NTE Connecticut, LLC application for a Certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a 550-megawatt dual-fuel combined cycle electric generating facility and associated electrical interconnection switchyard located at 180 and 189 Lake Road, Killingly, Connecticut	:	Docket No. 470
	:	November 1, 2016

MOTION FOR STAY AND/OR TO DISMISS
THE APPLICATION OF NTE CONNECTICUT, LLC IN DOCKET NO. 470

Pursuant to the regulations of the Connecticut Siting Council ("Siting Council") at Regs., Conn. Stat. Agen. §§16-50j-1 et seq., Not Another Power Plant ("NAPP") hereby files this motion to stay the Siting Council's consideration and hearings concerning the application ("Application") of NTE Connecticut, LLC ("NTE") for a 550 MW combined cycle natural gas power plant proposed in Killingly, Connecticut (the "Plant"). Alternatively, and for the reasons set forth herein, NAPP moves to dismiss the Application.

No person may commence the construction or supplying of a "facility" that may have a substantial adverse environmental effect in the State without first obtaining a certificate of environmental compatibility and public need (a "Certificate"). General Statutes § 16-50k(a). While the term "facility" has several meanings under § 16-50i(a), the relevant meaning for purposes of the Application is "any electric generating or storage facility using any fuel . . . for furnishing electricity." There is no dispute that the Plant falls under this definition and that NTE requires a Certificate from the Siting Council.

NTE seeks a Certificate only with respect to the Generation Facility Site and the

Switchyard Site, as such terms are defined in the Application.[1] The Generation Facility Site and the Switchyard Site, however, are ineffective in generating and transmitting electricity without the natural gas fuel source.[2] On this point there can be no disagreement. To power the Plant, NTE proposes an interconnection with the Algonquin Gas Transmission ("AGT") main line located 2.8 miles from the Plant in Pomfret, Connecticut. The natural gas pipeline path that NTE has chosen will utilize an existing Eversource right-of-way (the "ROW") located to the west of the Generating Facility Site property line. Within this 2.8-mile long and 50-foot wide ROW, Eversource[3] must remove, replace or upgrade the existing pipeline so that a much larger pipeline of "at least 14 inches with a pressure of 700 psig" can be installed to provide the sole natural gas fuel source for the Plant. (App. § 8.1.)

The Application summarizes the work associated with the removal, upgrade and replacement of the natural gas pipeline. The pipeline traverses many protected and regulated natural resources:

> From the [point of interconnection] with the AGT pipeline, the existing pipeline heads southeast beneath a wetland area for approximately 2,000 feet, then continues southeast for approximately 600 feet abutting an open field before crossing Holmes Road and the Airline North State Park Trail. The pipeline continues southeast for approximately 3,000 feet through forested and protected open space, then heads south, paralleling Durkee Brook for approximately 3,000 feet. The pipeline continues southeast for approximately 2,500 feet, passing west of Bruce's Pond and crossing River Road. The pipeline continues in a southeasterly direction, crossing the Quinebaug River into the Town of Killingly.

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[1] The Generating Facility Site is the 63 acre parcel of land north and west of Lake Road that will support the electric generating portion of the Plant, and the Switchyard Site is a 10 acre parcel located immediately across the street from the Generating Facility Site that will support the utility switchyard portion of the Plant. (Application ("App.") § 1.1.1.)

[2] In order to operate, NTE needs a maximum of 3.9 million cubic feet per hour of natural gas at a minimum pressure of 550 pounds per square inch gauge ("psig") when operating at 100% capacity and approximately 650 psig at the Site Boundary. (App. § 2.5.)

[3] The Application suggests, but does not confirm, that Eversource will eventually submit an application to the Siting Council for approval of the natural gas pipeline modifications and replacements that are necessary in order to operate the Plant as proposed in the Application.

> South of the Quinebaug River, the pipeline continues approximately 2,000 feet through forested lands until it enters the southern edge of Lake Road. . . . The approximate length of the existing pipeline is 2.8 miles."

(App. § 8.1.1.) Figure 8-1 of the Application provides a general map of the pipeline and is attached hereto as Exhibit A.

Without any supporting reports, studies, data or information, NTE claims that the environmental impacts associated with this significant pipeline work are minimal, but at the same time NTE cautiously hedges this claim: "impacts to the community and environment are expected to be minimal" (App. § 8.1.3); "will not require an increase in the width of the existing ROW, based on preliminary information provided by Eversource" (App. § 8.1.2); "it is not anticipated that blasting or significant earthwork issues will be required" (App. § 8.1.4); "It is anticipated that the replacement pipeline will cross the same resource areas crossed by the existing pipeline" (App. § 8.1.5); and "Construction of the replacement pipeline is not anticipated to adversely affect the existing groundwater resources or regional water supply" (App. § 8.1.7) (emphases supplied).

NTE should hedge its claim that the new pipeline will create no environmental harm because the new pipeline must cross, go through, or abut large wetland areas ("The existing pipeline traverses several wetland areas" (App. § 8.1.5)); open space and protected land held by the Wyndham Land Trust; the Bafflin Sanctuary owned by the Connecticut Audubon Society; the Airline North State Park Trail; a large undeveloped parcel owned by the Pomfret Rod and Gun Club; and the Quinebaug River. (App. § 8.1.8.) Additionally, in order to construct the necessary pipeline "some clearing may be necessary to accommodate the replacement lateral and to provide sufficient workspace for construction." (App. § 8.1.5.) In other words, some temporary expansion of the ROW is required in order to perform the necessary construction

work. Based upon the language in the Application, it is apparent that NTE has not obtained firm commitments to the design and construction of the new pipeline, and it certainly has conducted no assessment of the environmental impacts of such work.

NTE will no doubt argue that the pipeline is a separate application to be submitted by a third party, Eversource, and the Siting Council can act on the current Application and approve the gas pipeline application at a later time. However, as a matter of law, such division of applications which avoids comprehensive simultaneous review of a complete facility is referred to as "impermissible segmentation" and is "universally criticized." See In the matter of Amenia Sand and Gravel, Inc., Second Interim Decision, NYDEC (Nov. 22, 2000) (copy attached hereto). The agencies and courts that have considered "impermissible segmentation" generally agree that consideration of only a portion or segment of an action is contrary to the intent of agency environmental review. Id.

For example, in Delaware Riverkeeper Network v. FERC, the United States Court of Appeals for the District of Columbia Circuit considered FERC's action in issuing a certificate of public convenience and necessity for the construction and operation of the Northeast Upgrade Project by Tennessee Gas Pipeline Company, L.L.C. ("Tennessee Gas"). 753 F.3d 1304 (D.C. Cir. 2014). The petitioners in that case appealed FERC's approval on the grounds that FERC did not consider, as part of its environmental review of the Northeast Upgrade Project, three other connected, contemporaneous, closely-related and interdependent Tennessee Gas pipeline projects.

In conjunction with its review, FERC is required to satisfy the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 – 4370h, by identifying and evaluating the environmental impacts of actions that require a certification of public convenience and necessity.

In Delaware Riverkeeper, FERC conducted a NEPA review of the Northeast Upgrade Project and recommended a Finding of No Significant Impact. In issuing this finding, FERC did not consider the environmental impact of three other Tennessee Gas upgrade projects on the exact same line, even though one upgrade was under construction, and the other two were pending before FERC. Delaware Riverkeeper, 753 F.3d at 1308. Under the NEPA regulations, FERC is required to include "connected actions," "cumulative actions," and "similar actions" in a NEPA reivew. 40 C.F.R. §1508.25(a). The Appellate Court found that the four pipeline projects were "connected actions" because there is a "clear physical, functional, and temporal nexus between the projects." Delaware Riverkeeper, 753 F.3d at 1308. As a result, FERC impermissibly segmented the environmental review in violation of NEPA.

The Second Circuit similarly discredits segmentation as "an attempt to circumvent NEPA by breaking up one project into smaller projects and not studying the overall impacts of the single overall project." Stewart Park & Reserve Coalition v. Slater, 352 F.3d 545, 559 (2nd Cir. 2003); see also, Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988) ("Segmentation is to be avoided in order to insure that interrelated projects, the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant action."). The standard established by the Second Circuit is that a project is improperly segmented "if the segmented project has no independent utility, no life of its own, or is simply illogical when viewed in isolation." Stewart Park, 352 F.3d at 559 (citing Hudson River Sloop Clearwater, Inc., v. Dep't of Navy, 836 F.2d 760, 763-64 (2d Cir. 1988)).

The Connecticut trial courts have also followed federal case law concerning impermissible segmentation finding in City of Norwalk v. The Connecticut Siting Council et al., that

> "[t]he courts have held that 'impermissible segmentation' occurs where there are two proposed actions and 'the proposed component action has little or no independent utility and its completion may force the larger or related project to go forward notwithstanding the environmental consequences . . . Courts have also required that environmental effects of multiple projects be analyzed together when those projects will have a cumulative effect on a fiven region . . . Finally, multiple stages of a development must be analuzed together when the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." 2004 WL 2361540 (2004).

And in City of New Haven v. Connecticut Siting Council et al. the court applied the "independent utility" test in a claim that the Siting Council had impermissibly segmented review of an application. 2002 WL 847970 (2002).

Initially it must be noted that the definition of "facility" in General Statutes §16-50i(a)(3) means an electric generating facility "using any fuel." On its face, as presented to the Siting Council, the NTE Application is for a generating facility with no fuel (except for the 1,000,000 gallon diesel tanks to be used only in emergency circumstances). Thus by definition NTE has not presented the Siting Council with an Application for a "facility" as defined by the statutes.

Next, and as noted previously, there is no operating NTE Generation facility or Switchyard unless there is a source of natural gas that has been modified and installed as set forth in Sec. 8 of the Application. The natural gas is the life blood of NTE's proposed power plant and the Generation facility and Switchyard have no "independent utility" or life of their own without it. Thus, the application to expand, modify and replace the 2.8 miles of natural gas pipeline must be considered as part of the Application that is now before the Siting Council.

While the Siting Council does not have a regulation similar to 40 C.F.R. §1508.25(a), the absence of such a regulation is not controlling because the NEPA regulation does nothing more than ensure that the legislative intent of NEPA, as explained by the courts, is fulfilled, which is to ensure "fully informed and well-considered decision[s]" by federal agencies. Vt. Yankee

Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration." Delaware Riverkeeper, 753 F.3d at 1313. The justification for this rule is to prevent agencies from dividing one project into multiple individual actions each of which might have an insignificant environmental impact, but collectively have a substantial impact. Id. at 1314 (citing NRDC v. Hodel, 865 F.2d 288, 297 (D.C. Cir. 1988)).

In enacting the Public Utility Environmental Standards Act ("PUESA") , General Statutes §§ 16-50g et seq., the legislature found that "power generating plants and transmission lines for electricity and fuels, . . . have had a significant impact on the environment and ecology of the state of Connecticut; and that continued operation and development of such power plants . . . if not properly planned and controlled, could adversely affect the quality of the environment and the ecological, scenic, historic and recreational values of the state." General Statutes § 16-50g. A purpose of PUESA is "to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria." Id. (emphasis added). The legislature mandated that the Siting Council apply these principles when performing its tasks and thus the Siting Council is compelled under both CEPA and PUESA to consider all connected, cumulative and similar actions as part of its review of the Application.

The natural gas pipeline is physically and functionally part of the Plant. The Generating Facility and Switchyard have no independent utility without the construction of the natural gas pipeline. It would be a derogation of its duties for the Siting Council to continue with the hearing on the Application, conditioning ultimate approval on the approval of a subsequent application

by Eversource. The purpose of the impermissible segmentation doctrine is to avoid piecemeal reviews of projects. The Siting Council is obligated to review all of the environmental impacts of the Plant, including all of its related parts (such as the pipeline), as part of one simultaneous agency action.

There is an additional, resource-driven reason for requiring review of the pipeline as part of the Application. The Siting Council could expend substantial resources, as would parties, intervenors and the public, addressing the Generating Facility Site and the Switchyard Site, only to have any decision rendered moot by circumstances related to the pipeline. For example, Eversource could alter the specifications for the pipeline in a manner that alters the operational needs of the Plant. Or, the expected costs of the pipeline construction could substantially increase, which would have an effect on the economic viability of the Project. Or, the Siting Council in its approval of the pipeline could issue conditions or restrictions that make the Plant less productive.

The construction of the pipeline in the manner anticipated and proposed by NTE in the Application is completely and fully connected to the viability of the Plant. In the Application, NTE makes numerous assumptions concerning activities by a third party, Eversource, with respect to the construction of that pipeline. There is no assurance that those assumptions will prove to be true unless the whole facility is considered together as a whole.

WHEREFORE, the hearing on the Application should be dismissed, or stayed until such time that the Siting Council can consider it along with an application from Eversource regarding the pipeline.

NOT ANOTHER POWER PLANT

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CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by e-mail to the service list members on the 1st day of November, 2016, as follows:

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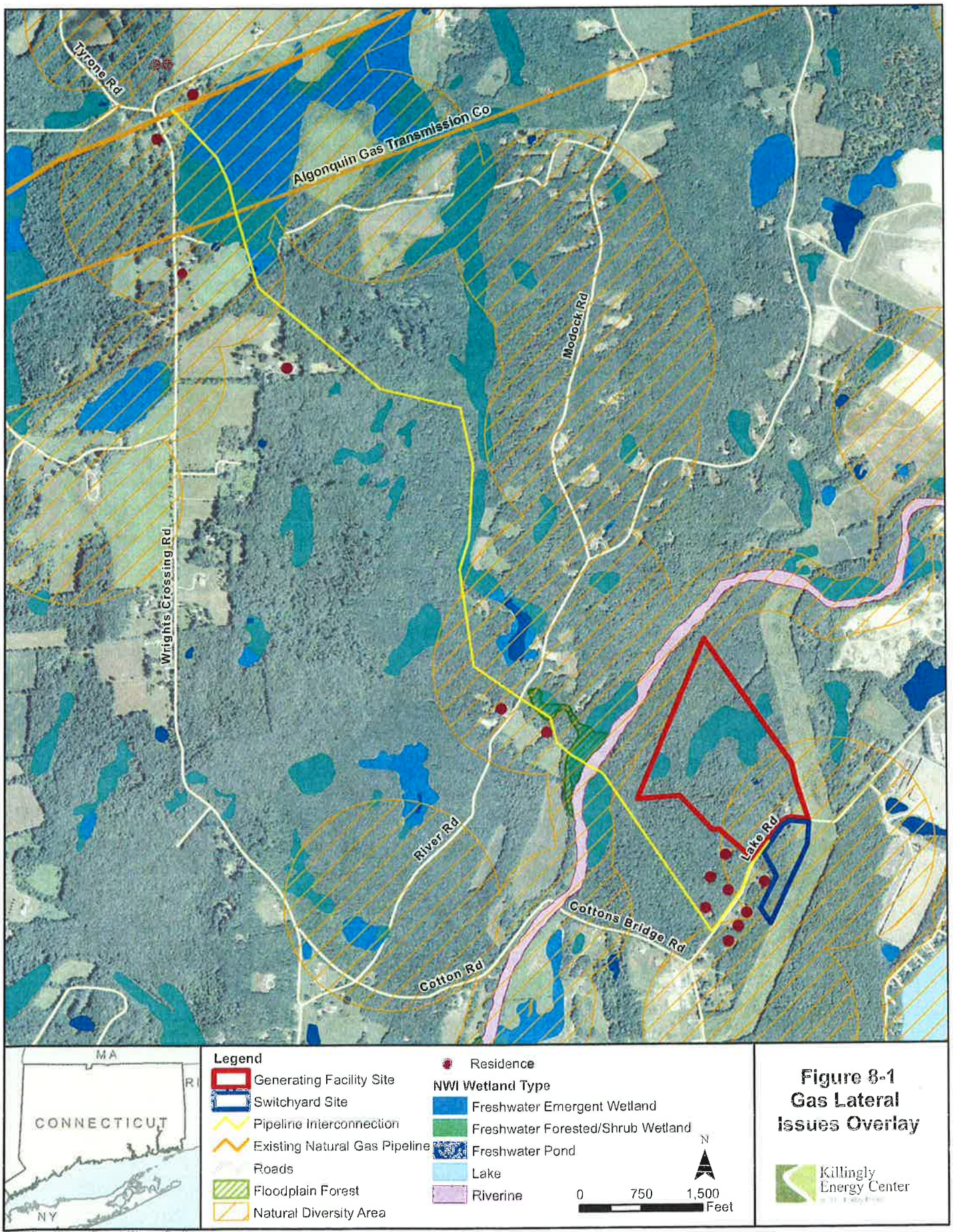
Exhibit A



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NEW YORK STATE OF OPPORTUNITY | Department of Environmental Conservation

Amenia Sand and Gravel, Inc. - Second Interim Decision, November 22, 2000

Second Interim Decision, November 22, 2000

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

50 Wolf Road
Albany, New York 12233-1010

In the Matter

- of the -

Application of

AMENIA SAND AND GRAVEL, INC.
for permits to operatea hard rock mine/quarry
in the Town of Amenia, Dutchess County
pursuant to the Environmental Conservation Law and Title 6
of the Official Compilation of Codes, Rules and Regulations of the State of New York

DEC Project No. 3-1320-00030/2

SECOND INTERIM DECISION

November 22, 2000

SECOND INTERIM DECISION

This second interim decision addresses the appeals filed pursuant to 6 NYCRR 624.8(d)(2) from portions of the August 10, 2000 supplemental issues rulings of Administrative Law Judge ("ALJ") Robert P. O'Connor. Appeals were filed on September 1, 2000 and responses were filed on September 12, 2000. Responsibility for decision of this appeal has been delegated to the Deputy Commissioner Johnson because Commissioner Cahill was the Department's General Counsel when the initial issues conference took place.

Background

Amenia Sand and Gravel ("AS&G" or "Applicant") proposes to quarry schist and marble on lands adjacent to Dutchess County Route 3 near South Amenia in the Town of Amenia ("Town"). AS&G currently mines unconsolidated sand and gravel at the site. AS&G has applied to the Department for a new mined land reclamation and air emission permits to authorize the quarrying of rock. During the review of the quarry application, AS&G submitted an application to expand its sand and gravel mining operation. The primary focus of this interim decision is on the relationship of the sand and gravel mine expansion to the proposed new rock quarry.

A draft environmental impact statement ("DEIS") on the proposed quarry operation was circulated and a public hearing was held in May, 1996. Following an issues conference, on June 16, 1997 the ALJ ruled there were potentially adjudicable issues regarding visual impacts, traffic, air quality and water issues. He also requested complementary information regarding traffic, air quality, and visual areas to bolster the DEIS but not to formally cause the DEIS to be supplemented ("SDEIS"). The ALJ also rejected certain issues proffered by the Oblong Valley Association ("OVA") for adjudication. OVA appealed. Applicant and Staff did not appeal. Applicant submitted a response to OVA's appeal.

On August 27, 1997, the interim decision of the Deputy Commissioner affirmed the ALJ's ruling in all respects. Briefly, the interim decision held; 1) a SDEIS was not required and the ALJ's request for additional information was reasonable, 2)zoning, cumulative impacts, baseline traffic data and alternatives were either adequately addressed in the DEIS or would be addressed through the continuing proceeding, 3) there are no "record of compliance" issues, and 4) issues regarding noise, hydrology and reclamation will not be adjudicated.

The complementary information requested by the ALJ in his earlier ruling was circulated by the Applicant in July, 1999. Comments were filed with the ALJ by the parties regarding that information. The ALJ then rendered his August 10, 2000 supplemental issues ruling ("Sup. Ruling"). The ALJ concluded that visual, air and water impacts would be adjudicated but that traffic issues would not and that the project was not segmented contrary to the State Environmental Quality Review Act ("SEQRA"). OVA appealed the Sup. Ruling. Applicant's responses to OVA's appeal argued in support the ALJ's ruling, finding traffic issues were not adjudicable and arguing the project was not segmented. Applicant did not appeal the ALJ's ruling to adjudicate issues of air quality, visual and water impacts.

Staff did not file a response to the OVA appeal. However, Staff filed an August 31, 2000 letter addressed to the ALJ, but not to the Commissioner, commenting on the ALJ's ruling. A review of that letter in the ALJ's file indicates Staff disagreement with certain substantive aspects of his ruling. OVA, by letter of September 15, 2000 to the Commissioner, responded to Staff's August 31, 2000 letter. Staff's letter to the ALJ was improper and should have been addressed to the Commissioner. Accordingly, Staff's letter will be considered an appeal and OVA's response to it will be considered as well. No other party sought to respond further.

SEQRA Segmentation

By way of introduction, the following quote puts the SEQRA segmentation issue in perspective:

Segmentation is universally criticized, but no two people agree on precisely what it is. In many controversial projects there are accusations of segmented review, and not infrequently this charge is justified. The difficulty arises in distinguishing between that segmentation which is required by the exigencies of project review and approval, as opposed to that which distorts the review process as to require judicial invalidation. *See*, *Environmental Impact Review in New York*, Gerrard, Ruzow and Weinberg, Vol. 2, Section 5.02. ("Gerrard").

Considering only a part or segment of an action is contrary to the intent of SEQRA. *See*, ECL § 8-0101 et seq. Segmentation is defined as the division of the environmental review of an action such that various activities or stages are addressed as though they are unrelated activities, needing individual determinations of significance. *See*, 6 NYCRR 617.2(ag); 617.3(g)(1).

Given that ECL Article 8 requires a complete environmental review, a heightened review is necessary in instances where seemingly related activities within the mine site are addressed individually.

The ALJ held the rock quarry project was *not* segmented contrary to SEQRA, because the quarry operation was 'functionally independent' of the planned sand and gravel mine expansion to be located on AS&G property within the mine site. This area, known as 'Bank E', will be an expansion of the Applicant's existing sand and gravel mining operation.

Staff issued a Notice of Incomplete Application (the "Notice") on June 3, 1999 for the Bank E permit application. Apparently no SEQRA determination of significance was made on the Bank E project. In that Notice Staff requires an AS&G response to questions regarding segmentation raised by Staff with reference to the SEQRA Handbook, to aid Staff in deciding whether the project is segmented contrary to SEQRA. AS&G had not responded to Staff's questions prior to the ALJ's August 2000 Sup. Ruling. AS&G, however, in its response to OVA's appeal, addresses the questions. *See*, AS&G response p. 11.

OVA takes the position on appeal that: since the Applicant currently has an incomplete application pending before the Department for expansion of the Bank E sand and gravel mining operation, it would be impermissible segmentation of the rock quarry permit application environmental review if the Department did not require the applicant to supplement its rock quarry DEIS to address the Bank E application.[(1)] *See*, *also* OVA September 15, 2000 letter responding to Staff's 'acceptably segmented' position.

AS&G states that the two pending applications are 'functionally independent' of one another, linked only by the Applicant's desire to have a steady source of materials. Further, the Applicant contends its Bank E operations will cease once the quarry becomes operational.

Discussion

As noted by Gerrard, supra, and others, distinguishing between permissible and impermissible segmentation can be difficult. Impermissible segmentation may occur if certain activities are wrongly excluded from the definition of the project. *See*, Gerrard, § 5.02[1]. Permissible segmentation requires that related project actions be identified and discussed to the fullest extent possible. 6 NYCRR 617.3(g)(1). Determining whether a project is segmented involves a "...judgment based on weighing case specific factors." *See*, *Matter of Dutchess Quarry & Supply Co., Inc.* Decision, August 13, 1992.

The proposed thirteen acre sand and gravel mining expansion operation is before the Region 3 Staff but the permit application is incomplete. Completing this permit application is within the control of the Applicant. Regardless whether the application is administratively incomplete, the proposed sand and gravel expansion must be evaluated in the present rock quarry application review to decide whether the Bank E mining expansion was wrongly excluded from the DEIS and is impermissibly segmented contrary to SEQRA. The answer turns on the facts known about the proposed sand and gravel expansion and the quarry operation.

The pending Bank E sand and gravel mining operation is a stop-gap measure to ensure the Applicant has sufficient mineral resources to keep operating, pending a Department's decision on the permit application for the hard rock quarry. If approved by DEC, AS&G's rock quarry will replace the currently permitted sand and gravel operation. AS&G response p. 13. The Bank E sand and gravel operation will also cease once the quarry is developed. AS&G response, Exhibit C par. 3, p. 2. Sup. Ruling p. 3. *See also*, AS&G response pp. 10 and 11. AS&G estimates the life of the expansion area to be roughly 30 months. About 125,000 tons will be mined during that time. The processing of AS&G sand and gravel occurs off-site at the Applicant's processing facility in Leedsville.

Therefore, under the facts presented thus far, the rock quarry project and the Bank E operations are 'functionally independent' of one another. The purpose of the Bank E expansion is to have a ready source of materials available in the interim until a decision on the quarry is made. Contrary to the assertions of OVA, I conclude there is no larger 'plan' which would be a factor in triggering segmentation. The Applicant conceived the Bank E project as a stop-gap project of limited duration; Bank E allows the business to operate until a decision is made on the rock quarry application.

Accordingly, it is reasonable to conclude there is no long range plan of which the expansion is part, or will be undertaken consistent with any plan, and is not dependent on such plan. Bank E can be reviewed on its own. A "...segmented review is permissible where the lead agency believes that is it warranted under the circumstances...." *Concerned Citizens v. Zagata*, 672 N.Y.S.2d 956 (3rd Dep't 1998), *lv. to appeal denied*, 92 N.Y.2d 808, 678 N.Y.S.2d 594 (1998). (Staff properly conducted a segmented review for a transfer station project as the project was wholly independent of a materials recovery facility and incinerator located on the same site.)

However, it is premature to decide the segmentation analysis based on this record. Staff, while voicing an opinion that the project is 'acceptably segmented', has yet to complete the review protocol specified in 6 NYCRR 617.3(g)(1), to wit:

If a lead agency believes that circumstances warrant a segmented review, it must clearly state in its determination of significance, and any subsequent EIS, the supporting reasons and must demonstrate that such review is clearly no less protective of the environment. Related actions should be identified and discussed to the fullest extent possible.

I am mindful of the ALJ's Sup. Ruling based on the record before him. But on appeal the issue of permissible segmentation was raised for the first time by Staff. The elements necessary to complete a permissible segmentation review are missing. I must allow record development on this issue to ensure consistency with SEQRA and a prudent environmental review. All aspects of the determination of significance for Bank E must be completed prior to addressing the segmentation issue. Until this protocol is satisfied there can be no decision whether segmentation is impermissible, as OVA asserts.

OVA points out that conflicting information exists in the record to suggest the simultaneous mining operation of both sites. OVA Mem of Law p. 6. AS&G notes OVA's misstatements of fact. AS&G response p. 3. However, any confusion on this issue is resolved by a permit condition in both draft permits to ensure the two operations do not operate simultaneously. Staff is directed to impose a special permit condition to this effect in each draft permit, provided Staff's protocol analysis concludes this is justifiable segmentation.

Traffic Impacts

In his initial June 16, 1997 Ruling the ALJ required additional complementary information on traffic issues. This was subsequently completed by the Applicant's consulting engineers who prepared a traffic impact study and circulated it to the parties for comment. Thereafter, the ALJ found that the cessation of mining operations at Bank E and the consecutive commencement of the quarry operations would not increase traffic on local roads and thus no adjudicable traffic issues were raised.

OVA's appeal seeks reversal of the ALJ's ruling on traffic. They first intimate the ALJ applied the wrong standard to raise an issue, suggesting its offers of proof are sufficient to cause reasonable minds to inquire further. OVA Mem of Law p. 31. OVA then follows with a series of assertions to show why traffic issues should be adjudicated. OVA Mem of Law pp. 31-46.

OVA's assertions do not persuade me to reverse the ALJ's ruling. Judgment about the strength of the intervenor's offer of proof are made in the context of the application, its supporting documents, the analysis of Staff, and any responses provided by the applicant. *See*, *Matter of Bonded Concrete*, Interim Decision, June 4, 1990, p. 2 The ALJ is the primary judge of whether a fact issue exists and substantial deference is given the ALJ's judgment. *See*, *Matter of Waste Management of New York*, Interim Decision, March 10, 1995, p. 1 (citing *Matter of Hyland Facility Associates*, Interim Decision, August 20, 1992). I find the ALJ used the proper standard of review and did not abuse his discretion.

With respect to OVA's comments on the alleged deficiencies regarding the traffic impact study, the Applicant's consulting engineers have responded. The ALJ methodically reviewed the traffic impact study and all comments and responses. He determined the responses sufficiently answered all of OVA's criticisms to satisfy SEQRA. Concurrent mining operations will not occur. The traffic flow will be acceptable. Local highway authorities are responsible for ensuring the service life of the highway. *See*, AS&G response pp. 13 - 16. Accordingly, I affirm the ALJ's ruling on traffic.

Commercial Driveways

The ALJ ruled that the DEC mining permit must be conditioned to require the Applicant satisfy the County's commercial driveway standards where the Applicant's operations have entrances onto County roads. Sup. Ruling p. 11. The County did not seek to intervene in this proceeding on traffic or associated issues. Nonetheless, they supplied comment to the ALJ on highway loading and driveway concerns. The County suggests Applicant's driveways need to meet commercial standards. Staff disagrees with the ALJ's inclusion of a special permit condition that Staff believes is "...outside of our authority and thus our enforcement capabilities". Instead, they would rely on the general permit conditions that a permittee must obtain other requisite permits or approvals as necessary and obey other applicable laws and regulations.

In view of the County's limited participation in this review, providing comments but not intervening in these proceedings, it is appropriate to adopt the Staff's recommendation regarding commercial entrances. *Compare*, *Matter of William E. Dailey, Inc.*, Interim Decision, June 20, 1995. "...the Town, which is the acknowledged agency with authority over the road, has offered expert proof with respect to the inadequacy of Farmers Inn Road that is at variance with the Applicant's analysis." *Id* p. 5. (The Town was a party to that proceeding.) Given that the County is not a party to this proceeding, the general permit condition will suffice.

Miscellaneous

By letter of September 13, 2000, Staff wrote the Commissioner that new information concerning the Applicant's rock quarry recently became available. Tremolite is a mineral that can be found in a asbestiform type or non-asbestiform type in quarries. Staff made a site visit and opined that the quarry contains a non-asbestiform type of tremolite. However, Staff cautions that the record should reflect there is a potential for asbestiform to be at the quarry based on Staff's limited site investigation.

By letter of September 14, 2000, Applicant responds, having first learned of the Staff's new information the previous day, that it would meet with Staff to pursue the tremolite concern. Applicant further states that the results of the meeting can be formalized pursuant to the regulatory provisions in 6 NYCRR 621.15(a), i.e., a request to AS&G to provide further information on the subject. Thereafter, whatever additional information is generated can be circulated to the parties and a motion to re-open the issues conference before the ALJ can made. According to the Applicant, until there is a ruling that tremolite is a potential issue, it should not be considered further by the Commissioner.

Staff's letter to the Commissioner that there may be a potential tremolite related issue, is noted. As AS&G correctly points out, the matter is properly before the Staff at this juncture. Any future dispute regarding tremolite is properly before the ALJ upon any party invoking proper motion procedures.

The application is remanded to the ALJ for further proceedings. Staff will complete the segmentation analysis consistent with the direction provided in this interim decision.

For the New York State Department
of Environmental Conservation

/s/
By: Carl Johnson, Deputy Commissioner

Dated: Albany, New York
November 22, 2000

1. The issue of whether the Applicant should be required to file a Supplemental DEIS in this proceeding was raised and was rejected by the ALJ in his first issues ruling and was affirmed by the Deputy Commissioner. *Amenia Sand and Gravel, Inc.*, Interim Decision, August 27, 1997. To the extent OVA raises this issue again in this appeal, it is *res judicata* based upon the previously addressed arguments.