that he would be calling certain technical witnesses to “testify about the relative impacts associated with historical activities compared to the impacts of activities proposed to support the Greenport Project at a rate of extraction of 6.7 million short tons, as described in the Draft Environmental Impact Statement. . .” TR 9-10.

Mr. Baker, on behalf of FOH, objected to the offer of witnesses or evidence related to the environmental impacts of past practices. TR 10-12. He argued that while operations in the past were dirtier, this was not relevant to the issue of “the scope of the mining activities” to determine whether the mine is grandfathered. Mr. Gerstman joined in this objection. TR 12, 14-16.

Mr. West responded that the purpose of the proposed testimony was not to explore the cement plant operation but “rather our focus is to look at the impacts associated with prior mining activities.” TR 12. Counsel West stressed that because impacts are central to SEQRA analysis, this evidence was relevant and necessary to the current inquiry. TR 13-14.

The ALJs deferred their ruling until February 28, when they advised the parties that they were granting the objection of the intervenors. Judge Goldberger ruled that “[t]he purpose of this hearing is to establish what activities took place at the mine prior to November 1, 1978. Under this rubric would be evidence of the extent of the mine, its production, transport, and to some degree the equipment that was used, and what if any other manufacturing processes took place.” TR 238-239. She explained further that impacts are not relevant to the Commissioner’s investigation as to what activities took place in order to determine whether SEQRA applies in the first instance. TR 239. ALJ Goldberger referred also to the December 17, 2002 conference at which both Mr. West and Assistant Commissioner Di Stefano clarified that impacts would not be the subject of the proceeding.

By letter dated March 5, 2003, SLC applied to Commissioner Crotty for leave to file an expedited appeal of this ruling pursuant to 6 NYCRR § 624.8(d)(2)(v). By letters dated March 10, 2003, FOH and HVPC, respectively, submitted their opposition to SLC’s request for an expedited appeal. By letter dated March 11, 2003, SLC replied to these submissions. By letter dated March 14, 2003, Chief Administrative Law Judge James T. McClymonds communicated the Commissioner’s decision to deny SLC’s application for leave to file an expedited appeal.

POSITIONS OF THE PARTIES

Position of SLC and Department Staff

SLC states that the Commissioner may only ungrandfather where the grandfathered action has potential for significant adverse environmental impacts and is subject to further mitigation or the applicant proposes a substantial change in the level of prior-authorized activity. It is the position of SLC that the mining operation is grandfathered from SEQRA review because there have been continuous mining operations and/or authorization of such activities at the Greenport mine predating the 1978 effective date of SEQRA by decades. Even for periods where there was no clear evidence of extraction of minerals from the site, SLC contends that it maintained regulatory authority for mining and no limits on extraction rates have ever been included in the DEC mining permits issued to the company. In addition, SLC argues that its investigations of the site, combined with its pursuit of continued regulatory approval for mining at Greenport, vest it with grandfathered rights to continue mining the entire site without SEQRA oversight. Moreover, SLC asserts that given the improvements in modern mining, the proposed mining activities will have even less impacts than those that occurred at this location for decades. And, because the applicant has agreed to extensive mitigation measures to mitigate adverse impacts, SLC maintains that ungrandfathering is also unnecessary.

With respect to whether its status may be changed based upon the ungrandfathering provisions found in ECL §§ 8-0111(5)(a)(i) and (ii), SLC argues that these provisions are inapplicable because the activities planned for the Greenport project present no material change from already authorized activities at the mine site. Furthermore, based upon initial disagreements

with staff as to restrictions on the permissible amount of extraction at the mine, SLC agreed to perform a SEQRA-type analysis with respect to any impacts that would increase due to the greater extraction rate proposed for the Greenport project. For other impacts, SLC agreed with staff that these would remain the same and further environmental review was not warranted. See, Ex. 25, DEIS, Appendix A.

Staff agrees with the applicant's position and is satisfied that the mine is currently permitted and covers 1,222 acres. Staff agrees that SLC maintained the necessary regulatory approvals commencing in 1977 when it took over the facility from the prior owner, thereby preserving its right to continue mining. From its perspective, the staff finds that SLC is not proposing to engage in activities that have not already been assessed and permitted, e.g., blasting, drilling, crushing, hauling, etc., and therefore, there is no basis to require a SEQRA review for those activities. Staff also maintains that for the periods of time SLC was not mining the site, other mine-related activities were ongoing and these are sufficient to demonstrate continuous mining. Staff says the Greenport project represents no change in the areal extent of mining and the Department did not limit extraction rates. Moreover, staff concurs with SLC that mining impacts will be less due to better mining methods. Staff ends its brief stating that impacts from future mining operations have been addressed in the DEIS and thus, there is no reason to ungrandfather the mine.

Both SLC and staff argue that the zoning concept of abandonment of a non-conforming use is inapplicable in this matter as "abandonment" is defined in ECL § 23-2705(1) as cessation of activities without prior notification to the Department. Moreover, staff and SLC argue that there has been no intent to abandon its mining activities demonstrated by SLC.

Position of FOH and HVPC

It is the position of these intervenors that SLC has not demonstrated that there has been continuous mining at the Greenport site up until 1978. Particularly, these parties question what mining rights, if any, SLC maintained from the time that it purchased the facility from the Universal Atlas Cement Company (UAC) in 1977. Pointing to various mining applications that do not indicate any acreage affected for the years 1977 to 1980, as well as evidence that the historical records do not reveal cement produced for these years, the intervenors assert that mining had been abandoned during this time. Accordingly, FOH and HVPC argue that SLC had not maintained any vested rights and thus, the mine should be subject to SEQRA. Additionally, these parties argue that the company did not maintain permits to mine, and that the various applications and submissions produced at the hearing did not constitute authorization to mine. Finally, these intervenors maintain that to the extent that SLC did mine at this site or allowed Colarusso, another mining company, to utilize its property for mining related purposes, the acreage affected was much less than what is proposed for the Greenport project. The intervenors assert that there are a host of environmental issues that have not been adequately analyzed (e.g., wetlands, wildlife habitat, site hydrology) due to the Department staff's position on the status of

the mine. Accordingly, FOH and HVPC argue that even if certain areas of the mine were grandfathered, this exemption from SEQRA should not apply to the entire area which has not been mined and where mitigation measures could be employed to protect the environment.

FINDINGS OF FACT

Project Description

1. St. Lawrence Cement Co., LLC proposes to construct and operate a cement manufacturing facility consisting of a raw mill system, kiln feed blending silo, preheater/precalciner tower, rotary kiln, clinker cooler, finish mill system and associated systems and facilities. SLC intends to produce 2.6 million US tons of clinker per year.

2. There are four major components to the proposed facility: 1) the manufacturing facility; 2) the surface mine; 3) the conveyor; and 4) the dock facilities for shipment of product and receipt of materials.

3. This facility is proposed for property owned by SLC in both the Town of Greenport and City of Hudson in Columbia County and is generally bounded on the north by the City of Hudson, on the east by Newman Road, on the south by NYS Route 23, and on the west by the Hudson River. The mine is to be located about 1.5 miles south of the City of Hudson and approximately 3 miles east of the Hudson River on Becraft Mountain.

Mining History

4. The mine is part of a 1222-acre parcel of which portions have been used as a quarry since at least the turn of the century.¹⁵ Ex. 1a, Tab 19, p. 2. In 1902, a plant was built by the Hudson Portland Cement Company and was located on the Hudson River. In 1908, the Atlas Cement Company built a new plant. Ex. 1a, Tab 82. The New York and New England Cement and Lime Company purchased the mining operation in 1909 and continued to operate the site until about 1930. Ex. 1c, Tab 160, p. 3 of the updated mined land use plan; Ex. 5b.

5. Universal Atlas Cement, a division of United States Steel Corporation, mined areas of this parcel starting in the 1930's. Ex. 4. UAC had operated two kilns (Nos. 4 and 5) that were installed in 1958 and 1968, respectively. As part of its mining operations, over the years, UAC

¹⁵ The entire SLC Greenport lands consist also of 547 acres contiguous to the mine - west of Route 9, and a 14-acre dock on the east side of the Hudson River. DEIS, Ex. 25, S-3. In order to distinguish the quarry that is the subject of these proceedings from other areas such as the Colarusso mine, in this report we will refer to the mine as the Greenport quarry.

mined limestone and shale, conducted excavation and reduction of mined stone using various kinds of drilling equipment, hydraulic and jack hammers, and explosives, and transported raw materials from the mines to the crushers and cement plant via electric shovel, front end loader, horse, rail car, and truck. UAC also operated a cement plant and a dock with shipping and storage facilities on the Hudson River near U.S. Route 9 in Hudson. Exs. 1, Tabs 12, 18, 34, 38, 54, 82 and Ex. 4.

6. In the early part of the 20th century, mining took place in the Greenport mine in the portion of land west of Newman Road. TR 320. Quarry progress maps from the years 1963 (section II quarry - HUSK-333), circa 1963 (light quarry - Bates number 014370, see, TR 141-145), 1971 (north end - HU-7002-1A), 1973 (south end - HU-7002-2), 1974 (quarry map - HU-7002-3) show the progress of the mine in various sections of the UAC property. Ex. 1a, Tabs 6, 10, 43, 66, 70, Exs. 2, 19, TR 157-163.

7. Mining technology has changed over the century. In 1949, a blast report for the Greenport mine indicates the drill pattern as 14 feet by 22 feet, using a six-inch drill bit to drill 25 holes. Ex. 1a, Tab 2; TR 170, 172-173. There was also evidence of drill patterns of 14 feet by 25 feet and 10 feet by 12 feet. TR 172. The depth of the holes drilled were up to 70 to 80 feet deep. In the late 1960's, drilling depths of 15 feet to 70 feet occurred. TR 855. In 1952, there were at least two top/hammer drill rigs in operation at this quarry. Ex. 4, photo 9c. From 1936 to 1952, drill rigs were stationed at the top of the uppermost bench of the quarry. Ex. 4, photos 9a-3, 11b, 12a, 15a, 18d. Drilling rates in 1969 were reported as less than 25 feet per hour, 36 feet per hour and at times ten feet per hour. Ex. 1a, Tab 22, 26; TR 175-176. During certain periods, blasting was conducted three to four times a week and in all kinds of weather. TR 177-178, 857-859. Drill cuttings were used to stem the material when conducting blasting. TR 179; Ex. 4, photo 10e. This practice resulted at times in stemming failures - a lack of confinement of the blast energy. TR 860; Ex. 4, photo 12b. Canned or cartridge explosives were used in the 1930's and 1940's. TR 176. Data from the late 1960's until the early 1970's indicates that blasting was conducted with millisecond delays and also simultaneous blasts of multiple holes. TR 179-180, 860-863. Gel-type explosives were employed at this time. TR 177.

8. After blasting, secondary breakage was conducted to make the stone small enough to be transported and crushed. TR 181. Up until 1952, this practice was accomplished with a jack hammer and dynamite. TR 181. In the late 1940's and early 1950's, UAC acquired a crane that had a heavy weight on it that was raised to the top and dropped onto the stone to break it. TR 181-182; Ex. 4, photo 18b.

9. In terms of transport of the rock, up until the mid-1950's, electric shovels and steam shovels were used to load the rail cars. TR 183. After 1966, UAC obtained two loaders to replace the shovels. TR 183-184. The rail cars hauled the stone to the older Gyratory crusher

that was located on the west side of the ridgeline. TR 185, 190-191; Ex. 4, photo 19b. The crushed stone was then taken by rail across Route 9 to the cement plant located on the west side of Route 9. TR 185-186; Ex. 4, photo 19b. Once the new crushers were constructed in the late 1930's, rail cars went to that crusher - which was also west of the ridge - and the crushed stone was conveyed across Route 9 via conveyor to the plant, where there was a third crusher. TR 186-187, 191-192; Ex. 4, photo 19b.

10. In 1953, UAC replaced the rail cars with haul trucks. In subsequent years, larger ton trucks replaced the 18-ton trucks that were used in the 1950's. TR 187; Ex. 1a, Tab 4.

11. Haul roads were cut and maintained. Ex. 4, photos 1, 2, 3, 5a, 8a; TR 215; Ex. 1a, Tabs 43, 44, 66, 70. Maintenance of the haul roads included grading and application of dust suppression - some use of calcium chloride - took place in the mid-1960's. TR 189-190, 887.

12. There is no available information on production rates for earlier periods, but in the years 1938-1942, the production rate was approximately 400,000 to 500,000 tons per year. TR 325-329. During this period there was one year where production doubled due to nighttime operations. TR 331, Ex. 4, photographs 14c, 18d.

13. Based upon records of clinker production, it is possible to calculate the amount of limestone excavated. This number is obtained by multiplying the amount of clinker by 1.6 to get an approximate number. TR 196, 341. For the years 1964-1972 there is a record of production rates. Ex. 11. During these years, the maximum amount of clinker produced was in 1965 - 628,000 tons. Based upon the calculation described, the amount of limestone excavated would be approximately one million tons.¹⁶ TR 342. That is the peak year for that period of time. TR 342, Ex. 11.

14. For the years 1970-1974 and part of 1975 there are also available clinker production numbers for the Greenport mine. Ex. 1a, Tab 83. In 1970, there were 557,000 tons of clinker produced with approximately 891,000 tons of limestone extracted for cement production. In 1971, UAC produced 451,000 tons of clinker which would require about 722,000 tons of cement stone. In 1972, there were 568,000 tons of clinker produced meaning an estimated 909,000 tons of cement stone was excavated. In 1973, 644,000 tons of clinker were produced with about 1,030,000 tons of cement stone. In 1974, UAC produced 588,000 tons of clinker based upon about 941,000 tons of cement stone. TR 343-344, Ex. 1a, Tab 83 (but see TR 196). In 1974, UAC shut down the no. 4 kiln due to market conditions, increased transportation costs, and expenditures associated with pollution control equipment. Ex. 1a, Tab 82. For 1975, the stone

¹⁶ This number does not include the amount of stone that is moved to get to the limestone. This figure will vary according to the location and geology. TR 196-198, 343.

taken from the quarry amounted to approximately 541,000 tons. Ex. 1a, Tab 82 (SLC Bates number SLC 014399).¹⁷

15. In 1976, UAC closed down its operation. There was no quarry production for 1977-1980. TR 345-346, 435-436.

16. ICC/SLC purchased the facility in 1977 for \$8.4 million. TR 418.¹⁸

17. SLC purchased the Greenport facility to establish a location from which it could produce cement to provide a source of cement for the Northeast market. TR 282-283, 286, 289-290, 419-420. Because of a variety of factors, including an International Trade Commission investigation of the company, the downturn in the economy, and the poor condition of the Greenport cement plant, the company opted to delay mining and rehabilitation and/or reconstruction of the plant. TR 291, 293, 295-297, 307, 421-422, 424, 430, Ex. 1, Tabs 83, p.2, 97, 99, 103, 125, Ex. 9. In the late 1970's, SLC leased a cement producing facility in Kingston for several years in order to become active in the New England market while the Greenport facility was subject to further planning. TR 297-299, 315, 423.

18. Beginning in 1977 and proceeding for several years, SLC personnel studied the feasibility of and made plans to renovate and re-activate the facility.¹⁹ TR 291, 421, Exs. 1a and 1b, Tabs 101, 102, 103, 106, 109, 129, 131, 133, 134, Ex. 9. In addition, beginning in 1977, SLC began an investigation of the geology of the quarry by core drilling to determine what reserves would be available for cement production. Ex. 1b, Tabs 102, 103, 109, pp. 6, 8, Tab 124; TR 199-207, 291, 305-306. The cost of this investigation was \$500,000. TR 437. In addition, another 1.5 million dollars was spent by SLC on demolition at the facility and clean-up as well as on operation of a cement terminal at this location. TR 437.

19. Colarusso & Sons, another mining operation, has been located on lands adjacent to the northeast portions of this quarry since 1927. TR 58, 214, 329. Since this period, Colarusso has had agreements with UAC and later SLC to use certain portions of the Greenport quarry to store dynamite, to stockpile materials, to operate a lime plant, and to use the quarry's roads to transport materials between the Greenport quarry and Colarusso properties. Ex. 1a, Tabs 5, 14,

¹⁷ Most of the documents contained in Exhibits 1a, 1b, and 1c have Bates numbers stamped in the right bottom corner.

¹⁸ To avoid confusion in this report, from this point forward we will identify ICC and/or SLC as SLC. ICC was a subsidiary of SLC. TR 33.

¹⁹ On January 1, 1998, the company changed its name to St. Lawrence Cement Co., LLC. Ex. 1c, Tab 187, 1998-2003 mining permit renewal and modification application, p.1.

45, 47, 63, 65. From the time SLC purchased the Greenport facility in 1977 through November 1, 1978, Colarusso used SLC property for stockpiling materials and explosive storage. TR 209-211. In later years, Colarusso was granted permission to mine portions of the SLC property. Ex. 1c, Tab 137, mining and reclamation plan - 1981-1984, Tab 145, life of mine mining map, Tab 160, updated mined land use plan, p. 2; Ex.4, photos 8a, 8b, 24a, and 24c; TR 85-86, 145-146; Ex. 18. And in the late 1970's, a local contractor, Joseph Laviano, removed some shale from the bank between Newman Road and the mine impoundment. TR 212.

20. In 1984, SLC had the opportunity to purchase a cement plant in Catskill. TR 425; Ex. 1, Tab 197. For approximately \$38 million, SLC purchased this plant and mine as an interim source of limestone and cement-making resources until the Greenport facility was established. TR 425-427, 438. Although SLC purchased Catskill believing that quarry reserves there were limited to nine years, they have turned out to be in excess of that amount as the mine currently continues to operate. TR 439-440.

Regulatory History

21. In April 1975, UAC submitted to DEC a mining application including an organizational report and permit fees. This application indicates that no acres are to be affected during the permit term. In the mining plan, in response to box no. 9 "estimated life of operation," UAC noted "confidential" and did not provide any number of years. Ex. 1a, Tab. 78. The Department section of the application contains a permit number (423-21-81) and date of issue -- May 5, 1975. Ex. 1a, Tab 73. The mining application is not signed by a Department staff member and does not indicate approval or disapproval in the available boxes. Id. As comparison, a mined land permit application submitted to DEC during this same period from Atlantic Cement Company, Inc. also does not contain a Department signature or check-off in the approval/disapproval boxes but has a permit number and date of issue. Ex. 15.

22. In order to respond to the State's new mined land reclamation law and address all the active mine operations in New York by the April 1, 1975 date mandated by the Legislature, the Department determined to process permits by requiring mine operators to submit a series of mine application materials in phases. The initial phase required the submission of the application, the organizational report, and the permit fee. Once these were submitted, the Department deemed the operation in compliance with the application requirements of the law and continued to process the permit application with requests for notice to adjacent landowners and the public, as well as additional information such as the mining and reclamation plans. While the permit process continued, the operator was advised that he could continue to operate beyond the effective date of the law - April 1, 1975. Ex. 1a, Tab74; TR 498-499. In the case of UAC, the letter dated May 5, 1975 from Bureau Chief Dragonetti served this function. Id. After promulgation of regulations, as a last step, the Department would use the information provided

to determine the reclamation bond required for the operation. TR 493-499; Ex. 1a, Tabs 73, 74, 77, 78, 86, 90; Ex. 15.

23. The May 5, 1975 Dragonetti letter required that additional information be provided and UAC submitted these items on October 20, 1975. Ex. 1a, Tabs 43, 74, and 78; TR 225.

24. In November 1976, DEC sent a letter to UAC enclosing a copy of the mined land rules and regulations. Ex. 1a, Tab 86; TR 227-228. In December 1976, SLC's counsel wrote to SLC recommending that it contact DEC about obtaining a mining permit. Ex. 1a, Tab 88. Another letter from DEC in January 1977 went out reminding UAC of the matters outstanding to complete the permit process. Ex. 1a, Tab 90; TR 229, 246.

25. In January 1977, SLC's counsel wrote to SLC vice president in charge of finance forwarding a letter from U.S. Steel stating its intention to inform DEC of the impending sale of the facility. In this letter, U.S. Steel suggests that SLC communicate directly with DEC regarding the permit and states its intention not to pursue the permit application in light of the sale. Ex. 1a, Tab 91. Also in January 1977, UAC informed DEC that it would not pursue its mining permit based upon the pending sale of the Hudson-Greenport operation to SLC. Ex. 1a, Tabs 92, 100. On February 1, 1977, UAC and SLC closed on this transaction. Ex. 1c, Tab 199. Beginning in early 1977, officials of SLC met with DEC personnel to discuss environmental planning at the facility. Ex. 1a, Tabs 96, 97, 108, Ex. 8.

26. In January 1978, SLC submitted an application to DEC with a \$100 fee for transfer of UAC's mining permit. Ex. 1b, Tab 111. This application notes that the mine was not in operation. *Id.* In response to the question on the annual reclamation report to "estimate number of acres to be affected during next report year," the company indicated "15.7 exclusive of haulage ways." Ex. 1b, Tab 112. By letter dated February 9, 1978, DEC sent SLC a receipt for the transfer and renewal fee for the mining operation. Ex. 1b, Tab 114. SLC represented that the acreage previously affected (1975-1976) was 8.2 acres. Ex. 1b, Tab 118, Map DWG No: IHQ-500G. In its mined land use plan (MLUP), SLC personnel explained that for the next ten years, mining would take place within previously mined or permitted area[s]. Ex. 1b, Tab 119, MLUP, p. 1. By letter dated February 9, 1978, DEC staff acknowledged receipt of the transfer and renewal fee for the mining operation. Ex. 1b, Tab 114. By letter dated March 15, 1978, SLC provided DEC with maps showing the proposed areas of mining and reclamation for 1978-79, the proposed reclamation plan, and projections for the 50 year limits of the quarry (579.8 acres). Ex. 1b, Tab 118, Ex. 19. At that time, it was SLC's understanding that the Greenport quarry reserves were approximately 50 years. TR 427-428.

27. In August 1978, DEC staff calculated that SLC's affected land in the Greenport quarry was 63.9 acres. This included the 8.2 acres that had been mined between August 1975 and 1976 as well as lands projected to be affected including haulageways, stockpiles, etc. Ex. 1b, Tab

126. After SLC submitted its reclamation bond to DEC, the Department issued the mining permit to SLC on December 29, 1978 with an expiration date of May 5, 1981. Ex. 1b, Tab 128. The permit is identified as part one of the mining permit with the application and associated materials comprising part two. Id. There are no limitations on extraction rates contained in these documents.

28. In an environmental assessment form submitted in 1981 to DEC as part of its application for renewal of its mining permit, SLC identifies the extent of the project area as 1200 acres. Ex. 1c, Tab 137. The mining plan submitted to DEC with this renewal application notes that SLC had an agreement with Colarusso Quarry Corp. to mine in the SLC quarry and transport broken rock to Colarusso's primary crusher. Id. There is no mention of limitations on extraction rates in these documents or the permit. Id., Tab 140.

29. In subsequent submissions to DEC, such as the 1985 life of mine - mined land use plan, the company explains that the quarry had not been operated since 1978 and there is standing water where the mine flooded. A second quarry adjacent to this one is owned by the City of Hudson and serves as an emergency reservoir. A third quarry at the northern end of Becraft Mountain is described as being operated by Colarusso for crushed stone aggregate. This document identifies the current quarry as 210 acres with the total area of affected land as 1155 acres. Ex. 1c, Tabs 145, 150. The MLUP explains the phases of the mine and in which directions it will progress but does not provide any information on the quantity of stone to be removed. Ex. 1c, Tab 145, life of mine - phased mining plan - DWG. 837A-4. The 1985 mining permit application provides that the estimated life of the mine is 100 years. Ex. 1c, Tab 145. The 1985 application identifies 9 acres of area to be affected during the 1985-1988 permit term, but there is no information on extraction rates. Ex. 1c, Tab 145.

30. In 1985, the mine plan map identifies approximately 272.2 acres as affected area. In this term's permit renewal process, DEC staff issued a positive declaration in response to SLC's stated plans to mine 1155 acres. Ex. 1c, Tab 150.

31. SLC challenged DEC's authority to require an environmental review pursuant to SEQRA, ECL Article 8. Ex. 1c, Tabs 150, 151, 157, 158, Ex. 1d. During this same period, the Atlantic Cement Company had also challenged DEC's authority to apply the life of mine policy to its operation. This litigation resulted in a favorable determination for Atlantic Cement. SLC shared a common view with Atlantic Cement that its activities in the mine were grandfathered from SEQRA .

32. DEC staff and ICC negotiated this issue which culminated in a consent order in October 1990. TR 258-259; Ex. 1c, Tab 165. This agreement provided that the mining area consisted of about 1200 acres that were permitted under the MLRL prior to and following the

implementation of SEQRA. The staff agreed not to apply the life of mine review policy to the SEQRA-excluded area. The consent order also provides that SEQRA could be applied in the future, pursuant to ECL §§ 8-0111(5)(a)(i) or (ii). For the term then at issue, the 272 acres would not be subject to environmental review. Ex. 1c, Tabs 165, 166, 167, 168, 172.

33. The 1990 mining permit application states that the area affected since 1975 is approximately 272 acres (phase 1) and that this area would not change in the upcoming permit term. Ex. 1c, Tab 160. The environmental assessment form submitted with this application states that 230 million tons of natural material would be removed from the site. Ex. 1c, Tab 161. The May 1990 updated mined land use plan indicates that approximately 2.0 million tons of rock will be mined per year. Ex. 1c, Tab 160, mined land use plan, p. 5. The permit states that mining operations shall be conducted in accordance with the May 1990 updated mined land use plan and the October 4, 1990 consent order. Ex. 1c, Tab 166.

34. In 1993, SLC sought renewal of its permit again and stated in its application that it remained within the 272.2 affected acres (phase 1). Ex. 1c, Tabs 168, 171. The 1993 mining permit references the terms of the 1990 updated mined land use plan and the 1990 consent order by which SLC must conduct its mining operations. Ex. 1c, Tab 172.

35. In 1996, SLC's application included a request for authority to establish a processing facility in the northern part of the mine. Because this was a modification to the existing facility, staff applied SEQRA, issued a negative declaration, and issued the permit. TR 265-266; Ex. 1a, Tabs 174, 179, 181, 183. The 1996 updated mined land use plan states that 504,000 tons of aggregate would leave the quarry each year. Ex. 1c, Tab 174, p. 2-5. As with the two prior permits, in the 1996 renewal, DEC requires in the special conditions that the permittee adhere to the updated mined land use plans (1990 and 1996) as well as the 1990 consent order and other application materials submitted to the agency by ICC. Ex. 1c, Tab 183, p. 4.

36. In 1998, the company applied to expand the permitted mining area to include the setback distance adjacent to the Colarusso property (4 acres) based upon the latter's consent. Ex. 1c, Tabs 184, 186-189. DEC issued a negative declaration for this renewal, transfer, and modification application. Ex. 1c, Tab 195; TR 268-269. The permit was issued in March 1999 with an expiration date of November 13, 2003. The permit references the 1990 MLUP. DEIS, Ex. 25, p. 8-3.

37. The extraction history of the mine for the period 1995-2000 is provided in Table 8-2 of the DEIS (Ex. 25) as follows:

<u>Year</u>	<u>Approximate Tonnage</u>
1995	773,000

1996	593,000
1997	540,000
1998	643,000
1999	555,000
2000	481,000

Appendix A of the DEIS estimated the 2001 output of the mine as approximately 500,000 tons per year. Ex. 26, Appendix A, DEIS, p. A-5.

Greenport Project Environmental Review

38. SLC commenced the DEC application process for the current Greenport project in 1999 including the initiation of the SEQRA process - public scoping as applicable to the manufacturing plant, conveyor system, and dock. With respect to the mine, SLC maintained that because of the “longstanding nature” of the mine, its operation is excluded from SEQRA review. SLC did review mining impacts to compare future practices with activities at the mine without the project. TR 455. Initially, staff and SLC disagreed as to whether the prior permits limited the extraction rate to 2 million tons per year.

39. While maintaining its position, SLC agreed to analyze the effect of the Greenport project on impacts associated with the mine, assuming that 2 million tons per year represented baseline conditions for future mining operations. Ex. 25, DEIS, p. 8-3. In Appendix A to the DEIS, SLC identified the expected level of operations that would be occurring at the mine without the project. TR 464. Where the company found there were potentially significant adverse impacts due to the increased rate of extraction, SLC agreed to evaluate those impacts in the DEIS. *Id.* For the other mining impacts, staff and SLC agreed that the impacts were the same with or without the project and need not be evaluated further under SEQRA. *Id.* However, these matters were addressed in Appendix A as descriptive of what SLC refers to as baseline conditions. Ex. 26, TR 464.

40. On page 8-4 of the DEIS in Table 8-1, there is a list of the impacts associated with mining, and a determination of whether a change in the extraction rate to 6.7 million tons would result in potentially significant adverse effects. The DEIS concludes that for groundwater resources, surface water resources, traffic and transportation, air quality, and noise there are potentially significant adverse impacts due to the change in extraction rate. Ex. 25, pp. 8-3 - 8-4. The applicant also prepared an Appendix A to the DEIS that provides an evaluation of mining impacts including those that will remain the same with or without the project. Ex. 26, Appendix A. These topics are: mining area and depth, mining sequence, mining method, blasting and vibration, reclamation, geology and topography, archaeology and historic resources, groundwater resources, surface water resources, aquatics and wetlands, terrestrial ecology, wildlife and

vegetation, and visual character.²⁰

41. The DEIS contains an analysis of the potential adverse effects of increased mining as part of the evaluation for the entire project for air quality, traffic, noise, and water consumption.²¹ Ex. 25; TR 470-474.

42. SLC maintains that in the event that the project is not permitted, the company expects to continue mining operations. SLC projects that extraction rates would reach at least 2 million tons per year and result in approximately 1 million tons of aggregate per year being transported off-site via trucks as currently operated. Ex. 25, DEIS, p. 8-12. SLC also states that market conditions could demand an extraction rate of as much as 6.1 million metric tons per year. Ex. 25, DEIS, p. 8-13.

Mitigation Measures in Draft Permit

43. SLC has agreed to forego mining the western ridge of Becraft Ridge conditioned upon the receipt of all permits necessary for the Greenport project, the resolution of all judicial appeals, and the decision of SLC or its successors to proceed with the project. The acreage involved in this portion of the mine is 178 acres. Ex. 2; Ex. 23, M.39.

44. SLC proposes to have one crusher located within a building placed “40 feet below all elevations that exist at the nearest limits of the life of mine.” Ex. 23, M.27; TR 835. Because this crusher can accept larger size pieces of rock, secondary breakage will be lessened. TR 867.

45. SLC is required to control dust according to a fugitive dust plan that includes use of water and DEC-approved dust suppressants. TR 836; Ex. 23, M.18.

46. All drilling activities are limited to daylight hours only. Ex. 23, M.20.

47. SLC would be limited to 2 blasts a week except when 2 blasts are not possible due to weather when a third would be allowed the following week. Ex. 23, M.33. Pursuant to the draft permit conditions, SLC is not permitted to blast on weekends or certain listed holidays, is required to keep blasting records, and must avoid blasting in certain adverse weather conditions. The draft permit sets limits for ground vibration and for air blasts that meet U.S. Bureau of

²⁰ Many of these matters were the subject of petitions and discussion at the issues conference and ruled upon in the ALJ’s issues ruling of December 7, 2001.

²¹ To the extent that issues related to these topics were raised by petitioners, they were addressed at the issues conference and in the issues ruling of December 7, 2001.

Mines guidelines. Ex. 23, M.34-35, p. 13.

48. The draft permit requires a pre-blast survey of structures within one thousand feet of any blasting in order to identify any damage resulting from blasting. Ex. 23, M.29-31.

49. SLC is required to monitor the impacts of mining on the City of Hudson's back-up water supply located in the former Lone Star Quarry. If these activities interfere with that supply, the draft permit requires SLC to address the problem and/or provide an adequate alternate water supply. Ex. 23, M.36-37.

50. The draft permit requires SLC to perform a well survey for any well within 2000 feet of the mining area. In the event that the mine interferes with such a water supply, SLC is required to provide potable water to the well owner. Ex. 23, M.38(a)-(e).

Proposed Mining Methods for Greenport Project

51. Two drill rigs are proposed for the future mine. TR 850. It is estimated that the penetration rates for this equipment at the Greenport mine will be 110 to 125 feet per hour. TR 854.

52. With respect to blasting patterns, the mine will typically use a 17 by 17 pattern. TR 855. The holes used will be 15 feet to 70 feet. TR 855. The drilling depth will be similar to what it was in the 1960's - up to 70 feet. TR 855. SLC proposes to drill at times at the original grade of the mine, but the majority of the operation is to be at a lower grade. TR 856. Instead of using drill cuttings to blast the mine, SLC proposes to use crushed stone to better confine the blasts. TR 859-860.

53. There will be less secondary breakage required due to the changed blasting techniques. For the secondary breakage needed, a hydraulic hammer would be used by SLC. TR 867.

54. SLC proposes to use three front-end loaders for loading shot rock into waiting vehicles. TR 867-868. These would operate between 40 and 550 feet below grade. TR 868-869. Six or seven 100-ton trucks will be used to transport the rock to the crusher inside the mine. TR 870-871.

DISCUSSION

Introduction and Summary

Environmental Conservation Law § 8-0111(5)(a) excludes from SEQRA review, *inter alia*, “[a]ctions undertaken or approved prior to the effective date . . .” of SEQRA 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.

In response to the ALJ’s ruling of December 6, 2001 and the intervenors’ offers of proof supporting the “ungrandfathering” of the mine pursuant to ECL § 8-0111(5)(a)(i), the Commissioner addressed this issue in her interim decision of December 6, 2002. Commissioner Crotty directed the ALJs to conduct a fact-finding hearing expeditiously to determine the extent of activities prior to November 1, 1978 (the date the Commissioner found SEQRA applicable to the mine). ID, pp. 12-18.

We find that the record created in the fact finding hearing held on February 25, 28, March 4-6 and April 8 and 19, 2003 and applicable law support a determination by the Commissioner to ungrandfather the mine pursuant to ECL § 8-0111(5)(a)(i) in order to consider all potential significant adverse environmental impacts resulting from the proposed Greenport project.

ECL § 8-0111(5)(a)(i)

The language in ECL § 8-0111(5)(a)(i) provides that “where it is still practicable either to modify the action in such a way as to mitigate potential adverse environmental effects or to choose a feasible and less environmentally damaging alternative . . . the commissioner may . . . require the preparation of an EIS . . .” Prior commissioners have invoked this section with

respect to proposed actions in which large environmental impacts loomed and there was still time and ability to mitigate them. Similarly, in cases in which the commissioners found insufficiently identified environmental impacts or impacts that had been mitigated adequately, they chose not to ungrandfather those projects.

In Matter of Buffalo Waterfront Urban Redevelopment Area (8/3/90), Commissioner Jorling determined that there were no adverse impacts that warranted the development of an EIS because the issues identified by the petitioners had already been addressed. In this matter, an EIS had already been prepared pursuant to the National Environmental Protection Act (NEPA). But, the commissioner did say

“[i]t is questionable whether the Legislature intended that incomplete projects, conceived 15 or more years earlier, should remain forever free of the environmental review procedures of SEQR, especially when major elements of such projects have been approved only as general plans.”

This is the case with respect to SLC’s proposed Greenport project. While the company has produced a record of its efforts to maintain the mine as a resource for a future supply of limestone once the manufacturing plant was considered viable, there has been no mining activity of the scale proposed, no application prior to this one for such activity, and therefore no approvals of same.

In many of the projects reviewed by former DEC commissioners, the issue of what resources the applicant applied to the proposal were considered. In Matter of Environmental Committee of the Rome-Floyd Residents Association (10/16/81), Commissioner Flacke found that this project for construction of a resource recovery facility had potential for significant adverse environmental effects at or near the project site. In doing so, the Commissioner acknowledged that expenditures up until that time had narrowed the alternatives that could be now considered but that did not preclude the development of mitigation measures to address the project as then currently proposed. Similarly, In the Matter of The Marketplace - Town of Henrietta (6/13/78), Commissioner Peter Berle found that while “substantial amounts of money have thus far been expended in connection with the project . . . this amount represents a small percentage” of the entire project. In light of the “regional magnitude, significance and the environmental dimensions . . .” of the proposed shopping center, despite these expenditures, the Commissioner decided that this project and its potential environmental impacts were clearly what the Legislature intended SEQRA to address.

With respect to the Greenport project, SLC presented evidence that the facility had been purchased for over \$8 million and the company has spent approximately \$2 million on

investigations and maintenance. We have no information on what sums the company has earned while leasing its facility to Colarusso. But in any case, like the Marketplace project, the Greenport mine and cement manufacturing plant will have many impacts on the area. Since this application and hearing process involving the entire project provide ample opportunity to address mitigation of adverse impacts associated with the mine component of the project, along with the plant, dock, and conveyor, we recommend to the Commissioner that SEQRA be invoked.

Substantial Change in Level of Operation

In Salmon v. Flacke, 61 NY2d 798 (1984), the Court of Appeals affirmed the lower courts' decisions to uphold DEC's determination to issue a permit to a landfill that had operated since the 1950's without subjecting it to SEQRA. The court added that there may be circumstances where the change in level of operation is so substantial that it removes the activity from those excluded under SEQRA. While this language does not appear in the statute that governs the application of SEQRA to activities that preceded the implementation of Article 8, the courts have applied this standard to the cases that have come before them on this subject. See, e.g., Guptill Holding Corp. v. Williams, 140 AD2d 12 (3d Dep't 1988) (mine operation started out as small operation and in later years proposed increase of 44 acres. DEC requested EIS. Court required fact-finding hearing to determine whether substantial change in operations was proposed; court distinguished from Atlantic Cement v. Williams, 129 AD2d 84 (3d Dep't 1987) which had plan that encompassed entire project for which it obtained DEC approval).

There has been mining on Becraft Mountain for many years. During the hearing, based upon his review of voluminous SLC records, photographs, and discussions with former employees of SLC and local historical experts, Paul Griggs, the mining expert on behalf of SLC, established that mining has been conducted on Becraft Mountain from the turn of the century. Mr. Griggs described the activities that are depicted in a number of photographs that were taken at the mine from the 1930's through the mid-1970's, in addition to those described in documents submitted by the applicant in 3 large volumes. TR 35 - 230, 245-269; Exs. 1a, 1b, 1c, 4. 22.

In excluding activities that had preceded SEQRA, the Legislature and the courts sought to avoid duplicative and potentially burdensome regulatory review when activities had previously been approved. In several cases, the courts have looked at the particular actions in contest and determined that because the Department had already reviewed and approved these activities and there was no substantial change in their operation, there was no basis for the heightened review. See, Stephentown Concerned Citizens v. Herrick, 280 AD2d 801 (3d Dep't 2001)(court determined that the mine operator's construction and use of water retention ponds and its reclamation activities were all authorized and approved previously); Fletcher v. Jorling, 179 AD2d 286 (4th Dep't 1992) (150-acre mine existed since 1920's and court determined that adding

machinery and equipment to operation was authorized by existing approval and that flexibility was needed in mining activities. The court noted also that expansion of mining into different areas is consistent with the nature of mining and does not constitute a major change that would trigger SEQRA. Furthermore, the Department previously issued a negative declaration to the mine operation).

Mr. Griggs responded candidly to questions about extraction in the late 1970's by stating that SLC did not extract materials during this period. TR 901-912. Once the mine was shut down by UAC, SLC did not conduct any mining on the site until the early 1980's when it contracted with Colarusso to do this work. Ex. 1c, Tab 137, mining and reclamation plan. SLC argues that activities conducted by Colarusso on the Greenport property prior to this time, such as storing explosives on the property, creating storage piles on the property, and using the haul roads, were sufficient to maintain the status of an active mine.

There does not appear to have been any extraction on the property after UAC closed down operations and for several years after SLC bought the property. Instead, based upon economics and other considerations, SLC used this time to investigate the quarry's resources and to determine how and when to proceed with building a new manufacturing plant which the quarry would supply with limestone. SLC was serious about continuing mining at the site but was warehousing the mine until the time was right.

In Atlantic Cement Inc. v. Williams, *supra*, the Appellate Division determined not to allow DEC to require an environmental impact statement for this mine that had been in continued operations since 1961 at that location. The court did not find in the record before it any evidence of a material change in operations - the advancement of the mine had already been considered by the Department.

In the application at issue, SLC has presented a mine with a proposed extraction rate that is 300% greater than what has existed previously, combined with a manufacturing facility, conveyor, and dock. While it is true that aspects of all of these activities have existed in the past at this location, in contrast to the facts in Atlantic Cement, *supra*, it has been many years since UAC was in operation. TR 912. And, once UAC shut down in 1976, SLC did not start up operations of any significant nature at the mine until it entered into an agreement with Colarusso in 1981.

Purpose of Grandfathering Provision in SEQRA

SLC contests the intervenors' focus on the period directly preceding the implementation of SEQRA asking that the Commissioner consider all the years of mining activities on Becraft Mountain. The purpose of grandfathering, however, is not to

indiscriminately allow continuation of an activity that is now subject to a different set of rules but rather to protect a particular individual or company that has invested in the performance of that activity. In Black's Law Dictionary (5th ed. West Publishing Co., 1979), "grandfather clause" is defined as:

Provision in a new law or regulation exempting those already in or a part of the existing system which is regulated. An exception to a restriction that allows all those already doing something to continue doing it even if they would be stopped by the new restriction.

Despite SLC's protests to the contrary, we think it is appropriate to look to general principles of zoning law insofar as they would appear applicable to these facts. We would agree with SLC that zoning law does not control. However, it appears that even the Court of Appeals in Salmon v. Flacke, *supra*, was guided by zoning principles in devising the "substantial change" test because although such language does not appear in ECL § 8-0111(5), a similar concept - change of use - is used in zoning cases that adjudicate the status of nonconforming uses. *See*, New York Zoning §§ 6.23 - 6.24, 6.32-6.33, pp. 244-248, 258-261 ("growing number of decisions support the conclusion that where the ordinance prohibits the extension of a nonconforming use and where the conduct complained of includes not only an increase in the volume or intensity of use but some qualitative alteration of the use, the courts will detect an unwarranted extension of use." *Id.* at p. 261.) (Robert M. Anderson, New York Zoning Law and Practice, Vol. 1 §§ 6.23 - 6.24, 6.32 - 6.33, [3d ed., The Lawyer's Co-Operative Publishing Co. 1984 & Supp. 1998]). Apart from the specific statute at issue - ECL § 8-0111(5) - the key distinction to be drawn is that unlike situations involving zoning, SEQRA's applicability does not bar the action in question but rather requires a review process. *See*, Wedinger v. Goldberger, 71 NY2d 428 (1988) (owner of property in freshwater wetlands alleged taking; court found that Article 24, unlike zoning law cited to by petitioners, requires a permit process and thus, is not tantamount to a taking).

The law with respect to nonconforming uses is analogous to the grandfathering provision in SEQRA in some important ways. With respect to nonconforming uses, zoning laws routinely attempt to protect the present owner of the property in his/her continued enjoyment of that use. Matter of Syracuse Aggregate Corporation v. Weise, 51 NY2d 278 (1980) (citations omitted). That right is balanced against the community's desires for the current scheme of zoning that addresses land use and not ownership. Village of Valatie v. Smith, 190 AD2d 17 (3d Dep't 1993), *aff'd as modified*, 83 NY2d 396 (1994). In enacting Article 8 of the ECL, the Legislature exempted activities that pre-dated SEQRA with certain limitations on that protection.

While we agree with SLC that the Mined Land Reclamation Act establishes the

Legislature’s goal in promoting mining in New York State, it also provides for that industry to be conducted “with sound environmental management practices” and for the “appropriate use of all the natural resources . . . , to prevent pollution, to protect . . . the health, safety and general welfare of the people as well as the natural beauty and aesthetic values in the affected areas of the state.” ECL § 23-2703(1); *see also*, Matter of Lane Construction, 1998 WL 389019 (Decision of Deputy Commissioner, 6/26/98). As stated above, the intent of SEQRA of course is not to exclude or terminate actions (as may be the case in nonconforming use matters) but instead to subject them to environmental scrutiny that will in most cases allow them to go forward with appropriate environmental mitigation measures. Therefore, the application of SEQRA accomplishes these goals. *See*, ECL § 8-0101; Town of Henrietta v. DEC, 76 AD2d 215 (4th Dep’t 1980).

We have concluded that is not necessary to determine whether or not SLC “abandoned” the mine. *See, e.g.*, Matter of Toys “R” Us v. Silva, 89 NY2d 411 (1996) (court interpreted non-conforming use ordinance with respect to when there is abandonment and loss of nonconforming use status). As we clarified above, the point of SEQRA and to ungrandfathering an action is not to terminate the pre-existing use but rather to apply environmental standards to its prospective operation. Thus, contrary to the non-conforming scenario in zoning law where such abandonment may spell the end of the use permanently, there is no need to make such a determination here.

Although we do not find SLC “abandoned” the use of the mine, because SLC did not conduct these activities prior to the enactment of SEQRA, it should not reap the same “protection” from having to undergo SEQRA scrutiny as perhaps its predecessor would have if UAC had continued its activities. The fact that it allowed Colarusso to use the property for some minimal activities prior to 1981 is not tantamount to this application that would allow for extraction of over 6 million tons of cement stone a year combined with an industrial plant and related processes.²² Similar to the zoning analysis, the SEQRA ungrandfathering provision calls for the examination of instances where, like here, there is not only a proposed increase “in volume and intensity of use” but also a “qualitative alteration of the previous use[s].” *See*, New York Zoning Law and Practice, *supra*.

SLC argues that all the prior years of mine operation be considered and emphasis should not be placed on the period directly preceding the implementation of SEQRA when the mine was not active. We would agree; however we also consider those years in which the mine has been

²² In the definition section of Article 23, “mining” includes stockpiling at the mine location but it does not appear that the storage of materials mined on another location would qualify. ECL § 23-2705(8). In addition, the regulations in effect specifically exclude from the definition of mining investigation of quarry resources. Ex. 1a, Tab 98 - 6 NYCRR § 420.1(k).

minimally operated. Since it has been decades since a mine operating at full capacity combined with a cement plant, conveyor and dock has existed, changes have occurred in the community and in the environment. These too must be considered as part of the backdrop to a determination on grandfathering. As stated by Appellate Division in Meilak v. Town of Coeymans, 225 AD2d 972 (3d Dep't 1996), a case involving a landowner's attempt to resurrect a project after a 25-year lapse, ". . . the factors affecting the welfare, quality of life and safety of the community which were considered . . . years ago have changed markedly in focus, intensity and in number throughout the State."

Regulatory Approvals

Staff and SLC emphasize that SLC had approval from DEC to mine at Greenport since the company purchased the facility in 1977. However, this is not so clear. In 1975, UAC started the process of obtaining a permit in response to the enactment of the MLRL. Ex. 1a, Tab 78. But once UAC determined it was selling the operation, it advised DEC that it would not pursue its application. Ex. 1a, Tabs 92, 100. Due to the number of mining applications DEC had to process during this early period of implementation of Article 23, the agency used a phased process that allowed existing operations to continue. TR 493-499; Ex. 1a, Tabs 73, 74, 77, 78, 86, 90, Ex. 15. Therefore, the now infamous "Dragonetti letter" served as approval for UAC to operate while its application was in process. Ex. 1a, Tab 72. But once UAC withdrew the application, there is no basis to assume that SLC became the beneficiary of that letter of approval.

In response to correspondence from DEC staff, SLC did contact DEC early on and let the agency know that it was interested in continuing mining operations. Ex. 1a, Tabs 95, 96. Perhaps because SLC was not going to be actively mining, the agency staff did not pressure SLC to submit its mining application immediately. Accordingly, it was not until a year later that SLC submitted a permit application and in December 1978, DEC approved same.²³ Ex. 1a, Tabs 111, 128.

It is true that DEC staff appears to have treated this application as a renewal/transfer despite the fact that no permit had ever been issued to UAC. Ex. 1b, Tab 114. But from the perspective of the Commissioner's current inquiry this history underscores the fact that the quarry was not active during the period directly preceding SEQRA's implementation. SLC's

²³ SLC argues that pursuant to State Administrative Procedures Act § 401(2), the company had authority to operate while DEC was processing its application. However, UAC had withdrawn its application and ICC did not apply for a permit until a year later. Thus, the SAPA provision which allows for continued operation while a timely and sufficient permit application is pending is not applicable.

initial application indicated that 15.7 acres would be affected during the upcoming term, and that for the next ten years mining would take place in previously mined areas. Ex. 1b, Tab 112. Even in the 50-year projections for the quarry, SLC projected that the acreage to be affected would be 579.8 acres. Ex. 1b, Tab 118, Ex. 19. In 1981, SLC revealed that the extent of the project area was 1200 acres. Ex. 1c, Tab 137. The Department staff issued a permit to SLC dated June 2, 1981. Ex. 1c, Tab 140.

In 1985, DEC issued a positive declaration pursuant to SEQRA in response to SLC's renewal application. Ex. 1c, Tab 150. The company resisted this review and ultimately the Department staff agreed to treat the mining operation as grandfathered and to issue the mining permit subject to future application of ECL §§ 8-0111(5)(a)(i) and (ii) as circumstances warrant. Ex. 1c, Tab 165, 166. In subsequent years, DEC staff has processed and approved the company's mining applications. Ex. 1b, Tabs 172, 183 (1996 permit that was result of SEQRA review based upon application for modification of permit to construct and operate portable processing equipment), DEIS, Ex. 25, p. 8-3 (1996 permit application was subject to SEQRA for 4-acre expansion of mine - staff issued negative declaration and permit).

We find that the project confronting the Department at this time is quite different than the preceding applications and projections. In many of the cases cited by staff and SLC in which the courts denied DEC's efforts to subject a pre-existing operation to SEQRA, the opinions target the unnecessary duplication of review. See, e.g., Atlantic Cement Inc. v. Williams, supra; Fletcher v. Jorling, supra; Buffalo Waterfront Urban Redevelopment Area (Commissioner Jorling, 8/3/90) (proposed development had been subject to federal environmental review) ; Northeast Solite v. Flacke, 91 AD2d 57, 60 (3d Dep't 1983) (producer of lightweight aggregate had operated facility prior to enactment of SEQRA in the same manner and numerous permits had been issued). Based upon the facts in the current application, the Department will not be engaging in duplication of environmental review, given the nature of this entirely new project. Prior to enactment of SEQRA, DEC performed very limited review of this quarrying operation based upon its scope. However, in response to proposed modifications in 1993 and 1996 that involved respectively, the addition of four acres to the mine and the addition of a crusher, staff did conduct an environmental review of these very small changes.

Extraction Rates

The intervenors have maintained that because the extraction rate proposed by SLC for the Greenport project is much greater than past practices, this 4.7 million ton change should serve as the basis for SEQRA review of the mine. The ALJs also cited to the proposed 6.7 million ton extraction rate as a basis to find that the mine should be ungrandfathered. See, December 6, 2001 issues ruling, pp. 61-64.

Based on the testimony of Mr. Griggs, SLC counters that the extraction rate cannot be the sole basis for determining the level of operation and resulting environmental effects. TR 845-846, 853. Mr. Griggs explained at the hearing that in determining the level of operation, one must consider the state of technology, location, design of the mine and other factors. TR 845-846. These specifics are taken up in the discussion below at p. 36.

SLC also argues that DEC has never limited extraction rates previously at this mine or at other mines. SLC explains that because extraction rates are market-driven, any such restriction would be unreasonable.

The Mined Land Reclamation Law and implementing regulations (in effect at the time of SLC's acquisition) require that applicants for mining permits and for renewal of these permits provide, in addition to mining applications, a mined land use plan and mining plan maps.²⁴ ECL § 23-2711; Ex. 1a, Tab 98 - 6 NYCRR §§ 421.1(b), (c). Section 422 of 6 NYCRR (Ex. 1a, Tab 98) contains the requirements for mined land use plans including requirements for methods of extraction, location and size of the areas of mineral extraction or removal, and a myriad of other mining details. Ex. 1a, Tab 98 - 6 NYCRR §§ 422.2.(b), (c). Section 421.1(k) (Ex. 1a, Tab 98) requires that mining permits "shall be conditioned upon compliance with an approved mined land use plan." The law and regulations also provide that the Department may suspend or revoke a permit to mine for repeated or willful violations of the terms of the mining permit or deviations from descriptions in the MLUP. ECL § 23-2711(6); 6 NYCRR § 421.5(b)- Ex. 1a, Tab 98. Section III of the MLR Mine Operator's Handbook (May 1977), provided to SLC by DEC staff, contains an entire section on the development of a mined land use plan and its importance in "achiev[ing] the goals of the Mined Land Reclamation Law . . ." Ex. 1a, Tab 98.

At the hearing, SLC was unable to provide much information on extraction rates for this mine up until the 1960's. During the 1960's, 1965 is the peak year when over 1 million tons of limestone were extracted. TR 342. During the early 1970's, prior to UAC's shutdown of the facility, the peak year appears to have been 1973 when again over 1 million tons were mined. UAC did not provide extraction rate information in the application materials it submitted to the Department in 1975. Ex. 1a, Tab 78.

In the 1978 mined land use plan provided by SLC to the Department, there is no specific information on extraction rates, although the company provides the planned depth of extraction - to the bottom of the lower cement stone formation. TR 249-250; Ex. 1b, Tab 118. The application submitted at this time notes that the mine was not in operation. Ex. 1b, Tab 111. In the 1981 renewal submission, the environmental assessment form (EAF) states that the

²⁴ The current regulations, revised in 1995, contain similar language. See, 6 NYCRR §§ 421.1(c), 421.5(b), Part 422.

extraction rate would be 500,000 tons per year. Ex. 1c, Tab 137, p. 3; TR 253. While the permit does not explicitly reference this information, the cover letter reminds the operator that it must comply with the mining regulations that require, as noted above, compliance with the mining plan. Ex. 1c, Tab 140. In addition, the permit itself references the application and other documents as “part two” of the permit. Id.

The 1990 mined land use plan provides that there would be a two million ton per year extraction rate. TR 260; DEIS, Ex. 25, p. 8-2; Ex. 1c, Tab 160, p. 5. The 1990 permit specifically provides as Special Condition 1 that the permittee shall conduct its mining operations in accordance with the 1990 MLUP and any amendments adopted pursuant to the October 4, 1990 order on consent. Ex. 1c, Tab 166. The 1993 permit issued by the Department for the mining operations also requires compliance with the 1990 MLUP. Ex. 1c, Tab 172. In the 1996 permit, the special conditions once again reference adherence with the 1990 MLUP. However, in the updated mining plan for the 1996 application, SLC projected approximately 504,000 tons of rock removal per year. Ex. 1c, Tab 174, p. 2-5; TR 266-267.

On behalf of SLC, Mr. Griggs testified that it was never SLC’s intention to make the 2 million tons per year a limit for the duration of the facility’s existence. TR 260. However, there is no indication anywhere in the materials presented of any representation to the Department of a different scenario up until the present application. And, as described above, in practice, the facility has not extracted at the 2 million ton rate. Thus, contrary to SLC’s position, the extraction rate has been a term of the conditions of operation at Greenport from 1981 through the 1996 permit term.

While market demand may mean that at times a mine will produce less or more - if the extraction rate is incorporated into the permit and its supporting documentation, the permittee cannot exceed that limit without obtaining a modification. As that rate was made part of SLC’s MLUP, an increase of the size proposed by the applicant would appear to be sufficient to require a new inquiry into the effects of this change.

SLC’s Present Environmental Analysis of Mining Impacts

As part of its application for this entire project, SLC has prepared a DEIS that has been revised with respect to certain elements. Exs. 25, 26. While initially SLC resisted DEC staff’s request that the mining operations be subject to SEQRA based on the 1990 consent order, the applicant agreed ultimately to review mining impacts to compare future practices with activities at the mine without the project.²⁵ Ex. 26, DEIS, Appendix A, A-4; Ex. 1c, Tab 165. This

²⁵ SLC agreed to perform this analysis; however, it maintained its position that the extraction rate was not limited by SEQRA and the mine was not subject to Article 8. TR 467.

agreement was based on SLC's disclaimer that it maintained its position that the mine operation was not subject to SEQRA. See, e.g., Ex. 26, DEIS, Appendix A. pp. A-1, A-3, A-4; Ex. 25, DEIS, p. 8-1. With respect to the mine, as explained by Mr. Lee at the hearing, SLC identified the effect of the Greenport project on impacts associated with the mine, assuming that 2 million tons per year represented baseline conditions for future mining operations.²⁶ Ex. 25, DEIS, p. 8-3; TR 463-464. In Appendix A to the DEIS, SLC identified the expected level of operations that would be occurring at the mine without the project. Ex. 26. The company found that there were potentially significant adverse environmental impacts due to the proposed increased rate of extraction and SLC agreed, "with a full reservation of rights" to evaluate those impacts in the DEIS. Ex. 26, Appendix A, p. A-4. Specifically, SLC found that the increased extraction rate would potentially affect groundwater resources, surface water resources, traffic and transportation, air quality, and noise. See, Ex. 26, DEIS, Appendix A; TR 466. Mr. Lee testified at the hearing that it was his opinion that cumulative impacts of the Greenport project including mining impacts were considered in the DEIS. For example, Mr. Lee stated that increases in transportation resulting from the 6.7 million ton extraction rate were considered together with the other aspects of the Greenport project. TR 473-474.

Appendix A is SLC's evaluation of mining impacts and a conclusion as to whether there will be any increase in these effects due to the increased rate of mining activity. For those areas that SLC determined there would be no change in impacts, the analysis is presented in the Appendix. See, Ex. 26, Appendix A, p. A-6.

SLC and staff maintain that given the analysis performed by SLC, the grandfathering issue is not meaningful in this process because the outcome would be the same. The intervenors counter that there are many areas such as impacts to wetlands and wildlife that have not been addressed adequately. We disagree with both positions. In the issues conference that took place over the summer of 2001, the intervenors proposed issues for adjudication on a host of proposed issues - many of which involved the mine. Apart from their conclusions regarding the SEQRA status of the mine, the ALJs agreed with the intervenors that substantive and significant

²⁶ Mr. Lee is the president of AKRF, a company that was part of the "team" that worked on the Greenport DEIS. TR 453. At the hearing, Mr. Lee provided an overview of the work of his firm on the DEIS and generally, of baseline analyses. As he was not responsible for writing the mining section of the DEIS or Appendix A, the value of his testimony is limited to a conceptual understanding of the DEIS process. TR 475.

questions had been raised with respect to certain matters such as visual impacts and noise.²⁷ In the first interim decision, the Commissioner affirmed the ALJs' ruling with respect to noise and air pollution impacts to Olana.²⁸ Interim Decision, December 6, 2002, pp. 19-21. As a result of adjudication and/or the completion of the SEQRA process, noise is an issue that potentially could result in additional conditions placed on the operation of the mine. If SLC's position on the grandfathered status of the mine is accepted, it is questionable whether there is a basis to further analyze noise impacts from the mine or to require further mitigation.

In the DEIS and Appendix A, SLC was clear that its decision to analyze certain impacts related to mining were voluntary. SLC stated in Appendix A that "[w]ith the potential impacts of increased extraction evaluated and disclosed, the difference of opinion between SLC and NYSDEC concerning the scope of grandfathered activities becomes irrelevant." However, SEQRA, unlike NEPA, is not only a disclosure statute. In addition to identifying environmental impacts, SEQRA requires that mitigation and alternatives be selected to "minimize adverse environmental effects" "to the maximum extent practicable." ECL §§ 8-0109(1), (8). See also, McKinney's Practice Commentaries, Vol. 17 __, ECL Article 8, C8-0109:2 - Minimizing Adverse Impacts (Prof. Weinberg 1997). Depending on what issues are ultimately heard in subsequent hearings and what, if any, environmental impacts are identified for mitigation or further mitigation, the mine's operation may be affected by such permit conditions assuming that the Commissioner agrees that the mine should be ungrandfathered.²⁹ Thus, we do not agree with SLC and staff that the grandfathering issues are academic.

With respect to other impacts such as those concerning wildlife or wetlands, we disagree

²⁷ Visual effects stemming from the mining of the Becraft Ridge was another impact the ALJs ruled subject to adjudication in their December 2001 issues ruling. SLC asserted that it would mine the ridge with or without the project. Because the ALJs found that this would have a significant adverse effect that could still be mitigated, they recommended it be addressed in a hearing. However, based upon the applicant's agreement to forego mining of this ridge assuming permits were granted and all appeals were resolved in SLC's favor, there is no reason to pursue this matter further in this proceeding. See, Ex. 40a.

²⁸ The first interim decision was limited to certain issues.

²⁹ We take no position in this report as to whether or not the mine's grandfathered status should be addressed in the event that the Greenport project does not go forward due to SLC's determination or permit denial. SLC has stated that if it does not proceed with the project it would expedite mining and reach the same extraction rate of over 6 million tons per year shortly. Ex. 26, Appendix A, p. A-5. It is possible that this change, combined with the removal of the Becraft Ridge, might trigger the ungrandfathering provisions in any case.

that these would be addressed in these proceedings.³⁰ The intervenors had the opportunity to raise all objections to the proposed application in their petitions which were examined over a 15-day issues conference culminating in a 137-page issues ruling. Appeals and supplemental appeals have been filed by the participants. Issues that the Commissioner decides should not be adjudicated should not be re-examined in light of ungrandfathering as these matters have been fully addressed previously.

Advances in Mining Techniques and Increased Extraction Rate

Mr. Griggs explained at the hearing that due to the greatly advanced technologies employed in mining, a significantly increased rate of extraction would not increase environmental impacts. He explained that in past operations two or more drill rigs were required but only two would be used in the planned operation. TR 850. He also stated that current drills can drill much further with fewer holes in a shorter amount of time. TR 851-857. Blasting methods have improved so that individual blasts use less explosives and contain the energy in a superior fashion obtaining much more efficient results and necessitating fewer blasts. TR 860-863. Because these blasting methods are more effective, the stone produced requires less secondary breakage. TR 866-867. Moreover, the methods used for secondary breakage have improved so that explosives and jack hammers have been replaced by a hydraulic hammer. TR 867. And, the proposed crusher can accept larger pieces of rock, thus also minimizing the amount of secondary breakage required. TR 867.

We appreciate that modern methods of mining should decrease environmental effects. However, even the applicant in its own DEIS concluded that certain impacts would likely increase due to the increased extraction rate. Moreover, we find that many of the potential impacts such as noise will result from the entwined actions of the manufacturing plant and the mine requiring the ability to examine those impacts and develop further mitigation measures as necessary. The applicant's evidence with respect to lower noise levels, lowered vibration, less dust, etc. are appropriate facts for examination in an adjudicatory hearing and/or the completion of the SEQRA process concerning the identified impacts and potentially, the development of additional mitigation measures.

³⁰ SLC has requested in its closing brief that the testimony of Al Butkas on behalf of the intervenors be stricken based upon Mr. Butkas' acknowledged omissions in his review of the project materials. Mr. Butkas testified as to alleged failings in the DEIS but did not review the draft permits including the special conditions that describe agreed upon mitigation measures. We decline to strike the testimony but have given it little weight. In light of our ruling that any determination by the Commissioner to "ungrandfather" should not result in opening the door to an entirely new environmental review of the project and mine, Mr. Butkas' contributions are not key.

Areal Extent of Mine Operation

SLC contends that the grandfathered status of the mine applies to the approximately 1200 acres described as the life of mine area in the 1984 life of mine plan, in several MRL permits issued to the applicant since 1990, as well as in the 1990 consent order. Ex. 1c, Tabs 145, 150, 151, 160, 166, 168, 175, 183, 189. As revealed during the course of the hearing in the testimony of Mr. Griggs and in the documentary evidence presented by many maps, only a portion of this entire acreage has been mined. Ex. 1a, Tabs 43, 70; Ex. 1b, Tabs 113, 118; Exs. 17, 18, 19. And, during the period of 1977-1981, not even those limited areas of the quarry were utilized. TR 902-912. In 1978, DEC staff calculated that SLC's affected land in the quarry was 63.9 acres. Ex. 1b, Tab 126. As late as 1989, SLC's mining plan map identified 272.2 acres as affected area. Ex. 1c, Tab 160. While SLC has "manifested an intent to appropriate the entire parcel to . . . quarrying" over the last period in its various submissions to the Department, this intention has not been carried out and provides an obvious opportunity to address adverse impacts given the phased approach proposed by SLC. See, Syracuse Aggregate Corporation v. Weise, supra at 286 (zoning case in which court determined that owner's engagement in substantial quarrying activities over the subject parcel over a long period warranted protection under zoning laws although excavation had been limited to a certain area. In contrast to the zoning scenario, no party is seeking to abolish the use in the Greenport quarry; rather the goal is to subject it to appropriate environmental review).

As noted by staff and the applicant, the courts have determined in a number of cases that the nature of mining is to move into adjacent areas and this factor alone is insufficient to determine that there is a substantial change in operations so as to trigger SEQRA. See, e.g., In the Matter of Sullivan/LaFarge v. Jorling, (Sup. Ct. Sullivan Co. 7/27/92) (mining operation at three sites; staff attempted to assert life of mine policy after operation purchased additional adjacent lands; court determined that this was insufficient to require new analysis given past approvals and activity). But in SLC's application there has not been an active mine operation for the period before SEQRA was effective nor in the years immediately following. More to the point, the proposed activity far exceeds what has transpired at the Greenport mine since at least 1976.

Proposed Mitigation Measures

SLC argues that in light of all the mitigation measures it has agreed to as conditions in the proposed draft permits, there is no reason to ungrandfather the mine to subject it to further environmental review. In response to a number of petitions to ungrandfather various projects pursuant to ECL § 8-0111(5)(a), Department commissioners have rejected these requests based upon the mitigation measures that had been incorporated into the project at issue. See, e.g., In

the Matter of Cranberry Hills Subdivision (Commissioner Flacke 6/6/80); In the Matter of Hunt Club (Commissioner Williams, 1/21/87).

Mr. Griggs described a number of the mitigation measures at the hearing. TR 822-843. In the original proposal for the Greenport project, the manufacturing plant was to be located at the former plant site - west of Route 9 by the Hudson River. TR 823. As a mitigation measure, SLC changed the design plans to site the cement plant in the mine. TR 824. As a result of this decision, SLC will not have access to the stone underneath the plant until the end of the useful life of the manufacturing facility when the draft permit requires its removal. Ex. 23, V.18; TR 824. In response to objections to the removal of Becraft Ridge in the later phases of the mine, SLC agreed to retain this ridge. Exs. 2, 23, M.39. Mr. Griggs estimated that the loss of the mineral reserves in this area as a result of the mitigation would be approximately 40 million tons and decrease the acreage of the mine by 160 acres. TR 830-831. The mine would have one crusher located inside the mine enclosed in a building reducing noise, dust, and traffic. TR 835, 837-838; Ex. 26, Table A-3, Ex. 23, M.27. The draft permit requires that there be dust control on the haul roads consisting of water and other dust suppressants. TR 836; Ex. 26, Table A-3, Ex. 23, M.18.

With respect to blasting, SLC has agreed to comply with Bureau of Mines guidelines for ground vibration and air blasts and to limit blasting to two production blasts per week in most circumstances. TR 839, Ex. 23, M.26, 33. The draft permit prohibits blasting under certain unfavorable weather conditions. Ex. 23, M.34. The draft permit also requires a pre-blast survey of homes within one thousand feet of the blasting to provide a baseline for any future claims with respect to structural damage related to blasting. Ex. 23, M.30. The draft permit requires SLC to protect the City of Hudson's reservoir located in the former Lone Star Quarry as well as residential mines located within 2,000 feet of the active mine in the event its mining activities adversely affect these water supplies. Ex. 23, M.36, 38.

There is no question that the draft permit addresses a number of potential adverse environmental impacts through these conditions. However, we found in the December 2001 issues ruling that at least with respect to one outstanding issue - noise - the intervenors raised an adjudicable issue that in part, related to the mine. In her first interim decision, the Commissioner agreed with the ALJs that this issue required adjudication. See, Interim Decision, pp. 19-21. To decide at this juncture that the special conditions contained in the draft permit are sufficient would deprive the public of the full environmental review that is mandated by this project.

CONCLUSION and RECOMMENDATION

We find that in response to SLC's application for the Greenport project, the mine should be ungrandfathered in order to adequately assess mining impacts for this application. As shown

above, for decades, the mine has not operated at its former full capacity which, in any case, never reached the levels now proposed. While the applicant's argument that current mining methods reduce impacts even when extraction rates are greatly increased is persuasive, such facts are more appropriately assessed during a hearing on the specific environmental issues that are identified for adjudication by the Commissioner. And, as the project entails more than a mine, the mining impacts are inextricably entwined with those from the plant, the conveyor, and dock. It is at this preliminary stage of assessment that it is appropriate to consider those impacts.

As noted by the staff and SLC, there has already been a good deal of environmental review and proposed mitigation relating to this project including the mine. However, we believe it would be remiss on the part of this agency to bind its review based upon mining activities that never reached the dimensions proposed by SLC and which were never subject to the scrutiny SEQRA requires. As was the case in Matter of Rome-Floyd Residents Association, *supra*, the Commissioner may determine to limit the scope of any further environmental review to issues that she deems require such scrutiny. This consideration should spare SLC any unnecessary regulatory burden but provide the public with the review necessary upon which to base a final permit determination.