

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Regional Director, Region 4
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November 26, 2019

The Honorable Richard J. Mooney
Rensselaer City Mayors Office
62 Washington Street
Rensselaer, New York 12144

Re: Rensselaer Resource Recovery LLC
"BioHiTech" Project
36 Riverside Drive, Rensselaer, NY

Dear Mayor Mooney:

In March 2018, Rensselaer Resource Recovery LLC (the "Applicant") applied to the City of Rensselaer Planning Commission (the "City of Rensselaer") for site plan approval and a special use permit for the proposed construction and operation of a facility for the processing of municipal solid waste to a solid recovered fuel (collectively, the "Project") to be located at the BASF brownfield site at 36 Riverside Avenue (the "Project Site"), immediately adjacent to the Hudson River. The Project is commonly referred to as "BioHiTech." The City of Rensselaer was lead agency during the local permit process for purposes of the State Environment Quality Review Act ("SEQRA"), which resulted in the City of Rensselaer issuing a negative declaration, approving the site plan, and issuing a special use permit for the Project.

The New York State Department of Environmental Conservation ("DEC") has grave concerns regarding what appears from a review of the SEQRA record for this Project to be a wrongfully abbreviated environmental impact assessment that the City of Rensselaer undertook, including the City of Rensselaer's failure to conduct proper coordinated review with DEC and the City of Rensselaer's determination that the Project will not have any potential significant adverse environmental impacts on the local community, including a nearby Environmental Justice community, notwithstanding the numerous impacts identified in the SEQRA record. For the reasons set forth below, DEC urges the City of Rensselaer—as the SEQRA lead agency for the Project—to reopen the environmental impact assessment process under SEQRA to the fullest extent provided by applicable law in order to address the myriad deficiencies it caused during the local permitting and approval process.

A. Lack of Coordinated Review with DEC

The City of Rensselaer designated the Project as a Type I action for SEQRA purposes because it involves the physical disturbance of 10 or more acres. Type I actions are presumed to have at least one potential significant adverse environmental impact,



Department of
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Conservation

and therefore determinations of non-significance for Type I actions require an elevated burden of proof.

Pursuant to DEC regulation at 6 NYCRR 617.6(b)(3)(i), when an agency proposes to approve a Type I action, the agency must transmit Part 1 of the EAF to all involved agencies and notify them that lead agency must be agreed upon within 30 calendar days. See *Merson v. McNally*, 90 N.Y.2d 742, 753 (1997) ("The environmental review process was not meant to be a bilateral negotiation between a developer and lead agency but, rather, an open process that also involves other interested agencies and the public.").

The City of Rensselaer held a regular meeting on April 9, 2018, during which it approved a motion to declare its intention to be SEQRA lead agency. While the City of Rensselaer has suggested that it prepared a Notice of Lead Agency, dated April 11, 2018 (the "Lead Agency Notice") and mailed it to the DEC Regional Permit Administrator, 1130 North Westcott Road, Schenectady, NY 12306, DEC did not actually receive the Lead Agency Notice until a copy was sent by e-mail to the Deputy Permit Administrator for DEC Region 4 on May 14, 2018 at 11:16 A.M., together with an unsigned and undated EAF. DEC has no record of receiving the Lead Agency Notice by mail at any time. If the City of Rensselaer has such a mailing record, we request a copy.

Seven hours after DEC received the Lead Agency Notice by e-mail, the City of Rensselaer held a regular meeting, beginning at 6:30 P.M., during which the City of Rensselaer approved a motion to designate itself as SEQRA lead agency. On such short notice, DEC was only able to provide a jurisdictional response describing the potential permits required from DEC for the Project.

DEC has come to learn that there were multiple versions of the Project's Environmental Assessment Form ("EAF") during the City of Rensselaer's local approval process. An unsigned version was provided to DEC for the first time on May 14, 2018. According to an initial completeness review letter from the City of Rensselaer's consultant, Greenman Pedersen Inc. ("GPI"), dated July 16, 2018, there was an original version of the EAF dated March 12, 2018 and additional unsigned versions of the EAF dated April 9, 2018, May 7, 2018, and June 6, 2018. According to GPI, "*the May 2018 version of the Full EAF was utilized to request Lead Agency status for the City of Rensselaer Planning Board*" and "*the June 2018 version of the form has been amended and will need to be reviewed by the Planning Board and the Involved Agencies highlighting the changes made to the document.*" The Applicant submitted to the City of Rensselaer a final EAF, dated August 8, 2018 (the "Final EAF").

DEC has noted certain differences among the Initial EAF in March 2018, the interim EAF in May 2018 that the City of Rensselaer contends was provided to DEC with the Lead Agency Notice, and the Final EAF in August 2018, as summarized in the following table:

Item	Initial EAF (March 2018)	Interim EAF (May 2018)	Final EAF (August 2018)
D.2.j	No substantial increase in traffic above present levels	Substantial increase in traffic above present levels (15 truck trips daily - morning and evening)	Substantial increase in traffic above present levels (15 truck trips daily - morning and evening)
D.2.o	No potential to produce odors for more than one hour per day	No potential to produce odors for more than one hour per day	Yes. The facility will have active odor control via negative pressure and biofilter
D.2.r	---	---	"Approximately 20% of the 150,000-ton throughput is estimated to be a non-SRF residual that must be disposed of at a permitted facility"
D.2.s	Anticipated rate of disposal/processing of waste: 12.5 tons per month	Anticipated rate of disposal/processing of waste: 12,500 tons per month	Anticipated rate of disposal/processing of waste: 12,500 tons per month
E.h.iv	---	---	"Facility construction will disturb portions of the composite cover system. Soil will need to be managed and the disturbed cover restored."
E.h.v	---	Site subject to a Site Management Plan	Project site institutional controls include use limitations on industrial/commercial use, groundwater use, vapor mitigation.
E.2.e	Drainage status of site soils: 100% Well Drained	Drainage status of site soils: 100% Well Drained	Drainage status of site soils: 100% Moderately Well Drained

DEC has no record of ever receiving a signed EAF or a supplemental notice of any changes to the EAF prior to the City of Rensselaer's issuance of the negative declaration on August 27, 2018. Accordingly, the City of Rensselaer failed to conduct appropriate coordinated review with DEC during the environmental impact assessment process.

B. Improper Issuance of Conditioned Negative Declaration for Type I Action

An agency cannot issue a conditioned negative declaration for a Type I action. Where an EAF indicates "at least one potentially negative impact and state[s] that all potentially negative impacts have been substantially mitigated or eliminated by the conditions imposed in the declaration," the declaration may constitute an impermissible conditioned negative declaration in a Type I action. *Merson v. McNally*, 90 N.Y.2d 742 (1997); *Ferrari v. Town of Penfield Planning Bd.*, 181 A.D.2d 149 (1992); *Matter of Shawangunk Mountain Environmental Assn. v. Planning Bd. of Town of Gardiner*, 157 A.D.2d 273 (1990).

Part 2 of the EAF prepared by the City of Rensselaer identifies the following "moderate to large impacts" of the Project:

1. The proposed action may result in routine odors for more than one hour per day.
2. There is a completed emergency spill remediation, or a completed environmental site remediation on, or adjacent to, the site of the proposed action.
3. The site of the action is subject to an institutional control limiting the use of the property (e.g., easement or deed restriction).
4. The proposed action may affect institutional control measures that were put in place to ensure that the site remains protective of the environment and human health.
5. The proposed action may result in the unearthing of solid or hazardous waste.
6. The proposed action may result in excavation or other disturbance within 2,000 feet of a site used for the disposal of solid or hazardous waste.
7. The proposed action may result in the release of contaminated leachate from the project site.

The City of Rensselaer held a special meeting on August 27, 2018, at which the City of Rensselaer issued its negative declaration and granted site plan approval and a special use permit for the Project. DEC is not aware of any public attendance at the special meeting, but if there were any public comments during the special meeting, we request a copy. The City of Rensselaer provided the following language in Part 3 of the EAF in support of its determination that the Project will not have a significant adverse environmental impact:

The project is located on a site with an approved site remediation plan. The applicant will be required to comply with the plans management requirements specifically relating to penetrations of any capped portions of the site. A Site Management Plan (SMP) will be submitted to the NYSDEC for approval prior to any work being started for the construction and operation of the project.

In other words, to the extent the City of Rensselaer's determination of non-significance is conditioned upon the Company's compliance with the Site Management Plan, it appears to constitute an impermissible conditioned negative declaration for a Type I action. See *Citizens Against Retail Sprawl ex rel. Ciancio v. Giza*, 280 A.D.2d 234, 239 (2001).

At the City of Rensselaer's next regular meeting on September 10, 2018, the City of Rensselaer ratified the negative declaration. An unsigned version of the negative declaration was sent to DEC on September 19, 2018. Public notice of the negative

declaration was published in DEC's Environmental News Bulletin on September 26, 2018. DEC did not receive a copy of the signed negative declaration until December 7, 2018.

C. Improper Determination of Non-Significance

In addition to the seven "moderate to large" impacts noted above, DEC understands that the City of Rensselaer accepted certain changes to the Project's expected truck traffic on local roads prior to issuing the negative declaration:

1. The Initial EAF identifies 15 truck trips daily, morning and evening;
2. An EAF narrative prepared by Sterling Environmental Engineering, dated May 7, 2018, indicated a total of 110 truck trips daily, including incoming municipal solid waste, outgoing solid recovered fuel product, and outgoing residuals and recyclables;
3. The traffic evaluation prepared by Creighton Manning, dated May 7, 2018, described that during peak operating conditions the inbound and outbound materials will be carried by approximately 170 truck trips daily, including garbage trucks and tractor trailers;
4. However, the minutes of the meeting of the Commission on May 14, 2018 state only that the "estimated truck traffic is about 45 per day." DEC has also taken note of the fact that during the May 14, 2018 public meeting, the Applicant could not guarantee that the incoming waste haulers would not be tractor trailers because, as explained by the Applicant's representative according to the meeting minutes, the source of the incoming waste "may want to use a tractor trailer to cut down on transportation costs."
5. The negative declaration indicates that the Applicant submitted an updated Traffic Evaluation Report, dated August 9, 2018. The City of Rensselaer never provided DEC with a copy of this updated Traffic Evaluation Report. Apparently on the basis of this updated Traffic Evaluation Report, the City of Rensselaer issued the negative declaration, dated August 27, 2018, recognizing that "no more than 25 waste haulers per hour" will be allowed based upon the capacity of the Project Site. The Final EAF contemplates daily hours of operation from 7:00 a.m. to 4:00 p.m. Monday through Friday, and 7:00 a.m. to 2:00 p.m. Saturday, which would equate to 225 truck trips per day, Monday through Friday, and 175 truck trips each Saturday, i.e., one truck trip every 2.4 minutes.

The Final EAF also acknowledges that construction will breach the remediation cap at the Project Site and will therefore require compliance with the Site Management Plan's Excavation Work Plan, Community Air Monitoring Plan, and Health and Safety Plan. As noted in the Final EAF, construction elements that may disturb the cap and the contaminated soil at the Project Site include the following:

1. Excavation for the 7,100 square foot municipal solid waste reception pit to an approximate depth of 25 feet below ground surface;
2. Trenching for site utilities to a depth of approximately 5 feet below ground surface;
3. Excavation and grading for stormwater management features (e.g., swales);
4. Excavation and grading for landscaping (e.g., tree planting). In addition, the Final EAF Narrative identifies that footings and foundations for the Project may also be constructed beneath the remediation cap.

In view of the foregoing, it is unclear how the City of Rensselaer could have determined that the Project does not involve at least one potential significant adverse environmental impact. See *Miller v. City of Lockport*, 210 A.D.2d 955 (1994).

D. Rensselaer County Solid Waste Moratorium

DEC understands that at its July 2019 legislative meeting, the Rensselaer County Legislature unanimously passed a local law (the "Moratorium") imposing a one-year prohibition against "the approval, permitting or opening of any solid waste management facility, including, but not limited to, landfills and transfer stations" within one mile of the Hudson River in the County.

Although it is well-established under New York law that the State has not preempted the field of local regulation of solid waste management, please be advised that DEC is not legally subject to the Moratorium because the Moratorium is inconsistent with DEC's statutory obligations under Sections 27-0707(2) and 27-0711 and Article 70 of the Environmental Conservation Law to either approve or deny a solid waste management facility permit application in accordance with applicable state statutes, regulations, and standards. Moreover, DEC has not identified any provision of the City of Rensselaer's zoning code that is less restrictive than, or otherwise inconsistent with, Title 7 of Article 27 of the Environmental Conservation Law. Accordingly, in the event the City of Rensselaer intends to defer to the Moratorium, DEC invites an explanation of the basis of the Rensselaer County Legislature's zoning authority to enact the Moratorium within the City of Rensselaer.

E. Conclusion

DEC is committed to reviewing, processing, and either approving or denying all permit applications under its jurisdiction in accordance with applicable law. Because DEC was not the lead agency during the above-described SEQRA process and was not provided with proper coordinated review as an involved agency, it is now incumbent on the City of Rensselaer, to the fullest extent provided by applicable law, to reopen the environmental impact assessment process under SEQRA and take appropriate corrective

action in order to ensure that the several significant adverse environmental impacts from the Project that the City of Rensselaer has already identified are adequately addressed for the protection of the public health and environment and the benefit of the residents of the City of Rensselaer and its neighboring communities.

Sincerely,

A handwritten signature in black ink, appearing to read "Keith Goertz", written in a cursive style.

Keith Goertz
Regional Director

c: Michael Stammel
Chairman of the Rensselaer County Legislature
1600 Seventh Avenue
Troy, New York 12180

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