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 for a Mine in the Town of Rochester, County of Ulster, pursuant to Article 23, Title 27 of the Environmental Conservation Law, and for an Air State Facility Permit pursuant to Article 19 of the Environmental Conservation Law and 6 NYCRR Part 201-5,

-by-

METRO RECYCLING & CRUSHING, INC.,

Applicant.

DEC Application Nos. 3-5144-00065/00001
and 3-5144-00065/00004

DECISION OF THE ACTING COMMISSIONER

April 21, 2005

DECISION OF THE ACTING COMMISSIONER

Metro Recycling & Crushing, Inc. ("applicant") has applied for a State facility air permit and for a modification and renewal of its existing mined land reclamation permit for a mine in the Town of Rochester, Ulster County (the "site"). The matter was assigned to Administrative Law Judge ("ALJ") Maria E. Villa who, in her Ruling on Issues and Party Status dated August 7, 2003 ("Ruling"), determined that issues relating to traffic impacts and hydrogeology were to be adjudicated.

Applicant and staff of the Department of Environmental Conservation ("Department") appeal from those portions of the Ruling that identified issues to be adjudicated in this proceeding. For the reasons that follow, I determine that the Ruling insofar as appealed from is reversed and that no issues need be adjudicated. Accordingly, the matter is remanded to Department staff to continue processing the permit applications consistent with this decision.

Project Description

Applicant is currently permitted to operate stone crushing equipment at its existing 20.5 acre sand and gravel mine. The mine, known as "Rock Mountain Farms," is located northeast of Queens Highway between Boodle Hole Road and Roberts Drive in the Town of Rochester, and is operated pursuant to a mined land reclamation ("MLR") permit issued pursuant to article 23, title 27 ("Mined Land Reclamation Law") of the Environmental Conservation Law ("ECL").

Applicant proposes to replace its existing 150 ton per hour crusher with a portable jaw crusher with a maximum material processing capacity of 400 tons per hour ("proposed project"). Applicant indicates that it has previously used as many as two-150 ton per hour crushers at the mine at one time.

In April 2000, applicant filed an application seeking renewal of its MLR permit. In June 2000, at the direction of Department staff, applicant applied for a modification of its MLR permit. Applicant also applied for a new State facility air permit, pursuant to ECL article 19 and part 201-5 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). The proposed modification and the new air permit would allow operation of the larger capacity crusher at the existing sand and gravel mine.

SEORA Status of the Proposed Project and Draft Permits

The Department, as lead agency, conducted a review of the proposed project under the State Environmental Quality Review Act ("SEQRA") (ECL article 8; 6 NYCRR part 617). Department staff determined that the replacement of the previously used crusher with a larger portable crusher was an unlisted action, that the action would not have a significant effect on the environment, and that a draft environmental impact statement ("DEIS") would not be prepared (Notice of Determination of Non-Significance, Project No. 3-5144-00065/1, Dec. 15, 2000 ["Negative Declaration"]).

Subsequently, Department staff issued a draft MLR permit and a draft State facility air permit which, if issued, would allow applicant to use the new crusher.

Ruling

In her Ruling, the ALJ determined that the Rochester Residents Association ("RRA"), an association of residents in the vicinity of the site, raised an adjudicable issue with respect to traffic impacts. The ALJ also held that RRA raised a potentially adjudicable issue regarding hydrogeology, but that adjudication might be avoided if applicant agreed to a certain permit condition. Given these two issues, the ALJ determined that RRA was entitled to party status. The ALJ concluded that the remaining issues that RRA raised were not adjudicable.

On September 4, 2003, Department staff appealed the ALJ's rulings identifying traffic and hydrogeology as issues for adjudication. On September 5, 2003, applicant filed an appeal challenging the same rulings. RRA did not appeal any part of the ruling and did not respond to the appeals of applicant and Department staff.

Standards for Adjudication

Pursuant to 6 NYCRR 624.4(c)(1), an issue is adjudicable only if it: relates to a dispute between Department staff and the applicant over a substantial term or condition of a proposed draft permit; relates to a matter cited by Department staff as a basis to deny the proposed permit and such matter is contested by the applicant; or is proposed by a potential party and is both substantive and significant.

An issue is substantive if sufficient doubt exists about the applicant's ability to meet statutory or regulatory criteria

applicable to the proposed project, such that a reasonable person would require further inquiry (see 6 NYCRR 624.4[c][2]). In determining whether such sufficient doubt exists, the ALJ considers the issue in light of the permit application and related documents, the draft permit, the content of any petitions for party status, the record of the issues conference, and any subsequent written arguments authorized by the ALJ (see id.).

An issue is significant if it has the potential to result in the denial of a permit, a major modification to the proposed project, or the imposition of significant permit conditions in addition to those proposed in the draft permit (see 6 NYCRR 624.4[c][3]).

Pursuant to 6 NYCRR 624.4(c)(4), where, as here, Department staff has reviewed a permit application and finds that the applicant's project, as proposed or as conditioned by the draft permit, conforms to all applicable statutory and regulatory requirements, the burden of persuasion is on the party seeking intervention to demonstrate that the issue proposed is both substantive and significant. This burden of persuasion is met by an appropriate offer of proof. Such offer

> "can take the form of proposed testimony, usually that of an expert, or the identification of some defect or omission in the application. Where the proposed testimony is competent and runs counter to the Applicant's assertions an issue is raised. Where the intervenor proposes to demonstrate a defect in the application through cross-examination of the Applicant's witnesses, an intervenor must make a credible showing that such a defect is present and likely to affect permit issuance in a substantial way. In all such instances a conclusory statement without a factual foundation is not sufficient to raise issues" (Matter of Halfmoon Water Improvement Area No. 1, Decision of the Commissioner, April 2, 1982, at 2).

Offers of proof, however, are not made in a vacuum, and may be rebutted by the application, its supporting documents, the analysis of Department staff, and responses provided by applicant (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2).

As an intervening party, RRA has the burden in this proceeding of demonstrating that the issues it proposes are adjudicable.

Applicant's and Department Staff's Arguments on Appeal

Applicant and Department staff each challenge that part of the ALJ's ruling that certified the issues of traffic impacts and hydrogeology for adjudication. Applicant contends that RRA's comments on the hydrogeology issue pertain to impacts from the existing, previously approved mining activities, and not impacts associated with proposed modification to the crushing equipment, which is the subject of the modification application.

Applicant further contends that the modification sought will result only in a change in the processing equipment and not in a change in the rate of extraction. Applicant asserts that the extraction rate is determined by market demand, not the processing speed of the equipment, and that RRA failed to make a competent offer of proof to the contrary.

Applicant also argues that RRA failed to address Special Condition 9 in the draft MLR permit. This condition requires, among other things, that applicant report any suspected spill within one hour of discovery, keep a spill kit on the premises and store fuels off site. Applicant maintains that RRA failed to demonstrate how this condition will be insufficient to address RRA's concerns with respect to potential impacts to groundwater. Applicant also claims that use of a 400 ton per hour crusher will result in less fuel use and risk of spillage than would the use of two-150 ton per hour crushers.

With respect to the traffic impacts alleged by RRA, applicant contends that RRA failed to connect the alleged traffic impacts to the modification of the equipment, that no basis exists for limiting truck trips from the mine site, that the issue is not adjudicable in the absence of an objection by an agency with jurisdiction over the road in question, that RRA failed to offer any proof of its own that the Queens Highway or the site driveway are unsafe, and that it is too late to revisit prior SEQRA reviews of the project.

Department staff similarly argues that RRA's challenge is concerned with road safety arising from existing conditions and currently permitted activities, and that RRA's concerns are unrelated to impacts resulting from use of the new crusher. Moreover, Department staff points out that RRA's arguments were insufficient to call into question the negative declaration.

With respect to the hydrogeology issue, Department staff contends that the ALJ's ruling fails to explain how Special Condition 9 of the draft MLR permit is inadequate to address

RRA's concerns. Furthermore, Department staff argues that RRA's concerns about the increased risk of fuel spillage are based on mere speculation and that RRA failed to establish any connection between the new crusher and any impact on groundwater.

RRA filed no appeal or replies to the appeals of applicant or Department staff and, thus, offered no comments other than those it presented at the issues conference or in its petition for party status.

DISCUSSION

Traffic

At the issues conference, RRA argued that no proper analysis of the crusher had been undertaken either pursuant to SEQRA or the Mined Land Reclamation Law (Issues Conference Transcript ["Tr."], at 185-86). RRA contended that the use of a larger capacity crusher would result in an increase in productivity and a corresponding increase in truck traffic bearing product to market. This would, RRA claimed, impact traffic safety on Queens Highway, a town road that connects the site to State Route 209. In support of its position, RRA produced a traffic engineer to describe road conditions on Queens Highway. RRA's expert alleged various inadequacies in the road and concluded that any increased use of the road would result in safety problems.

The ALJ determined that RRA's offer of proof was sufficient to advance this issue to adjudication under SEQRA. Based on my review of the record, I respectfully disagree.

In order to raise traffic impacts as a SEQRA issue, RRA must first successfully challenge Department staff's determination not to require the preparation of a DEIS. Where, as in this case, the Department is the SEQRA lead agency and Department staff determines not to require the preparation of an environmental impact statement, inquiry at the issues conference stage is limited to whether Department staff's SEQRA determination was "irrational or otherwise affected by an error of law" (6 NYCRR 624.4[c][6][i][a]). If the ALJ determines that Department staff's decision not to require an environmental impact statement was not irrational or affected by an error of law, the SEQRA inquiry is concluded and SEQRA issues will not be subject to adjudication in Part 624 proceedings.

If the ALJ concludes that Department staff's determination was irrational or affected by an error of law, the ALJ must remand the matter to Department staff with instructions for a

redetermination (see id.). Only if Department staff determines upon remand that a DEIS is to be prepared will issues concerning the sufficiency of the DEIS or the ability of the Department to make the SEQRA findings required by 6 NYCRR 617.9 be a proper subject of Part 624 proceedings (see 6 NYCRR 624.4[c][6][i][b]).

When reviewing, pursuant to Part 624, the rationality of Department staff's determination of significance, the question is whether Department staff identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination (see, e.g., Matter of Chemical Specialities Mfrs. Assn. v Jorling, 85 NY2d 382, 396-397 [1995]; see also 6 NYCRR 617.7[b] [determination of significance for Type I and unlisted actions]). So long as Department staff's determination is reasonable and supported by the record, it will be upheld (see 85 NY2d at 396).

In its negative declaration on the proposed project, Department staff concluded that the proposed action would not result in significant transportation impacts (see Negative Declaration, at 3). Department staff also noted applicant's projection that four to five trucks per hour would exit the site and travel approximately 1.7 miles to State Route 209, and that the Town of Rochester Highway Superintendent indicated that the one bridge between State Route 209 and the mine entrance will carry any legal load that is permitted on a state highway without a special weight permit (see id.; see also Issues Conference Exhibit ["IC Exh"] 12). The Highway Superintendent, in response to a request for comments during the SEQRA review, did not voice any concerns about traffic impacts or safety (see IC Exh 12; Tr., at 202).[1]

At the issues conference, RRA did not specifically challenge Department staff's determination of non-significance as irrational or affected by an error of law, and nothing in RRA's arguments or offers of proof supports such a conclusion (see also Department Staff Appeals Brief ["Staff Brief"], September 4, 2004, at 5 [discussing RRA's failure to contradict the negative declaration]). To the contrary, Department staff identified traffic impacts as a relevant area of environmental concern, took a hard look at the issue, and provided a reasoned elaboration for its conclusion that traffic impacts associated with the mining operation will not be significant.

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[1] The draft MLR permit also establishes limits on the hours of operation of the crusher (7:30 a.m. to 5 p.m., Monday through Friday)(see IC Exh 24, at 3 [Special Condition 4]).

RRA's arguments at the issues conference do not support the conclusion that Department staff's determination was irrational. RRA's position with regard to traffic is based entirely on an assumption that truck traffic will increase as a result of the increased crusher operation capacity. A review of the record indicates the speculative and conclusory nature of RRA's comments. RRA failed to allege any factual basis for concluding that a significant increase in traffic will occur due to the proposed project or any factual basis refuting applicant's projections concerning the volume of truck traffic in the future (see, e.g., Staff's Brief, at 5-6; see also Applicant's Appeals Brief ["Applicant's Brief"], at 14 [larger capacity crusher intended to make operation more efficient and allow for less crushing time] and 17-18 [noting deficiencies in RRA observations and lack of factual support]; Tr., at 205 [no expected increase in truck traffic from site arising from the use of the higher capacity crusher]).

RRA referred to two accidents on the town road (Queens Highway). However, RRA failed in its discussion of the accidents to describe their cause or to demonstrate how they relate to existing mining operations or to impacts relating to the proposed modification (see, e.g., Tr., at 191 [RRA consultant indicating that he hadn't reviewed any specific reports on the accidents]).

Accordingly, based upon the issues conference record, it cannot be concluded that Department staff's reliance on applicant's projections for future conditions, or that Department staff's determination that impacts from truck traffic will not be significant was irrational or otherwise affected by an error of law. Thus, Department staff's determination not to require the preparation of a DEIS should not be disturbed (see 6 NYCRR 624.4[c][6][i][a]), and the issue of traffic impacts under SEQRA is not adjudicable in this proceeding.

RRA also attempted to rely on the Mined Land Reclamation Law to raise this issue. The ALJ, however, found an adjudicable issue concerning truck traffic only under SEQRA (see Ruling, at 22 [ALJ's discussion of truck traffic in light of SEQRA case law]).

Although RRA referenced general policies enunciated under the Mined Land Reclamation Law at ECL 23-2703 and 6 NYCRR 420.2(a), and regulations relating to the required mining plan (6 NYCRR 422.2[a] and 422.2[c][4]), a review of the record demonstrates that RRA failed to identify any specific permitting standard under the Mined Land Reclamation Law that would be

violated by the traffic issue that RRA sought to raise (see 6 NYCRR 624.4[c][2]) or that would serve as a basis for imposing any permit condition relating to off-site traffic. Accordingly, RRA failed to meet its burden of persuasion that a substantive and significant issue exists under the Mined Land Reclamation Law. However, as noted, the ALJ did not determine that a traffic issue was raised under the Mined Land Reclamation Law, and RRA did not file an appeal challenging that determination.

Hydrogeology

RRA claimed at the issues conference that nearby water wells were vulnerable in the event of fuel spills which, it suggested, were more likely to occur due to the use of the new crusher. In support of its position, RRA offered the opinion of Paul A. Rubin, a hydrogeologist. His concerns were focused on the geological conditions that, in his view, posed a risk to nearby wells in the event of a fuel spill. RRA urged that applicant's application to modify and renew its MLR permit should be denied on the ground that the mining project would violate the policies enunciated at ECL 23-2703 and 6 NYCRR 420.2(a), the requirements at 6 NYCRR 422.2(a) and 422.2(c)(4), and SEQRA.

In response, applicant presented Jeff Lang, a hydrogeologist, who argued that the use of a larger generator would have no impacts on hydrogeological conditions at the site. Department staff countered RRA's expert with information provided by Robert Martin, a Department Mined Land Reclamation Specialist, concerning the water table level at the site and the existence of a sand and gravel buffer between the mine floor and that water table. Department staff also argued that Special Condition 9 of the proposed permit, prohibiting the storage of fuels on the site and mandating special care in fueling to prevent any fuel spillage to the mine floor, was sufficiently protective of groundwater.

The ALJ determined that the issue of hydrogeology was potentially adjudicable. However, the ALJ ruled that adjudication could be avoided if the draft permit included, for example, a condition requiring applicant to provide potable water to adjacent landowners if the nearby wells became contaminated, "unless and until the applicant can demonstrate to the satisfaction of the Department that its mining operation is not a contributing cause" (Issues Ruling, at 20 [quoting Matter of Empire Bricks, Inc., Interim Decision, Aug. 1, 1990 (finding no adjudicable issue where applicant agreed to permit condition)]).

I disagree that RRA raised an adjudicable issue concerning

the hydrogeological impacts of applicant's project, and I find Department staff's and applicant's arguments to be persuasive. With respect to hydrogeology as an issue under SEQRA, RRA failed to adequately challenge Department staff's determination of non-significance. In the SEQRA negative declaration, Department staff examined the potential impacts on groundwater, and determined:

> "[t]he Department has found that, in general, sand and gravel mining carried out in conformance with state requirements poses little threat to groundwater quality or quantity. There will be no taking of groundwater associated with this crusher. The retention of a minimum of 5 feet of separation between the final floor of the mine and the water table will act as a filter for infiltrating rainwater. Fuel will be stored in appropriate approved containers and any spills must be reported to the Department's 24 hour Spills hotline within two hours" (Negative Declaration, at 2).[2]

Again, Department staff identified the risk of fuel spills and its impact upon groundwater as a relevant area of environmental concern, took a hard look at the issue, and provided a reasoned elaboration for its conclusion that the mining project posed little threat to groundwater quality. Nothing in RRA's arguments or offers of proof suggest that Department staff's determination was irrational or affected by an error of law. Thus, Department staff's determination not to require the preparation of a DEIS will not be disturbed, and the issue of impacts to groundwater under SEQRA is not adjudicable.

In addition to SEQRA, RRA identified certain other grounds upon which its challenge to applicant's application is premised. Specifically, RRA relied upon the regulatory requirement that the proposed mining activity comply with the regulations of the Department and any other applicable standards governing, among other things, protection of groundwater quality (see, e.g., 6 NYCRR 422.2[c][4] [referencing water quality and protection of

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[2] The current draft permit requires that any spill be reported within one hour (see IC Exh 24, at 4 [Special Condition 9]). In addition, the crusher cannot be located closer than about 600 feet from a stream which is on the property (see Negative Declaration, at 2).

waters]; see also 6 NYCRR 422.3[d][2][iii]). This argument proposes an issue concerning applicant's ability to meet the statutory or regulatory criteria applicable to the project, other than SEQRA (see 6 NYCRR 624.4[c][2]).

In evaluating whether RRA's proposed issue is substantive, the permit condition proposed by Department staff must be taken into account (see id). Special Condition 9 of the March 31, 2003 draft MLR permit expressly provides:

> "Storage of fuels is not permitted at the mine site. A fuel truck will be used during operational time frames. The truck will be secured in a locked Quonset hut on adjacent property during all non-operational periods. Fueling of on-site vehicles shall be done in a manner which prevents any spillage to the mine floor. A spill containment kit shall be kept on site. Any inadvertent spills shall be reported to the DEC Emergency Spill Hot Line (1-800-457-7362) within one hour of the spill. Permittee shall not allow any waste fuels, chemicals or lubricants to be stored at the mine site" (IC Exh 24).

Implicit in Special Condition 9 is the requirement that the spill containment kit be used in the event of a spill.

In its offer of proof, RRA's expert predicted the rapid movement of contaminants through the subsurface aquifer in the event of its contamination. However, no factual allegations were presented demonstrating that the use of a larger crusher would result in an elevated risk of spillage.[3] Generalized concerns without an adequate offer of proof are insufficient to advance an issue to adjudication (see Matter of Bonded Concrete, Inc., Interim Decision of the Commissioner, June 4, 1990, at 2 ["[a]ssertions made by prospective intervenors cannot be conclusory nor speculative but must be supported by a sound

[3] Applicant noted that, with the new crusher, there would be considerably less time spent crushing material on site than if the 150 ton per hour crusher were used (Tr., at 166), and there would be less fuel used (see Applicant's Brief, at 10). Applicant also noted that a Department study of sand and gravel mining operations in New York State found no impacts on groundwater attributable to mining activities (see Tr., at 164-65; IC Exh 23, at 18 footnote b).

factual and/or scientific foundation"]). Moreover, RRA's arguments appear to reflect its general opposition to mining at the site, rather than being specifically directed to any impacts of the proposed new crusher.

RRA failed to offer any proof sufficient to raise a reasonable doubt concerning whether Special Condition 9 governing the refueling of equipment, storage of fuels, reporting of spills, and use of spill containment equipment is inadequate to prevent spills and, thus, prevent the violation of any statutory or regulatory standards governing groundwater protection. Under these circumstances, RRA's offer of proof on hydrogeology was insufficient to raise a substantive issue requiring adjudication. Moreover, Department staff clearly demonstrated the protections that Special Condition 9 afforded (see, e.g., Staff's Brief, at 7-8; Tr., at 156-57).

Because Special Condition 9 provides a reasonable assurance that statutory and regulatory standards governing the protection of groundwater quality will be met by applicant's project (see Matter of Hyland Facility Assocs., Decision of the Commissioner, April 13, 1995, at 5), the additional condition recommended by the ALJ need not be imposed upon applicant.

Nevertheless, Special Condition 9 should be modified to expressly provide that, in the event of a spill, the spill containment kit will immediately be used. Specifically, the sentence "[a] spill containment kit shall be kept on site" in Special Condition 9 shall be revised to read as follows: "A spill containment kit shall be kept on site and shall immediately be used, as appropriate, in the event of a spill."

CONCLUSION

RRA failed to demonstrate that Department staff's SEQRA determinations regarding traffic and hydrogeology were irrational or affected by an error of law, and failed to raise any adjudicable issue concerning applicant's ability to meet statutory or regulatory criteria applicable to its proposed mining operations.

Accordingly, the ALJ's determinations regarding traffic and hydrogeology are reversed, and those issues will not be

adjudicated. Because the ALJ ruled that all other issues raised by RRA are not adjudicable, and because those rulings were not appealed, RRA's petition for party status is denied. Accordingly, Department staff is directed to complete the processing of the permit applications and to issue the permits to applicant, consistent with this decision.

For the New York State Department
of Environmental Conservation

_____/s/_____

By: Denise M. Sheehan
Acting Commissioner

Albany, New York
April 21, 2005

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