

◀Palumbo▶ Block Company, Inc. - Decision, August 18, 2003 Decision, August 18, 2003

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1010

In the Matter

- of the -

Application for a Mined Land Reclamation Permit, pursuant to Article 23, Title 27, of the Environmental Conservation Law of the State of New York, for a proposed sand and gravel mine in the Town of ▶Ancram▶, County of Columbia, New York

by

◀PALUMBO▶ BLOCK COMPANY, INC.

DEC 4-1020-00035/00001
MLF 402-3-30-0355

DECISION OF THE COMMISSIONER

August 18, 2003

Introduction

This Decision addresses the application of ▶Palumbo▶ Block Company, Inc. ("Applicant") to mine unconsolidated sand and gravel from a 73 acre parcel located in the Town of ▶Ancram▶, Columbia County, over a period of twenty years, involving the removal of approximately 2,000,000 cubic yards of sand and gravel. As stated in the attached Hearing Report of Administrative Law Judge ("ALJ") Richard R. Wissler, the mining would occur in seven phases and would take place on the east side of New York State Route 22, approximately one mile north of White House Road.

My review of the record of this proceeding, and giving due consideration to the evidence presented, constrains me to disagree with the ALJ's recommendation that the permit for this project, as drafted, be issued to the Applicant. My reading of the record and my interpretation of the requirements of the State Environmental Quality Review Act ("SEQRA"), as set forth in the discussion that follows, lead me to conclude that the record contains insufficient information upon which to make the required SEQRA determinations and the necessary findings. Therefore, I must deny the application.

Background

The Applicant applied for a mined land reclamation permit. The Department of Environmental Conservation ("Department") is the lead agency for the review of the project under SEQRA (Environmental Conservation Law Article 8 and 6 NYCRR Part 617). The Department determined that the project may have a significant environmental impact and required preparation of an Environmental Impact Statement ("EIS").

A legislative hearing on the project was conducted on July 20, 1999, at which unsworn comments were received on the application and the draft environmental impact statement for the project. ALJ Susan DuBois presided over an issues conference later that year.

ALJ DuBois' ruling identified several issues for adjudication, including: 1) Applicant's record of compliance; 2) erosion control and drainage; 3) freshwater wetlands impacts; 4) visual impacts; 5) noise; 6) impacts on the character of the community; and 7) deficiencies in the maps submitted as part of the mining permit application. Ruling on Issues and Party Status of ALJ Susan DuBois, February 9, 2001.

Applicant appealed, challenging only the ruling that impacts on the character of the community be adjudicated. By Interim Decision dated June 4, 2001, I affirmed ALJ DuBois's ruling to include community character as an issue for adjudication.

Due to scheduling conflicts in another matter assigned to ALJ DuBois, ALJ Richard R. Wissler was assigned to preside over the adjudicatory hearing. Some of the issues certified for adjudication were resolved by agreement among the parties, including deficiencies in the maps that were part of the mining permit

application, noise, and erosion control and drainage (except as to whether SPDES stormwater general permits would be required).

The remaining issues adjudicated were: impacts on Wetland CO-26 located east of the project site, including impacts to the habitat of bog turtles; visual impacts; community character; record of compliance; and whether SPDES stormwater general permits would be required for the proposed project.

The Commissioner's responsibility under the Mined Land Reclamation Law ("MLRL") and SEQRA was previously addressed in the Decision of the Deputy Commissioner in the Matter of the Application of Lane Construction Company, June 26, 1998. As discussed in that decision, the MLRL and SEQRA require the evaluation of "whether a mining application meets the criteria for permit issuance, and whether adverse environmental impacts can be avoided, mitigated, or minimized adequately in light of other economic and social considerations." *Id.* at 3.

In making this evaluation, I must consider environmental protection as well as the management and planning for the use of non-renewable natural resources. The Department, as lead agency under SEQRA, "must identify 'the relevant areas of environmental concern' and take a 'hard look' at them. . . ." *Merson v. McNally*, 90 N.Y.2d 742, 751-52, 665 N.Y.S.2d 605, 609-610 (1997); see also *Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 417, 503 N.Y.S.2d 298, 305 (1986).

Discussion

Based upon my review of the overall record in this case, I am unable to accept the recommendation that the application be granted. A review of the adjudicated issues in this proceeding follows.

Impacts on Wetland CO-26

A freshwater wetland designated as CO-26 on the Department's freshwater wetlands maps is located adjacent to and partly on the site. Although the project as proposed would be located outside of both the wetland and the 100 foot adjacent area around the wetland, the Issues Ruling determined that a substantive and significant issue existed about whether the required "hard look," for purposes of SEQRA, had been taken with respect to potential impacts on Wetland CO-26 and the Noster Kill. *Issues Ruling*, at 11. The mining operation's effect on the quantity and quality of water entering the wetland, in light of the environmental conditions in the wetland, was also to be examined.

As set forth in the Hearing Report, of the seven plant communities identified in the wetland, three are fen communities. Hearing Report, at 19. Fen communities are considered to be rare or significant habitats by the New York State Natural Heritage Program and are ranked S1/S2 "meaning that they are imperiled, perhaps critically so, in New York State due to rarity or are vulnerable to extirpation from New York State due to biological factors." Id. at 19.

It is undisputed in the record that the three fen communities are successful and that their success is dependent on a reliable, calcium-rich recharge. It is also undisputed that the fen communities contain, at least in part, desirable habitat for the bog turtle, an endangered species in New York. See 6 NYCRR 182.6(a)(5)(ii).

However, the parties are sharply divided as to the source of the calcium recharge. Intervenors contend that the source may consist, in whole or in part, of the surficial aquifers running through the sand and gravel deposits proposed to be mined by Applicant. Applicant maintains that the source is more likely the deeper, bedrock aquifer underlying the site, which would not be disturbed by mining. While the record discloses the presence of clay or lower permeability lenses underlying the site, critical information necessary for a complete understanding of the role of these lenses in the movement of groundwater to Wetland CO-26 was not fully developed. It remains unknown whether such lenses are continuous and form an effective barrier preventing recharge to the wetland from the bedrock aquifer. While Applicant developed some information on this subject, principally from resource evaluation test borings, this information is far from complete and affords no basis for evaluating the parties' contentions.

Intervenors argued that much of Applicant's information was not based on adequate site-specific data. For example, Intervenors' expert testified that the borings, which had been performed to evaluate the site as a resource for mining, were not adequate to provide an understanding of the geology of the site.

In order to properly evaluate impacts for purposes of SEQRA on such a sensitive environmental resource as Wetland CO-26, more site-specific information is essential. This would include a more accurate determination of the depth to bedrock at the site, and the extent to which the lower permeability lenses

identified at the site are continuous. Development of a water budget and more detailed water chemistry analysis would also be appropriate for any review of potentially significantly adverse environmental impacts.

I also note that the impacts of later phases of mining, in particular Phases 6 and 7, cannot be determined on this record. Special permit condition 25 is meant to provide information based on the initial mining phases as to whether Phases 6 and 7 can proceed. Absent such data at this time, no SEQRA determinations can be made as to the impacts of those later phases on Wetland CO-26, and whether those phases can be permitted.

Visual Impacts

The Hearing Report notes that some of the views of the proposed mine from the South Taconic Trail cannot be mitigated. Similarly, the mine would be visible from portions of the proposed Harlem Valley Rail Trail. The record also indicates that the mining operation would be visible, in part, to several single-family homes located on the west side of New York State Route 22, as well as to passing motorists.

The New York State Office of Parks, Recreation and Historic Preservation ("OPRHP"), as well as the Columbia County Board of Supervisors and the Columbia County Tourism Department, previously expressed concerns about visual impacts on the rail trail. Issues Ruling, at 16.

The Taconic State Park and the proposed Harlem Valley Rail Trail would be considered aesthetic resources of statewide significance. Issues Ruling, at 15-16. Although the Hearing Report sets forth mitigative elements found in the topography and the vegetative cover, and Special Permit Condition #3 requires the planting of white pines on the site, it is not clear from the record that an adequate number of viewpoints were investigated in the visual analysis that was conducted, or if all the data used for the analysis was sufficiently current. Furthermore, additional mitigation measures that were proposed during the hearing should be considered, including additional tree planting and further development of a planting program. My review of the record does not allow me to determine whether or not the impacts of the mine's visibility are significantly adverse or additional mitigation should be required.

Community Character

My Interim Decision of June 4, 2001 affirmed that community character would be an issue for adjudication. The contentions of the parties are inconsistent regarding community character, particularly in light of the proposed Scenic Corridor Overlay Zone and other aspects of local zoning. The record needs further elaboration to enable me to make the requisite SEQRA findings.

Record of Compliance

I have reviewed and accept the findings and recommendations in the Hearing Report with respect to the Record of Compliance.

SPDES General Permits

Also at issue was whether Applicant would need a SPDES general permit for stormwater discharges associated with industrial activity (GP-98-03) and/or a SPDES general permit for stormwater discharges from construction activity (GP-02-01). I conclude, based upon a review of the record of this hearing, that Applicant is required to obtain a SPDES general permit for stormwater discharges from construction activity.

The regulations implementing the stormwater permit program were promulgated by the U.S. Environmental Protection Agency in 1990. The authority for the Department's issuance of the general permits became effective on October 15, 1992.

In evaluating whether a stormwater general permit is required, two of the prerequisites are whether a point source discharge will occur and whether such a discharge may reach the waters of the United States. The Hearing Report discusses the term "point source" and its definition at ECL 17-0105(16), but interprets that term too narrowly for purposes of stormwater general permits for construction activity. For example, bulldozers and various excavating and earthmoving equipment have been considered to be point sources. *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 922 (5th Cir. 1983); see also *Borden Ranch Partner. v. U.S. Army Corps of Engineers*, 261 F.3d 810, 815 (9th Cir. 2001); *U.S. v. Lambert*, 915 F. Supp. 797, 802 fn. 8 (S.D.W.Va. 1996).

Even prior to the stormwater general permit program, the Department determined that surface runoff from construction requires a SPDES permit as a point source. DEC Declaratory Ruling 17-02 (*Kinderhook Lake Corporation*)(1980). DEC correspondence in this proceeding (Exhibit 61) indicates that the removal of topsoil "would be an activity that would invoke the [construction activity] permit requirement."

As noted in Applicant's Erosion and Sediment Control Plan, the mining area will be developed in a series of seven phases of approximately ten acres each. Prior to March 10, 2003, construction activities disturbing five acres or more were regulated under the stormwater general permit program. On March 10, 2003, new federal regulations became effective that extended coverage to construction activities that disturb one to five acres in size and, in certain circumstances, to disturbance activities of less than one acre. Testimony was received that the construction of the onsite berms would entail the disturbance of more than one acre.

Consultants for Applicant and intervenors each testified on whether any discharge would reach the "waters of the United States." As defined, "waters of the United States" include DEC Freshwater Wetland CO-26. See SPDES General Permit for Stormwater Discharges for Construction Activity (GP-02-01). Intervenors' consultant, who specializes in stormwater management and related issues, described the potential for such discharges to the wetland and the flow paths during heavier rain events.

Applicant's Erosion and Sediment Control Plan is meant to curtail off-site runoff. However, the record indicates that there will be periods during which the topsoil and/or subsoil berms are being constructed when the grass-seed mixture planted on the berms will not have taken hold. Specifically, draft permit condition #5 indicates that the berms and dikes need not be seeded immediately, but only within seven working days after construction. This delay increases the potential for sediment runoff in a storm event during that period. The record also raises concerns regarding the potential for discharges of sediment-laden runoff from the areas of the silt fencing.

Based on my review of the record, I conclude that Applicant would be required to obtain coverage under the SPDES general permit for stormwater discharges from construction activity. However, I concur with the ALJ's determination that Applicant is not required to obtain coverage under the SPDES general permit for stormwater discharges associated with industrial activity for this application.

Conclusion

In light of the foregoing, I am unable to make the necessary findings under SEQRA, and must deny the application. This Decision does not preclude

Applicant from reapplying for a Mined Land Reclamation permit for this project consistent with this Decision.

For the New York State Department of Environmental Conservation

_____/s/_____

Erin M. Crotty, Commissioner

Albany, New York

August 18, 2003

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CONSERVATION

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 BLOCK COMPANY, INC.

DEC 4-1020-00035/00001

MLF 402-3-30-0355

HEARING REPORT

- by -

/s/

Richard R. Wissler

Administrative Law Judge

PROCEEDINGS BACKGROUND

◀Palumbo▶ Block Company, Inc., Dover Furnace Road, Dover Plains, New York 12522, (the Applicant) proposes to mine unconsolidated sand and gravel from a 73 acre parcel located in the Town of ▶Ancram▶, Columbia County, over a period of twenty years, removing approximately 2,000,000 cubic yards of sand and gravel. The mining would occur in seven phases. The mining would take place on the east side of NYS Route 22 approximately one mile north of White House Road.

The Applicant applied for a mined land reclamation permit pursuant to Environmental Conservation Law (ECL) Article 23, Title 27, and Parts 420 through 425 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Parts 420 through 425).

The Department of Environmental Conservation (the Department) is the lead agency for the review of the project under the State Environmental Quality Review Act (SEQRA, ECL Article 8 and 6 NYCRR Part 617). The Department determined that the project may have a significant environmental impact and required preparation of an Environmental Impact Statement (EIS).

The hearing on the project began on July 20, 1999 with a legislative hearing to receive unsworn comments about the application and the Draft EIS. The issues conference had been scheduled for July 21, 1999 but was postponed by agreement of the parties and potential parties to October 5, 1999. The issues conference continued on October 27 and December 16, 1999. The hearing was held pursuant to 6 NYCRR Part 624, the Department's permit hearing procedures.

Two petitions for party status were received, one from the Village of Millerton (the Village) and one from a consolidated party consisting of the Town of ▶Ancram▶ and the Taconic Valley Preservation Alliance (the Intervenors). The Town of ▶Ancram▶ had also submitted comments under ECL 23-2711.3 in a July 23, 1999 letter from Warren Replansky to Michael Higgins.

The Applicant is represented by Laura Zeisel, Esq., of the firm of Drake, Sommers, Loeb, Tarshis & Catania, PLLC, Newburgh, New York. The Department's Region 4 Staff is represented by Richard Ostrov, Esq., Assistant Regional Attorney, DEC Region 4, Schenectady, New York. The Intervenors are

represented by Warren S. Replansky, Esq., of the firm of Osofsky and Replansky, Pine Plains, New York. The Village of Millerton was represented by Michele W. Haab, Esq., of the firm of Downey, Haab & Murphy, Millerton, New York.

As discussed in a ruling dated October 22, 1999, the issues conference record remained open pending the outcome of an enforcement hearing involving a facility in the Town of Dover, Dutchess County, in which the Applicant was one of the Respondents. On October 5, 2000, the Commissioner of Environmental Conservation issued an Order finding that the Respondents in that matter had violated the Mined Land Reclamation Law and an Order on Consent by mining without a permit.

Also during 2000, there was additional correspondence on a number of subjects including confirmation by the U.S. Army Corps of Engineers of a wetland boundary delineation on the site, a site visit requested by the Intervenors, and a supplemental notice regarding the location of the land which the Applicant has an option to buy for use in the project.

The original notice of hearing had identified the site as being entirely in the Town of ◀Ancram▶, Columbia County, based on the depiction of the site in the DEIS. In correspondence after the beginning of the hearing, however, the Applicant's consultant identified the land as also including an area in the Town of Northeast, Dutchess County. Although the Applicant proposes to mine only on the area within the Town of ◀Ancram▶, the Applicant does propose to take the other land into account in determining setback distances from property lines. The Applicant also identified the possibility of growing trees on the land which is located in Northeast, although that is not part of the present proposal. The Town of Northeast was notified of the application and was provided an opportunity to comment pursuant to ECL Section 23-2711.3. The Department Staff responded to these comments on November 7, 2000 and made no changes in the draft permit in response to the comments.

The Applicant, the Department Staff and the Intervenors submitted summary statements regarding the proposed issues on December 6, 2000.

STATUS OF APPLICATION AND DRAFT PERMIT

The application underwent a number of revisions during the issues conference process, including a change in the location of the mine phases. Prior to the adjudicatory hearing, the application included an Updated Mined Land Use Plan narrative dated November 20, 2000, a Mining Map dated January 5, 2000, a Reclamation Map dated November 12, 1999, and an Erosion and Sediment Control Plan dated November 19, 1999. Administrative Law Judge (ALJ) DuBois ruled that some of the other reports and correspondence submitted by the Applicant during the issues conference process would be considered as supplemental application materials.

The draft permit was also revised prior to the adjudicatory hearing. Some of the revisions resulted from discussions among the parties about possible resolution or narrowing of issues. As of the date of ALJ DuBois' Issues Ruling, the draft permit consisted of the initial four pages of the October 18, 1999 draft permit, the special conditions dated January 14, 2000 (pp. 5 through 8), and the two additional changes identified in Richard Ostrov's letter of December 4, 2000.

RULING ON PARTY STATUS

In her issues ruling of February 9, 2001, ALJ DuBois determined that the Applicant and the Department Staff are parties to the hearing pursuant to 6 NYCRR 624.5(a). Moreover, the Town of  and the Taconic Valley Preservation Alliance (the "Intervenors") were granted party status as a consolidated party, inasmuch as they had filed a petition as required in 6 NYCRR 624.5(b), demonstrated an adequate environmental interest in the project, and had raised a number of substantive and significant issues for adjudication.

The Village of Millerton's petition for party status was denied by ALJ DuBois. In so ruling, ALJ DuBois noted that it was unclear whether the Village had proposed any testimony. The Village had participated in the issues conference only to a limited extent. While there was some indication that the Village might consolidate its participation in some manner with that of the Intervenors, this was never confirmed. On November 2, 2000, ALJ DuBois wrote to the attorney for the Village, stating that in the absence of a response about the Village's intention to participate, she would conclude that the Village was no longer requesting party status. ALJ DuBois received no response to her November 2, 2000 letter.

INTERVENORS' REQUEST FOR A SUPPLEMENTAL EIS

In both their petition for party status and their December 6, 2000 summary statement, the Intervenors stated that the Draft Environmental Impact Statement was deficient and failed to address or study numerous significant impacts that were identified in the Department Staff's positive declaration and the scoping

document. The Intervenors contended that a Supplemental Environmental Impact Statement (SEIS) should be required.

Some of the missing information was provided during the time between the start of the Issues Conference and the date of ALJ DuBois' Issues Ruling on February 9, 2001. The application had been supplemented and revised on a number of occasions. The record on certain other subjects would be developed through the adjudicatory hearing since they were being identified as issues for adjudication (see 6 NYCRR 624.13(c) and 624.4(c)(6)).

ALJ DuBois pointed out that a lead agency may require an SEIS only under certain conditions identified in 6 NYCRR 617.9(a)(7), limited to subjects not addressed or inadequately addressed in the EIS that arise from changes proposed for the project, newly discovered information, or a change in circumstances related to the project. In the present case, ALJ DuBois ruled, the criticisms of the EIS were not related to project changes, new information or changed circumstances, so the procedure of supplementing the EIS did not apply here and an SEIS would not be required unless the conditions contemplated in 617.9(a)(7) occur. Instead, issues arising from the EIS may be addressed through the examination of the issues identified by ALJ DuBois for adjudication.

ISSUES FOR ADJUDICATION AS DETERMINED BY ALJ DuBois

ALJ DuBois found that the following issues should be adjudicated: 1) the Applicant's record of compliance; 2) erosion control and drainage; 3) freshwater wetlands impacts; 4) visual impacts; 5) noise; 6) impacts on the character of the community; and 7) deficiencies in the maps submitted as part of the mining permit application. Issues determined by ALJ DuBois not to be adjudicated included impacts on groundwater, spill prevention, air and dust impacts, and traffic.

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

An appeal was filed by the Applicant challenging only ALJ DuBois' ruling finding impacts on the character of the community an issue for adjudication. While choosing not to appeal ALJ DuBois' ruling, the Intervenors filed a response to the Applicant's appeal. Department Staff did not file an appeal to the issues ruling nor a response to the Applicant's appeal. By Interim Decision, dated June 4,

2001, the Commissioner affirmed ALJ DuBois' ruling to include community character as an issue for adjudication, in all respects.

ASSIGNMENT OF MATTER TO ALJ WISSLER

Inasmuch as ALJ DuBois was involved in another matter which would cause a conflict in the scheduling of the adjudicatory hearing in this case, ALJ Richard R. Wissler was assigned by the Assistant Commissioner for Hearings and Mediation Services to preside over the instant adjudicatory hearing.

ADJUDICATORY HEARING

Following a visit to the site, the adjudicatory hearing in this matter was convened on January 28, 2003, at American Legion Post 184, 7 Fairview Avenue, Hudson, New York. The hearing was continued on January 29 and 30, and February 4, 5, 6, 12 and 13, 2003, at the same location.

As had been the case previously at the Issues Conference, the Applicant was represented by Laura Zeisel, Esq., of the firm of Drake, Sommers, Loeb, Tarshis & Catania, PLLC, Newburgh, New York. The Department's Region 4 Staff was represented by Richard Ostrov, Esq., Assistant Regional Attorney, DEC Region 4, Schenectady, New York. The Intervenors were represented by Warren S. Replansky, Esq., of the firm of Osofsky and Replansky, Pine Plains, New York.

The witnesses who testified on behalf of the Applicant were Roy T. Budnik, Ph.D.; Joseph T. Bridges, Ph.D.; Karen Arent, R.L.A.; and Richard Martin, Mined Land Reclamation Specialist, NYSDEC Region 3.

Testifying on behalf of the Intervenors was Michael Miller, P.E.; Christopher Burns, Ph.D.; Andrew Michalski, Ph.D.; Nicholas J. Schwartz, R.L.A.; Richard Hawthorne; Roger Akeley; Renee Bouplon; Timothy Abbott; Erik Kiviat, Ph.D.; Robert Wilcox; Richard Hermans; Donald MacLean; and Michael Klemens, Ph.D.

While reserving its right to do so as might be required, Department Staff elected not to call any witnesses at the adjudicatory hearing.

The parties submitted closing briefs on or about March 28, 2003. To provide the Applicant the opportunity to comment on proposed draft permit Special Condition 25, as well as the opportunity for the parties to respond to a newspaper article annexed to the Applicant's closing brief, reply briefs were permitted with a filing date of May 6, 2003, with surreplies by May 13, 2003. The hearing record closed on May 14, 2003, upon receipt of the surreply briefs by the ALJ.

APPLICABLE REGULATORY PROVISIONS

Environmental Conservation Law (ECL)

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

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

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

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

Section 422.2(c)(4)(iii) of 6 NYCRR directs that the applicant provide a description of its proposed method for minimizing the effect of its mining operation on the people of the State to the extent necessary to achieve compliance with applicable regulations, and that to achieve this objective it may employ various or similar methods including the use of screening which "may consist of either artificial or natural barriers such as berms, fences, shrubs, trees or any combination of these which have the ... effect of ... reducing noise levels, and which minimize the visual impact of the mine on the people of the State."

The word "environment" is defined at Section 617.2(l) of 6 NYCRR and "means the physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archaeological, historic or aesthetic significance, existing patterns of population concentration, distribution or growth, existing community or neighborhood character, and human health."

In making its findings pursuant to the mandates of SEQRA, a lead agency, in accordance with 6 NYCRR 617.11(d)(5), must "certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is one that avoids or minimizes adverse

environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable by incorporating as conditions to the decision those mitigative measures that were identified as practicable."

APPLICABLE DEPARTMENT PROGRAM POLICIES

On July 31, 2000, and pursuant to the authority of ECL Articles 8 and 49, the Department's Division of Environmental Permits issued Program Policy Memorandum, DEP-00-2, entitled Assessing and Mitigating Visual Impacts. As indicated in its cover page, "this policy and guidance defines what visual and aesthetic impacts are, describes when a visual assessment is necessary and how to review a visual impact assessment, differentiates State and local concerns, and defines avoidance, mitigation and offset measures that eliminate, reduce, or compensate for negative visual effects." While it does not operate as a rule of law, nor create any enforceable right, as a Program Policy Memorandum of the Department, it provides guidance to Department Staff as well as the regulated community to assist in the interpretation of the regulatory scheme as well as to ensure the consistent and uniform application of those regulations. In this context, it is applicable to the instant matter.

On August 8, 1991, and revised in February of 1993, the Department promulgated Enforcement Directive II.24 entitled, Record of Compliance Enforcement Guidance Memorandum. This memorandum establishes the policies and procedures pursuant to which the Department determines whether an Applicant is unsuitable to receive a requested permit based upon its prior record of compliance. The memorandum does not establish a strict code of procedures or standards, but is to be applied on a case by case basis.

Issues relating to the need to obtain coverage under the SPDES general permit for stormwater discharges for either construction or industrial activity are contained in Department documents entitled SPDES General Permit For Stormwater Discharges From Construction Activities, Permit No. GP-02-01, and SPDES General Permit For Storm Water Discharges Associated With Industrial Activity Except Construction Activity, Permit No. GP-98-03, respectively. These documents delineate the jurisdictional requirements for these permits and provide essential definitions.

ADJUDICABLE ISSUES RESOLVED BY AGREEMENT OF THE PARTIES

Certain issues identified by AJL DuBois for adjudication were resolved by agreement among the parties. These issues concerned: (1) deficiencies in the maps that were part of the application; (2) erosion control and drainage; and (3) noise impacts.

With respect to deficiencies in the maps that were part of the application, the Applicant agreed to make certain additional notations to the proposed mining and reclamation maps including spot elevations on the mine floor, contour lines on the mine floor, flow arrows to indicate general drainage patterns, and that the maximum permissible slope would be two-on-one.

With respect to erosion control and drainage, the Applicant agreed to supplement the existing Erosion and Sediment Control Plan by adding a designation of the critical areas that might be susceptible to erosion as well as a specific plan for a diversion ditch to be constructed at the southern end of Phase 6 of the mine to address a potential worst-case scenario wherein the 36-inch culvert under NYS Route 22, under the exclusive control of New York State Department of Transportation (NYSDOT), would be functioning at full capacity.

The foregoing revisions to the mining and reclamation maps were made by Roy T. Budnik, Ph.D., provided to the parties on or about March 20, 2003, and are made a part of the record in this matter.

With respect to noise impacts, the Applicant agreed to a modification of Special Condition 17 of the draft permit which would require that front end loaders and bulldozers used at the site be equipped with manufacturer-approved critical grade silencer equipment. In addition, the Applicant agreed to a modification of Special Condition 10 of the draft permit reducing the hours of the mine's operation from 7:00 A.M. to 6:00 P.M., Monday through Saturday, to 7:00 A.M. to 5:00 P.M., Monday through Friday, with the only activity permitted on Saturdays, except for emergencies, being equipment maintenance.

FINDINGS OF FACT

1. ◀Palumbo▶ Block Company, Inc., Dover Furnace Road, Dover Plains, New York 12522, (the Applicant) proposes to mine unconsolidated sand and gravel from a 73 acre site in the Town of ▶Ancram▶, Columbia County, over a period of twenty years, removing approximately 2,000,000 cubic yards of sand and gravel.

2. The proposed site is located on the east side of NYS Route 22 approximately one mile north of White House Road and is part of the property commonly known as the Neer farm. While the Neer farm extends eastward into Dutchess County, the easternmost border of the proposed mine is contiguous with the Columbia/Dutchess County border. The portion of the Neer property between NYS Route 22 and the Columbia/Dutchess County border is approximately 118 acres, 73 acres of which are proposed for mining, as noted above. From north to south, the Neer property runs somewhat more than 5100 feet along NYS Route 22. A 200 foot buffer will, at all times, be maintained between NYS Route 22 and the westernmost border of the mine.
3. To the north, the Neer property is bordered by a sand and gravel mine operated by O&G Industries, Inc. This mine was permitted by the Department under DEC Permit No. 4-1020-00011/00001. While the plan for the O&G mine provides for a total area of 22.61 acres to be mined in three phases, the current permit authorizes the mining and reclamation of 11.09 acres of this total area.
4. To the south, the Neer property is bordered by lands belonging to John H. Brusie. The Brusie property is the site of a sand and gravel mine 4 acres in size which was authorized by the Department pursuant to DEC Permit No. 4-1020-00010/00001.
5. The proposed mining would occur in seven phases, each approximately 10 acres in size, beginning with Phase 1 comprising the northernmost portion of the 73 acre mine area. The operation would then proceed south, numerically through the remaining phases, ending with Phase 7, at the southernmost portion of the mine.
6. The preparation of each phase for mining would be similar. Double and parallel continuous berms will be constructed around the work area of the phase being mined. These berms will each be 3 feet high and 12 feet across at the base, providing a slope of two-on-one, horizontal to vertical. The berms will be constructed of topsoil and subsoils removed from the section of the phase to be mined, with topsoil forming the outer berm and subsoil forming the inner berm. The remainder of the topsoil and subsoil not used in construction of the berms will be stored in separate stockpiles located on that

portion of the particular mine phase not being excavated. Within 7 days of their construction, the berms will be seeded with an appropriate conservation seeding mixture. Full vegetative cover will be maintained on the berms until they are utilized in the reclamation of the phase. Where inspection by the mine operator reveals that flow channels may develop or have developed along the base of the berms in those areas where adjacent topography slopes toward the berms, appropriate action will be taken by the operator including repair and reseeded of the berm, as well as the installation of check dams. Silt fencing will be installed on the down-slope side of the work area prior to removal of the topsoil and subsoil and remain in place until the adjacent perimeter berms are reclaimed. Where necessary to avoid excess lateral pressure which could lead to failure, the silt fence will be reinforced with woven wire or supplemented with check dams. Beginning in the northeast corner of Phase 1 and running approximately 200 feet along its eastern border, beginning at a point about 150 feet from the northern border of Phase 2 and running along its eastern border approximately 200 feet, and beginning in the southeastern corner of Phase 5 and continuing along the entire eastern borders of Phases 6 and 7, an inner earthen dike, in lieu of a 3 foot inner berm, will be constructed having a minimum height of 10 feet and a base of 40 feet, with sides maintaining a two-on-one slope, horizontal to vertical. Parallel and contiguous to this earthen dike will be a 3 foot outer topsoil berm of the same specifications and slope as in the other Phases of the mine. All of these measures, implemented in accordance with the proposed Erosion and Sediment Control Plan, will reasonably ensure that there will be no discharge of turbid water or sediment-filled water and no discharge of any surface waters from any reclaimed mining areas, to any area outside the life of mine boundary, including Wetland CO-26. Moreover, a 100 foot buffer will at all times be maintained between the easternmost border of the mine and the Department delineated boundary of Wetland CO-26.

7. As the mining of each phase proceeds, the berms will be continuously constructed as required by the southward progress of the mining operation and utilized in the reclamation of the particular phase as required. Similarly, the placement of the silt fencing will change as the mining operation

proceeds southward, being ultimately removed as each phase or portion thereof is reclaimed.

8. Upon reclamation, the floor of the site will be returned to agricultural use. Perimeter slopes of the reclaimed site will not be steeper than two-on-one, horizontal to vertical, and will be revegetated.
9. The Neer property is characterized by a gently rolling relief of hills and swales ranging in elevation from approximately 745 feet above sea level (ft asl) to 810 ft asl. The site is located on the northern end of a major physiographic lowland known as the Harlem Valley, in the Hudson-Mohawk Lowlands Landform Region. Locally, the Neer property is part of the Noster Kill Valley, so named after the stream which flows through it. The Noster Kill Valley is bounded on the west by Fox Hill, with an elevation of 1,346 ft asl, and on the east by Brace Mountain, with an elevation of 2,311 ft asl.
10. That portion of the Neer property proposed for mining has been used for farming for many years, primarily alternative crops of corn and hay, and is, therefore, fields and devoid of forest stands or other significant vegetation. Hedgerow and other old field vegetation are, however, encountered at the margins of the fields.
11. Department designated Freshwater Wetland CO-26 encompasses approximately 53 acres of the property, of which 2 acres are in Columbia County and 51 acres are located in Dutchess County. The 53 acres are comprised of 29 acres of wetland plant communities and 24 acres of ponds. The Department lists the wetland as a strongly minerotrophic, rich shrub fen. It is ranked S1/S2 by the Natural Heritage Program.
12. Soils within the area to be affected by the proposed mine are of the Blasdell series, a deep, nearly level to rolling, well to somewhat excessively drained, low lime, gravely soil formed in outwash and recent alluvium. Generally, the soil's pH is 4.5 to 6.0 in the surface layer and 5.1 to 6.5 in the substratum.
13. A review of the literature and available studies suggests that the bedrock comprising the hills and mountains immediately to the east and west of the proposed site is composed of harder metamorphic strata, predominately Walloomsac slate, but with Normanskill shale also present. The bedrock of

the Harlem Valley itself, and presumably the proposed site, generally coincides with a belt of weaker marbles of the Stockbridge Group, a carbonate rock, commonly referred to as Stockbridge limestone. Limestone consists mainly of calcium carbonate, CaCO_3 . The actual depth and configuration of the bedrock surface beneath the proposed site is not known. Although a boring made north of the site, but not on the Neer property, encountered bedrock at a depth of 178 feet, test borings made on the proposed site in the late 1980's, to depths not exceeding 60 feet, failed to encounter bedrock.

14. The bedrock in the region, including the proposed site, is overlain by glacial deposits consisting of sand and gravel with local intervals of fine-grained pond deposits. The test drilling conducted on the property in the late 1980's indicated that the sand and gravel to be mined was interspersed with very fine-grained facies comprised of clayey silts to silty clays. These fine-grained sediments are locally exposed in swales along the eastern margin and central portion of the property and were encountered in several of the boreholes sunk during the test drilling. Though commonly found interspersed with coarser deposits, these fine sediments indicate the presence of discontinuous lenses of the clayey material across the property.
15. Petrographic analyses of samples taken from the sand and gravel deposits at the site indicate that the lithology of the deposits is 81% non-carbonate rock and 19% carbonate rock.
16. Stormwater movement in the area of the proposed site is generally from west to east. As the topsoil on Fox Hill is relatively thin over its metamorphic bedrock, most of the precipitation occurring there and not lost to evapotranspiration flows overland as runoff to the valley floor. Due to the highly permeable nature of the sand and gravel deposits on the valley floor, this runoff is rapidly infiltrated along with any precipitation falling directly on the valley floor, as well as runoff from any other adjacent uplands. Culverts carry runoff from Fox Hill beneath NYS Route 22 onto the Neer property where it rapidly infiltrates the sand and gravel. Such rapid infiltration is indicated by the lack of permanent or intermittent streams, or standing bodies of water within that portion of the property located within Columbia County.

17. The site is underlain by both bedrock and surficial aquifers. The bedrock aquifer is composed of carbonate rock and the surficial aquifer is composed of sand and gravel. Recharge to these aquifers comes from adjacent upland runoff and direct precipitation on the valley floor. Discharge occurs at the streams, ponds and wetlands on the valley floor. Consistent with the topographic gradient, groundwater flows in the area of the site are generally west to east.
18. Site springs, seeps and subsurface groundwater flows are the principal source of water for the western half of Wetland CO-26, being that half of the wetland closest to the proposed mine.
19. This section of Wetland CO-26 contains three fen communities which are considered to be rare or significant habitats by the New York State Natural Heritage Program and are ranked S1/S2 by that agency. To the north and south of the wetland, these fens have been designated the North Graminoid Fen and the South Graminoid Fen. Between them lies the Rich Shrub Fen. These fens all possess the requisite groundwater hydrology and substrate features to be suitable habitat for the bog turtle, *Clemmys muhlenbergii*. Indeed, the harsh fen portion of the North Graminoid Fen, characterized by low growing vegetation, constitutes highly desirable bog turtle habitat.
20. Although no sighting of a bog turtle has been documented in that portion of Wetland CO-26 contiguous to the site of the proposed mine, it is well established that this section of the Harlem Valley encompassing Wetlands CO-26 and CO-27 is highly suitable as bog turtle habitat. Bog turtles have been sighted within two miles of the site.
21. The bog turtle, *Clemmys muhlenbergii*, is listed by the Department as an endangered species and efforts are underway at both the State and Federal level seeking to ensure its survival.
22. Critical to the survival of the fen communities, and thus to the survival of the bog turtle, is the constant availability of sufficient water, high in calcium and just rich enough in nutrients to ensure the fen's survival while at the same time discouraging other invasive plant species.
23. Water samples taken at three separate locations within Wetland CO-26, two of which were in the harsh fen portion of the North Graminoid Fen,

indicated an average pH of 7.7 mg/l, an average calcium level of 58 mg/l, an average magnesium level of 29 mg/l, and an average total dissolved solids (TDS) level of 369 mg/l. A soil sample taken in the harsh fen portion of the North Graminoid Fen revealed a pH of 7.0, a calcium level of 2,400 mg/l, and a magnesium level of 2,600 mg/l. The pH for the three water samples ranged from 7.2 to 7.9 while the calcium level ranged from 42 mg/l to 68 mg/l.

24. While it is clear, as indicted in Finding of Fact 18, above, that site springs, seeps and subsurface groundwater flows are the principal source of hydrology for the western half of Wetland CO-26, it is unclear whether that water is discharged from the carbonate bedrock aquifer as opposed to the surficial sand and gravel aquifer, or whether the total discharge is comprised of some combination of both. Moreover, it is unknown what percentage, if any, of the pH or calcium levels observed in the water samples taken in the wetland is attributable to the carbonate aquifer or the surficial sand and gravel aquifer, and how, if at all, these values will be affected by the removal of some portion of the sand and gravel overburden occasioned by the proposed mining operation.
25. The proposed mining operation will remove sand and gravel from the site to vertical depths of 0 to 50 feet below present site topography. However, a minimum of 5 feet of unmined material will be maintained above the water table at all times. Accordingly, no mining below the water table will occur and no dewatering of the site will be required.
26. Of the seven phases through which the proposed mining operation would proceed, only Phase 6 and 7 would be contiguous to those sections of Wetland CO-26 where the critical fen areas are located.
27. Department Staff has proposed, and the Applicant has agreed to, Special Condition 25 in the proposed permit. This condition requires that prior to the commencement of any mining, the Applicant will install a minimum of five groundwater monitoring wells, in accordance with a Groundwater Monitoring Plan (GMP) to be submitted by the Applicant's consultant and approved by the Department. Three of the wells will be placed down-gradient to monitor the shallow surficial sand and gravel aquifer, one well will be placed down gradient to monitor the carbonate bedrock aquifer, and one well will be placed up-gradient to monitor the shallow surficial sand and gravel aquifer.

The wells will be monitored on a quarterly basis, with water level, pH, temperature and conductivity observed and recorded at the time of each sampling event. The samples thus obtained will be analyzed at an accredited laboratory for standard major inorganic ions and for nutrients, as per USEPA standard methods. In accordance with the GMP, a Fen Water Budget will be prepared and submitted to the Department not less than one year prior to mining Phase 3. This Fen Water Budget will calculate the recharge rates to each aquifer, compare the chemistry of the water in the aquifers with the water discharged at the fens, and assess the primary source of groundwater to the fens. Following this evaluation and review by the Department, the special condition provides:

"Mining in Phases 6 and 7 shall be permitted unless the Department concludes:

- 1) that a shallow (10 feet or less below the water table) lower permeable barrier exists beneath Phases 6 and 7 (which shallow barrier results in nearly all of the discharge at the fen seeps originating as recharge through Phases 6 and 7 of the mine), or
- 2) the chemistry of the water discharged at the fen seeps is otherwise shown to be predominantly related to the chemistry of the unsaturated portion of the surficial sand and gravel deposit."

28. To the east of the proposed site is the New York State Taconic State Park. Within the Park and within two miles of the proposed site lies Brace Mountain, a part of a ridge of mountains running through this entire section of the Noster Kill Valley, from north to south, forming its easternmost border. Elevations of the ridge in the area exceed 2000 feet asl, with the summit of Brace Mountain being 2311 feet asl. Views eastward from the site are limited by this mountain ridge. A hiking trail, the South Taconic Trail, follows the mountain ridge, taking in the summit of Brace Mountain, and affording hikers numerous views of the Noster Kill Valley, including the proposed mining site, the O & G and Brusie mines, as well as the other residential and agricultural uses present in the valley below.
29. Running to the north and south approximately 600 feet east of the proposed site and between the site and the mountains to the east, lies the

proposed Harlem Valley Rail Trail, a hiking and recreational trail to be developed along the bed and right-of-way of an abandoned railroad. While portions of the trail have actually been completed in Dutchess County to the south, the section of the trail lying immediately to the east of the site has not yet been developed. The Rail Trail will afford views of the proposed site and surrounding lands.

30. Lying somewhat south and east of the site and approximately 1 mile away is a subdivision of homes on Quarry Hill Road. Built on the slopes of the mountain ridge of which Brace Mountain is a part, this subdivision lies at an elevation approximately 300 feet above the valley floor. Homes in this development have a view of the proposed site and the neighboring mines, as well as the other residential and agricultural uses existing in the area.
31. Several single family homes are located on the west side of NYS Route 22 directly across from the proposed mining operation.
32. Views to the west from the proposed site, the Rail Trail, the homes on Quarry Hill Road and along NYS Route 22, and the lower slopes of Brace Mountain are limited by Fox Hill which runs north to south, the entire length of the area, and rises to 1346 feet asl.
33. Special Condition 3 of the draft permit requires that white pine trees, a minimum of 4 feet high, be planted 15 feet on center in two staggered rows, in three plantings in the 200 foot buffer area along the eastern side of NYS Route 22. The first planting shall be prior to the commencement of Phase 1 and be in the 200 foot buffer area along Phases 1, 2 and 3. The second planting shall be prior to the commencement of Phase 3 and be in the 200 foot buffer area along Phases 4, 5 and 6. The third planting shall be prior to the commencement of Phase 5, and be in the 200 foot buffer area along Phase 7.
34. Permit Special Condition 12, mandates that no more than 10.5 acres shall be disturbed by mining at any one time.
35. Existing hedgerows, trees, brush and other existing vegetation provide screening of the site from various vantage points, particularly along the proposed Rail Trail and the South Taconic Trail.

36. Existing land uses, particularly when viewed from the slopes of Brace Mountain, provide a mosaic of fields, forests, residential neighborhoods and other gravel mines.
37. Enacted pursuant to the Town Law of the State of New York, and in effect since 1972, the Town of ◀Ancram▶ has a local zoning regulation entitled, The Zoning Ordinance of the Town of ◀Ancram▶, New York, and also referred to as the Development Plan and Zoning Ordinance.
38. As indicated in the Town of ◀Ancram▶'s Zoning Ordinance, the proposed site is located entirely within a area of the Town zoned as Rural Residential. Moreover, Section III(A) of the Ordinance, entitled, Permitted Uses; Conditional Uses, at page ZO-9, lists certain industrial uses and provides that "extractive operations and soil mining" are a conditional use permitted in areas zoned Rural Residential upon securing a Special Use Permit from the Zoning Board of Appeals.
39. In January 2003, a consultant to the Town of ◀Ancram▶ prepared the final draft of a document entitled the Scenic Resource Protection Plan For Town of ◀Ancram▶, New York. The plan seeks to protect the Town's rural and agricultural character through the protection of its scenic resources. The plan does not expressly prohibit mining in the Town. However, in order to implement the plan, a "Scenic Corridor Overlay Zone" is proposed and is annexed to the plan as Appendix A. The overlay zone would cover the area of the Town along NYS Route 22, which would include the area of the proposed mine. This overlay zone would prohibit "extractive operations and soil mining or excavation of minerals of a threshold that would require New York State Department of Environmental Conservation permit in accordance with the New York State Mined Land Reclamation Law, Title 27, Section 23 of the New York State Consolidated Laws."
40. While the Scenic Resource Protection Plan has been adopted by the Town Board of the Town of ◀Ancram▶, Appendix A, comprising the Overlay Zone, and the zoning changes proposed therein have not been adopted nor enacted. Moreover, the Town has not imposed a moratorium on new mining operations pending the adoption of the Overlay Zone, nor enacted any zoning changes recommended therein.

41. In addition to the O&G and Brusie mines, the Department has granted permits to three other mining operations in the Town of ◀Ancram▶.
42. Historically, the Town of ◀Ancram▶ has embraced an open and rural character with farming as a primary industry. Sand and gravel mining, often in the form of small operations located on individual farms, has been part of the working landscape of the area for many years. Recent years have seen an increase in residential uses, as new residents move into the Town.
43. ◀Palumbo▶ Sand and Gravel Co., Inc., Carmine ◀Palumbo▶, Danny Fortune and Co., Inc., and Anthony ◀Palumbo▶ (not the Applicant's principal herein), entered into an Order on Consent dated June 6, 1994, regarding violations at a sand and gravel mine located east of Sherman Hill Road near the intersection of Sherman Hill Road and NYS. Route 22, Dover, Dutchess County, New York, which involved commencing construction of a solid waste management facility at the ◀Palumbo▶ Sand and Gravel Co., Inc., mine site in Dover, New York, without the required Departmental permits. The Order imposed a civil penalty in the amount of \$10,000.00, and required the implementation of certain corrective measures.
44. On November 23, 1998, Danny Fortune and Co., Inc., entered into a short form Order on Consent, fully executed by the Department on December 3, 1998, regarding excavation of portions of the Dover Industrial Park in the Town of Dover, Dutchess County involving mining without an ECL Article 23 MLRL permit and was assessed a civil penalty in the amount of \$3,500.00.
45. On July 28, 1999, Danny Fortune and Co., Inc., entered into a short form Modified Order on Consent, fully executed by the Department on August 3, 1999, for failure to grade and revegetate areas addressed in the Order on Consent of December 3, 1998, and was assessed a civil penalty in the amount of \$5,000.00.
46. By Complaint dated September 13, 1999, and amended October 25, 1999, the Applicant was named as a Respondent, along with three others, in an administrative enforcement proceeding brought by the Department alleging mining without a permit in the course of the construction of an industrial park in the Town of Dover, Dutchess County. The other three Respondents were Danny Fortune & Co., Inc.; Fortunato ◀Palumbo▶; and Anthony ◀Palumbo▶, a cousin of Anthony P. ◀Palumbo▶, the Applicant's

principal herein. Upon finding the violation alleged confirmed by the proof adduced at the enforcement hearing, the Commissioner, by Order dated October 5, 2000, directed the Respondents to pay a civil penalty in the amount of \$12,250, and to reclaim the 4.2 acres at the industrial park where the unpermitted mining had taken place. The Respondents paid the civil penalty and reclaimed the site as directed. Subsequent inspections by the Department indicate that the site remains in compliance with applicable Departmental regulations.

47. On May 30, 2002, the Department issued DEC Permit No. 3-1326-00210/0001, MLR No. 3013-30-0617, to Danny Fortune & Co., Inc., to mine 50,000 yards of sand and gravel and complete reclamation from a 4.7 acre site. The permit has an expiration date of June 15, 2005. Fortunato ◀ **Palumbo** ▶ is the President of Danny Fortune & Co., Inc., and the site is located in the Town of Dover, Dutchess County. On October 23, 2002, and after a public hearing held on October 15, 2002, the Town Board of the Town of Dover granted Danny Fortune & Co., Inc., a special permit to conduct the aforementioned mining operation.
48. On November 5, 2002, the Department issued DEC Permit No. 3-1326-00031/0002, MLR No. 3013-30-0100, to ◀ **Palumbo** ▶ Sand & Gravel Company, Inc., to continue to mine sand, gravel and clay from 77 acres of a 155 acre parcel located in the Town of Dover, Dutchess County. The permit has an expiration date of November 5, 2007. Anthony ◀ **Palumbo** ▶ is the Vice President of the applicant company. An inspection report completed during an inspection of the site on February 27, 2002, indicates that there are "no environmental problems at the mine" and that "bonding is adequate."
49. The permits indicated in Findings of Fact 47 and 48, above, were issued with the Department's full knowledge of the facts and history resulting in the enforcement actions delineated in Findings of Fact 43, 44, 45 and 46, above. No more stringent conditions are included in those permits, nor any increased amount in the performance bond required. In the view of the Department's Region 3 Staff, the Palumbos are competent mine operators. The record does not indicate any action ever taken by the Department to revoke or modify a permit issued to one of the ◀ **Palumbo** ▶ affiliated companies.

DISCUSSION

Requirement of a SPDES Stormwater Permit

In her Issues Ruling of February 9, 2001, ALJ DuBois noted that "the question of whether a SPDES permit for stormwater is required remains unresolved and will depend on the outcome of the drainage and erosion control issue." Issues Ruling, p. 24. While the parties, by agreement, resolved the drainage and erosion control issues obviating the need for any adjudication of the issues therein raised, the Intervenor maintained that a SPDES permit would still be required for stormwater discharges. (Transcript of Adjudicatory Hearing, pp. 151-165, hereinafter abbreviated T. and page number.) The chief concern of the Intervenor, articulated by Michael Miller, P.E., is that during construction of the berms, but prior to the establishment of any vegetative cover on them, a heavy rainfall of high intensity could result in sediment laden stormwater runoff being conveyed to wetland CO-26. (T., pp. 219-220.) Pointing to areas of the proposed berms on the eastern borders of Phases 2, 4 and 7, Miller argued that stormwater could collect along siltation fencing, or swales adjacent to the berms, or flow around the ends of the berms as then constructed and discharge to the wetland. Such flows would constitute discrete point sources, in Miller's opinion, requiring the issuance of a SPDES stormwater permit. (T., pp. 222-223.) On cross examination, Miller admitted that he had visited the site only once and that it was snow covered at the time, and that he had made no site-specific observations which would support his opinion with respect to potential stormwater runoff discharges. (T., pp. 228-229 and 238-239.)

Testifying on behalf of the Applicant, Dr. Roy T. Budnik spoke of his visits to the site and noted that evidence of surface erosion in the soils from the development of rills and concentrated flows, often typical in farm fields, was not seen at this site, owing to the high permeability of the soils. (T., pp.173-174.) Moreover, while contour lines on the site map might suggest points of discharge along swales, this has not been confirmed by his field observations which never revealed the presence of gullies or other evidence of stormwater discharge. (T., p. 201.) In view of the high permeability of the soil at the site, the seeding and mulching of the berms when constructed by utilization of a hydroseeder to ensure adhesion to the berms, the use of silt fencing, and the installation of check dams where appropriate to prevent discharge of water around the toes of the berms, Dr. Budnik asserted that in accordance with the proposed permit, there would be no discharge of surface waters off the proposed site during either construction or operation of the mine. (T., pp. 105-108, 112, and 115.)

For a SPDES general permit for stormwater discharges, either for construction activity under Permit No. GP-02-01 or industrial activity under Permit No. GP-98-

03, an essential requisite is that there be a point source discharge. The term "point source" is defined at ECL 17-0105(16) and "means any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." Moreover, the term "discharge" is defined at 6 NYCRR 750.2(a)(9) and "means any addition of any pollutant to State waters, waters of the contiguous zone, or the ocean through an outlet or point source." While these definitions should be given broad interpretation, it is clear that any point source must be unequivocally a "discernable, confined and discrete conveyance." The record in this case does not reasonably support the existence or potential existence of any such points of off-site discharge. Indeed, in light of the high permeability of the soils, the manner in which the mine will be constructed, and the safeguards which will be put in place during and after construction including berms, earthen dikes, silt fencing, seeding and mulching, the installation of check dams, and the maintenance of a 100 foot buffer at all times between the limits of the mine and the Department delineated border of Wetland CO-26, compliance by the Applicant with the mandate in the proposed permit that no surface waters will be discharged off the site either during or after construction of the mine can be reasonably presumed. Accordingly, the Applicant is not required to obtain coverage under either SPDES stormwater general Permit No. GP-02-01 or Permit No. GP-98-03.

Impacts on Wetland CO-26

In her Issues Ruling of February 9, 2001, ALJ DuBois determined that for the purposes of SEQRA the requisite "hard look" had not been taken with respect to potential impacts on Wetland CO-26 from the proposed project, as well as whether mitigation measures proposed would avoid, and mitigate to the maximum extent practicable, impacts on the wetland. Moreover, Issues Ruling concluded that the mining operation's effect on the quantity and quality of water entering the wetland, in light of the environmental conditions in the wetland, should be examined.

In response to ALJ DuBois' ruling, the Applicant conducted an extensive on-site study of that portion of Wetland CO-26 adjacent to the Neer property. The findings of that study were summarized in a report authored by Joseph T.

Bridges, Ph.D., a Senior Biologist for Matthew D. Rudikoff Associates, Inc., and submitted in evidence during the adjudicatory hearing as Exhibit 88. The report is entitled, Assessment Report: Identification, Characterization and Assessment of Site Springs, Surface Water Seeps and Plant Communities Within the Onsite Portion of NYSDEC Wetland CO-26. The report indicates that this portion of the wetland is comprised of 7 plant community types, encompassing approximately 225 separate plant species. None of the individual plant species observed is listed by the Department as threatened or endangered. Of the 7 plant communities identified, however, 3 are fen communities which are considered to be rare or significant habitats by the New York State Natural Heritage Program (NHP) and are ranked S1/S2, meaning that they are imperiled, perhaps critically so, in New York State due to rarity or are vulnerable to extirpation from New York State due to biological factors. (Exhibit 88, pp. 2-3.) These fen communities are identified as the North Graminoid Fen, the South Graminoid Fen and the Rich Shrub Fen. All three of these fens are located on the western border of Wetland CO-26, adjacent to Phases 6 and 7 of the proposed mine. While the fens possess the requisite groundwater hydrology and substrate features associated with bog turtle habitat, Dr. Bridges concluded that most of the fens, with the exception of certain harsh fen areas, were too highly shaded to meet the critical spring basking and nesting requirements of the bog turtle. (Exhibit 88, p. 3.) Both Dr. Erik Kiviat and Dr. Michael Klemens, testifying on behalf of the Intervenors, disagreed with this conclusion and maintained that the fens, in their entirety, constituted highly desirable bog turtle habitat. (T., pp. 1758-1759, and 2283.) Moreover, Dr. Klemens pointed out that these fens in Wetland CO-26 are actually part of a greater corridor habitat of interconnected wetlands and fens through which the bog turtle moves. (T., pp. 2282-2283.) This being the case, the fact that bog turtles have not actually been observed in this section of Wetland CO-26, does not diminish the need to protect this habitat for use by bog turtles in the future. (T., pp. 2287-2288.) To protect the wetland bog turtle habitat, Dr. Bridges suggested that a berm be placed along the entire eastern boundary of the mine site, as well as silt fencing. (Exhibit 88, pp. 3-4.) Dr. Klemens noted, however, that the migration of the bog turtle upland onto the mine site is extremely improbable, except under the most catastrophic circumstances. (T., p. 2294.)

With regard to hydrology, Dr. Bridges concluded that site springs, seeps and subsurface groundwater flows were the principal source of water flowing to this portion of Wetland CO-26. (Exhibit 88, p. 1). All the experts who testified concurred in this opinion. Dr. Budnik collected water samples from three sites within the fens and, upon analysis of those samples, concluded that they showed an average pH of 7.7 and a calcium concentration of 58 mg/l. (Exhibit 89, p. 7.) All of the experts agreed that survival of the fens was dependent upon the constant availability of sufficient water with high alkalinity, high calcium levels and low nutrient levels. The experts differed with respect to the source of this calcium rich water, however. Dr. Budnick asserted that such high calcium levels suggest that the source of this water at the fens lies in the calcareous bedrock, the limestone underlying the site. (T., p. 500.) Only in the limestone bedrock, being mainly calcium carbonate, would the residence time of the groundwater be long enough to impart the concentration of calcium observed in the samples. (T., p. 501.) Both Dr. Burns and Dr. Michalski suggested that groundwater discharge to the wetland could be through the surficial sand and gravel aquifer and that calcium levels and residence time in this surficial material was sufficient to impart the calcium concentrations to the groundwater observed in the wetland by Dr. Budnick. (T., pp. 679, 717 and 861-866.) Indeed, Dr. Budnik had reported that lithologies of the sand and gravel deposits on the site revealed a carbonate level of 19%. (Exhibit 89, p. 4.) Removal of the sand and gravel overburden through mining could result in the removal of the very calcium source essential to the proper chemistry of the groundwater discharging to the wetland, asserted Drs. Burns and Michalski.

Experts also differed over potential impacts from possible changes in nutrient levels and temperature of the water reaching the wetland as a result of the mining operation. Dr. Budnik concluded that nutrient loading would not be affected by the mining operation and that fens are relatively insensitive to external nutrient inputs. (Exhibit 89, p. 16.) Dr. Kiviat, however, argued that increases in nutrient levels could encourage invasive plants and lead to a degradation of the fens. (T., p. 1785.) Moreover, as to temperature, Dr. Michalski testified that removal of the sand and gravel could raise groundwater temperatures, slowing the dissolution of calcium in the groundwater and thus lowering the calcium concentration at the fens. (T., p. 889-891.)

From the foregoing, in order to maintain the fens contiguous to this site and, thus, the bog turtle habitat they provide, certain parameters in the groundwater must be maintained, including the quantity, chemistry, nutrient level and temperature. The assurance that these parameters are maintained is critical to any determination in this matter for, as Dr. Klemens opined, if these parameters are maintained, and the mine is developed in the manner proposed with berms, earthen dikes and silt fencing to curtail runoff, as well as the 100 foot buffer from the wetland, then the proposed "mine can be run in an environmentally sound fashion." (T., pp. 2365-2367.) To provide these assurances, Department Staff and the Applicant have proposed the inclusion of Special Condition 25 in the proposed permit. As Finding of Fact 27, above, indicates, this condition requires that prior to the commencement of any mining, the Applicant will install a minimum of five groundwater monitoring wells, in accordance with a Groundwater Monitoring Plan (GMP) to be submitted by the Applicant's consultant and approved by the Department. Three of the wells will be placed down-gradient to monitor the shallow surficial sand and gravel aquifer, one well will be placed down gradient to monitor the carbonate bedrock aquifer, and one well will be placed up-gradient to monitor the shallow surficial sand and gravel aquifer. The wells will be monitored on a quarterly basis, with water level, pH, temperature and conductivity observed and recorded at the time of each sampling event. The samples thus obtained will be analyzed at an accredited laboratory for standard major inorganic ions and for nutrients, as per USEPA standard methods. In accordance with the GMP, a Fen Water Budget will be prepared and submitted to the Department not less than one year prior to mining Phase 3. This Fen Water Budget will calculate the recharge rates to each aquifer, compare the chemistry of the water in the aquifers with the water discharged at the fens, and assess the primary source of groundwater to the fens. Following this evaluation and review by the Department, the special condition provides:

"Mining in Phases 6 and 7 shall be permitted unless the Department concludes:

- 1) that a shallow (10 feet or less below the water table) lower permeable barrier exists beneath Phases 6 and 7 (which shallow barrier results in nearly all of the discharge at the fen seeps originating as recharge through Phases 6 and 7 of the mine), or

2) the chemistry of the water discharged at the fen seeps is otherwise shown to be predominantly related to the chemistry of the unsaturated portion of the surficial sand and gravel deposit."

In light of the studies submitted into the record, the expert testimony provided by the parties, and the proposed inclusion of Special Condition 25 in the proposed permit, for the purposes of SEQR the requisite "hard look" has been taken with respect to potential impacts to Wetland CO-26 and its bog turtle habitat from the proposed project. Moreover, the mitigation measures proposed will avoid, and mitigate to the maximum extent practicable, impacts on the wetland and its bog turtle habitat.

Visual Impacts

ALJ DuBois found that a substantive and significant issue exists regarding visual impacts of the mine. In particular she noted that while there are two places of statewide aesthetic significance from which the project will be visible, the Taconic State Park and proposed Harlem Valley Rail Trail, the DEIS did not contain a meaningful evaluation of the visibility from these locations. Moreover, the aesthetic impacts of the views of the mine are substantively in dispute, she found, as is the adequacy of screening, although it is not in dispute that the site cannot be screened from the view of potential receptors in the Taconic State Park.

Section 422.2(c)(4)(iii) of 6 NYCRR directs that the applicant provide a description of its proposed method for minimizing the effect of its mining operation on the people of the State to the extent necessary to achieve compliance with applicable regulations, and that to achieve this objective it may employ various or similar methods including the use of screening which "may consist of either artificial or natural barriers such as berms, fences, shrubs, trees or any combination of these which ... minimize the visual impact of the mine on the people of the State." However, whether any proposed mitigation is sufficient and appropriate to the circumstances for Departmental review purposes, must begin with an analysis made pursuant to the Department program guidance applicable in this matter, Assessing and Mitigating Visual Impacts, DEP-00-2. As previously noted, and as indicated in its cover page, "this policy and guidance defines what visual and aesthetic impacts are, describes when a visual assessment is necessary and how to review a visual impact assessment, differentiates State and local concerns, and defines avoidance, mitigation and offset measures that eliminate, reduce, or compensate for negative visual

effects." Moreover, with regard to visual or aesthetic impacts of a purely local, as opposed to statewide, concern, the guidance differentiates these concerns, and thus the Department's focus in any visual impact analysis, asserting that the "guidance defines State regulatory concerns and separates them from local concerns. There is nothing in this program policy that eliminates or reduces the responsibility of an applicant to local agencies to address local visual or aesthetic concerns."

The guidance memorandum contemplates a four step process to be undertaken by a permit applicant and verified or confirmed by the Department. The first three steps require the Department's verification of (1) the applicant's inventory of aesthetic resources of statewide significance, (2) its visual assessment made using either graphic viewshed and line-of-sight analysis, or other visual simulation and digital viewshed analysis, and (3) the applicant's assessment of the potential significance of any defined visual impact. The fourth step requires a review the reasonableness and efficacy of the applicant's proposed mitigation strategies, or a direction by the Department that such mitigation strategies be submitted, and, when appropriate, the imposition of permit conditions consistent with those strategies. A visual impact analysis consistent with these guidance requirements was prepared by Karen Arent, a landscape architect, and submitted by the Applicant, Exhibit 86.

The Arent report, entitled Visual Impact Assessment Report for ◀Palumbo Gravel Mine, and dated May 10, 2002, provides the required inventory of significant State scenic and aesthetic resources, identifying as such the Taconic State Park and the proposed Harlem Valley Rail Trail. That these two entities are State significant aesthetic resources is clear from an examination of the suggested categories of such resources enumerated in the Department's Guidance. These categories, delineated at Section V(A) of the Guidance, include "State Parks" as well as a "State or federally designated trail, or one proposed for designation."

Using line-of-sight analysis and computer modeling, the Arent report provides a visual influence analysis to provide an overall assessment of the degree of visibility of the proposed mine relative to the surrounding topography, and photo simulations depicting the visibility of the mine from various vantage points. From

this analysis, it is clear that while each of the various phases of the mine will not be completely hidden from sight, their visual impact will not be so significant as to preclude effective mitigation from existing topography and vegetation or from the additional mitigation measures proposed.

In the first instance, the proposed mine is to be situated between two other existing mines located immediately to the north and south of the site, the O&G mine and the Brusie mine, respectively. The O&G mine is 11.09 acres in size while the Brusie mine is 4 acres in size. No phase of the proposed mine will impact more than 10.5 acres at any one time, and given the need to move stockpiles of topsoil and subsoil from one half of a phase to the other half before mining that half of the phase, it is unlikely that in actual operation this 10.5 acre limit will be exceeded. Accordingly, since the working part of any particular phase of the proposed mine at any one time will be comparable in size to the mines nearby, it will not occasion any visual impact greater than the impacts associated with the existing mines. In addition, existing vegetation along both the South Taconic Trail and the proposed Harlem Valley Rail Trail will screen the proposed mining operation from view at many vantage points. While all views of the proposed mine from the South Taconic Trail cannot be mitigated, the distances from and elevation above the site, as well as surrounding uses, indicate the visual impact of the proposed mine will not be significant to hikers and others utilizing the Trail. Similarly, the distance and existing vegetative screening indicates that the mining operation will not result in any significant visual impact to those using the Rail Trail. Finally, while no residents from the Quarry Hill subdivision testified at the hearing, it is clear that the view of the proposed mining operation from this area, perhaps a mile away, will not be inconsistent with or significantly impact the view of the valley already experienced by these homeowners.

In addition to the existing mitigative elements found in the topography and vegetative cover, the proposed permit directs the Applicant to implement certain mitigation measures. In particular, Special Condition 3 of the draft permit requires that white pine trees, a minimum of 4 feet high, be planted 15 feet on center in two staggered rows, in three plantings in the 200 foot buffer area along eastern side of NYS Route 22. The first planting shall be prior to the commencement of

Phase 1 and be in the 200 foot buffer area along Phases 1, 2 and 3. The second planting shall be prior to the commencement of Phase 3 and be in the 200 foot buffer area along Phases 4, 5 and 6. The third planting shall be prior to the commencement of Phase 5, and be in the 200 foot buffer area along Phase 7. These measures will, to the reasonable extent practicable, mitigate the visual impact of the proposed mining operation on occupants of the several single family homes located on the west side of NYS Route 22 directly across from the proposed mining operation, as well as to passing motorists.

The Intervenors had previously submitted their own visual impact study, entitled Draft Visual Impact Assessment Report, Exhibit 78, which was explained by Nicholas Schwartz, a landscape architect. The Intervenors candidly pointed out that this report was not a complete analysis comporting with the Department's guidance, but was intended to point out deficiencies in the DEIS. (T., p. 1225.) Generally, Mr. Schwartz agreed with the methodologies employed by Ms. Arent. (E.g., T., pp. 1230 and 1456.) In its visual analysis, the Intervenor's report, Exhibit 78, assumes that the entire 73 acres of the mine will be unreclaimed and is, therefore, of little value in resolving the instant issue.

Upon the record in this matter, it is clear that visual impacts, to the extent that they are significant, can be mitigated to the reasonable extent practicable in accordance with 6 NYCRR 617.11(d)(5).

Community Character

ALJ DuBois held that existing character of the community would be an issue for adjudication in view of the visual and noise impact issues raised, as well as the Town of Ancram's development plan emphasizing the open and rural character of the area. On appeal, this finding was affirmed by the Commissioner.

Dr. Budnik testified on behalf of the Applicant and noted that the community was predominantly rural but was changing as more people were acquiring second homes in the area. (T., pp. 1526-1527.) The sand and gravel of this area is of high quality and because of its soundness and hardness is accepted by the NYS Department of Transportation. It is used to build houses and other buildings, foundations, septic systems, concrete block and for ice control. (T., pp. 1529-1530 and 1536.) Mining has been part of the working landscape of the Harlem Valley for many years, going back to the time of the American Revolution when iron was mined and smelted in the area. (T., pp. 1533-1534.) Beginning perhaps

75 years ago, sand and gravel pits began to appear on farms in the area. The gravel so mined was used in the construction of the first paved roads constructed to facilitate the movement of farm products to market. The Applicant also introduced into evidence a copy of the Town of Ancram zoning ordinance, Exhibit 122, and five permits issued by the Department for other sand and gravel mines in the Town of Ancram, Exhibit 123.

At the adjudicatory hearing various witnesses testified on behalf of the Intervenor with respect to the issue of community character. Renee Boulpon testified to efforts by the Columbia Land Conservancy to assist and sustain farm operations in the Town. (T., p. 1582-1588.) Timothy Abbott, Director of the Nature Conservancy Berkshire Taconic Landscape Program, and a hiker familiar with the area, spoke of the changing demographics of the area and the "creeping sprawl" occurring as new residents move into the area from Albany and New York City. (T., p. 2067.) He acknowledged that, historically, mines had been part of the working landscape but that they were, in his estimation, less than 5 acres in size. (T., pp. 2063-2064.) When hiking in the area, Abbott suggested that the presence of the proposed mine would aesthetically diminish his hiking experience. (T., p.2078.) Robert Wilcox, a local resident and hiker, stated that the proposed mine would be visible from Brace Mountain, an area popular with hikers. (T., pp. 2135-2137.) Wilcox also acknowledged that mines were a part of the landscape, although a small part, in his view. (T., p. 2144.) Roger Akeley, Commissioner of Planning and Development for Dutchess County, in testifying to the development of the Rail Trail in Dutchess County, acknowledged that the Rail Trail passes through industrial areas in his county and, moreover, that sand and gravel mines are part of the working landscape. (T., pp. 1560-1563.)

Richard Hermans, Treasurer and former Chairman of the Harlem Valley Rail Trail Association, a group advocating completion of the Rail Trail, testified that the completed section of the Rail Trail through Millerton, to the south of the site, had resulted in an increase in tourism there. (T., p. 2171.) The section of the as yet uncompleted Rail Trail between Millerton and Under Mountain Road, which passes by the proposed site, was the "jewel" of the trail, he asserted. The view from the trail is important and the presence of the mine could cause "a potential visual degradation of the view from the trail." (T., p. 2172.)

Donald MacLean, Chairman of the Town's Planning Board, testified to the Town's recent adoption of a plan entitled, Scenic Resource Protection Plan, Exhibit 135, which has as a primary goal "the preservation of the Town's rural and agricultural character through the protection of its scenic resources." (Exhibit 135, p. 1.) Annexed to the Plan as Appendix A is a proposed "Scenic Corridor Overlay Zone." A provision of the Overlay Zone would prohibit mining operations that are large enough to require a permit from the Department. (Exhibit 135, Appendix A, p. 1..) Unlike the Scenic Resource Protection Plan, the Scenic Corridor Overlay Zone has not been adopted by the Ancram Town Board, nor have any of the changes to existing zoning proposed therein. Moreover, the Town Board has not imposed a moratorium on future mining operations pending possible adoption of any change in local zoning laws. (T., p. 2206.)

Enacted pursuant to the Town Law of the State of New York, and in effect since 1972, the Town of Ancram has a local zoning regulation entitled, The Zoning Ordinance of the Town of Ancram, New York, and also referred to as the Development Plan and Zoning Ordinance. As indicated in this zoning ordinance, the proposed site is located entirely within an area of the Town zoned as Rural Residential. Section III(A) of the Ordinance, entitled Permitted Uses; Conditional Uses, at page ZO-9, lists certain industrial uses and provides that "extractive operations and soil mining" are a conditional use permitted in areas zoned Rural Residential upon securing a Special Use Permit from the Zoning Board of Appeals. In addressing the issue of community character it is essential to understand that this zoning ordinance is the law of the Town of Ancram at this point in time. While the Town has adopted the Scenic Resource Protection Plan For Town of Ancram, New York, which essentially embraces the Town's vision of the character of the community, in general terms, the enactment of the "Scenic Corridor Overlay Zone" and related amendments to the Town's zoning law have not occurred, nor has the Town imposed a moratorium on future mining operations pending such legislative action. In her Interim Decision in this matter, and in reference to the Scenic Resource Protection Plan, the Commissioner observed that "such adopted local plans can serve as 'evidence of a community's desires for the area and should be consulted when evaluating the issue of community character as impacted by a project.' Matter of William E. Dailey, Inc., Interim Decision of the Commissioner, June 20, 1995; Matter of American Marine

Rail, ALJ Ruling, August 25, 2000 (adopted local plans should be afforded deference in assessing impacts of a project)."

In this case, however, while a vision of the community has been articulated and adopted by the Town Board, the local laws essential to implementing that vision have not been adopted, and it is not certain at this time that they will be so adopted as expressly stated in the proposed "Scenic Corridor Overlay Zone." Perhaps the Overlay Zone will be adopted in the future and mines meeting the Department's permit threshold will be excluded. But this is not the current state of the law in the Town of Ancram as expressed by its governing legislative body, and may never be. While these concerns could be discussed in any special permit proceeding before the Town's Zoning Board of Appeals, the consideration of community character for the purpose of SEQR should center on the facts and law as they currently exist. The facts and law, as demonstrated by this record, show that while historically, the Town of Ancram has embraced an open and rural character with farming as a primary industry, sand and gravel mining, often in the form of small operations located on individual farms, has been part of the working landscape of the area for many years. Indeed, the Department has permitted five other sand and gravel mining operations in the Town.

The mining operation proposed will be conducted in phases of no more than 10.5 acres each, comparable to other operating and permitted mines which have been part of the working landscape of the community for many years. While the mine will be visible at points from the Taconic State Park, the proposed Harlem Valley Rail Trail, and to some residences in the area, physical topography and vegetation as well as additional mitigation by the Applicant will mitigate any such impacts. Moreover, any issues as to noise impacts have been resolved by agreement between the parties. Accordingly, impacts to the character of the community have been mitigated to the maximum extent practicable and do not provide a basis to deny this application, or to impose permit conditions more stringent than those currently proposed.

Record of Compliance

As noted previously, the Department's Enforcement Directive II.24 entitled, Record of Compliance Enforcement Guidance Memorandum, establishes the policies and procedures pursuant to which the Department determines whether an Applicant is unsuitable to receive a requested permit based upon the

Applicant's prior record of compliance. As the document expressly states on its first page, however, it "does not establish a strict code of procedures or standards. Rather, the procedures and guidelines for review must be applied on a case by case basis" Pages 4 and 5 of this Guidance Memorandum list certain events which, if occurring within the preceding ten years, and involving the applicant, should be considered in evaluating a permit application including (a) conviction of a crime related to the proposed permit activity; (b) prior administrative, civil or criminal finding of an ECL violation or violation of an order issued after such a finding; (c) denial of a permit for similar activity by New York or any other state or federal authority; (d) fraud or deceit in the preparation and submission of the permit application; (e) exceeding the scope of a permitted project; and (f) a prior criminal conviction for either filing or making a false statement. Of these enumerated areas of concern, only (b) has applicability in this case as a result of the Commissioner's Order of October 5, 2000, set forth in Finding of Fact 46, above. This matter, however, was resolved to the Department's satisfaction, the penalties assessed were paid and the appropriate corrective actions taken by those responsible. Moreover, subsequent inspections by the Department indicate that the site remains in compliance with applicable Departmental regulations.

The Enforcement Guidance Memorandum states, on page 1, "The Department also recognizes that a prior violator can demonstrate that rehabilitation has occurred such that, with or without more stringent oversight, as the specific circumstances warrant, the entity can carry out activities in a responsible manner." The enforcement action resulting in the Commissioner's Order of October 5, 2000, arose in Region 3 of the Department. The Region 3 Department mining specialist familiar with the case and who made the site inspections indicating current regulatory compliance, testified at the hearing that in his view the Palumbos are competent mine operators. Moreover, the record does not indicate any action ever taken by the Department to revoke or modify a permit issued to one of the Palumbo affiliated companies. In addition, two other permits have since been issued since the October 5, 2000, Commissioner's Order. As indicated in Findings of Fact 47 and 48, above, they were issued to Danny Fortune & Co., Inc., and Palumbo Sand & Gravel Company, Inc. These permits were issued with the Department's full knowledge of the facts and history resulting in the enforcement actions delineated in Findings of Fact 43, 44, 45 and 46, above. No more stringent conditions are included in those permits, nor any increased amount in the performance bond required.

Finally, the permit conditions proposed in this matter, and drafted by Region 4 Department Staff, are clear and comprehensive and do not need to be added to

or made more stringent by virtue of the Applicant's prior involvement in Departmental enforcement proceedings. Accordingly, on this record, it is apparent that Region 4 Department Staff properly applied the standards and criteria contained in the Department's Record of Compliance Enforcement Guidance Memorandum in this matter, and in no way abused its discretion in recommending issuance of the instant permit.

CONCLUSION

The project, when operated in accordance with the Department's proposed draft permit, including revised Special Condition 25, as well as the proposed mining plan, comports with the requirements of Section 422.2(a) of 6 NYCRR inasmuch as the Applicant has proposed a method of mining which includes measures to be implemented to minimize the effect of the mining operation on the environment and on the property, health, safety and general welfare of the people of the State.

In addition, the project, when operated in accordance with the Department's proposed draft permit, including revised Special Condition 25, in accordance with 6 NYCRR 617.11(d)(5), will avoid or minimize adverse environmental impacts to the maximum extent practicable.

RECOMMENDATION

With the inclusion of Special Condition 25, I recommend that the permit for this project, as drafted by Department Staff, be issued to the Applicant.

FINAL ENVIRONMENTAL IMPACT STATEMENT

The Final Environmental Impact Statement ("FEIS") for this Project shall consist of the following:

1. Draft Environmental Impact Statement, accepted April 7, 1999.
2. Written comments provided to the Department from April 19, 1999, to July 28, 1999, in response to the Department's Notice of Complete Application and Availability of the DEIS issued on April 7, 1999.
3. Transcript of Legislative Hearing of July 20, 1999.
4. Transcript of Issues Conference of October 5 and 27, and December 16, 1999.
5. Exhibits 1 through 83 received during and subsequent to the Issues Conference but prior to the Adjudicatory Hearing.

6. Ruling on Issues and Party Status by ALJ DuBois, dated February 9, 2001.
7. Interim Decision of the Commissioner, dated June 4, 2001.
8. Transcript of the Adjudicatory Hearing held January 28, 29 and 30, and February 4, 5, 6, 12 and 13, 2003, and Exhibits 84 through 139.
9. Revisions to the mining and reclamation maps made by Roy T. Budnik, Ph.D., on or about March 20, 2003.
10. Special Permit Condition 25, as provided by Department Staff on March 28, 2003.

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