

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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August 10, 2020

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RE: NOTICE OF PERMIT DENIAL
DEC Permit Application #4-3814-00084/00001
6 NYCRR Part 360 Solid Waste Application
6 NYCRR Part 201 Air State Facility
Rensselaer Engineered Fuels Facility
36 Riverside Avenue
City of Rensselaer, Rensselaer County

Dear Messrs. Soriano and West:

On August 4, 2020, Rensselaer Resource Recovery LLC (the "Applicant") issued a demand pursuant to the New York State Uniform Procedures Act, specifically New York State Environmental Conservation Law ("ECL") Section 70-0109(3)(b) and its implementing regulations at Part 621.10(b) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), that the New York State Department of Environmental Conservation ("DEC") issue its final decision on Applicant's application for a Part 360 Solid Waste Management permit and Air State Facility permit (collectively, the "Part 360 Application") within five days of receipt of the demand. The Uniform Procedures Act provides that "[a]n application for a permit may be denied for failure to meet any of the standards or criteria applicable under any statute or regulation pursuant to which the permit is sought, including applicable findings required by article 8 of the ECL and its implementing regulations at Part 617 of this Title, or for any of the reasons set forth in section 621.13(a)(1)-(6) of this Part.¹ For the reasons set forth below, the Part 360 Solid Waste Management permit and Air State Facility permit are hereby denied.

¹ 6 NYCRR Part 621.10(f).

Background

On January 25, 2019, DEC received the Part 360 Application for the proposed Rensselaer Engineered Fuels facility (the "Proposed Facility") to be located at property owned by a third party at 36 Riverside Avenue in the City of Rensselaer—which is also a State Superfund Site (154.00-5-2.132). The Proposed Facility would entail the construction of a solid waste management facility and the disturbance of approximately 19 acres for the construction and operation of the Proposed Facility's building infrastructure, access roads, and stormwater management systems in order to accommodate the processing of an annual throughput of 150,000 tons of municipal solid waste, consisting of residential waste, commercial waste, and waste generated by hospitals, long-term care facilities, schools, prisons, government agencies, and other similar type facilities.

Ten months before DEC's receipt of the Part 360 Application, in March 2018 the Applicant applied to the City of Rensselaer Planning Commission (the "Planning Commission") for site plan approval and a special use permit for the construction and operation of the Proposed Facility. The filing of the application with the Planning Commission for site plan approval and a special use permit commenced the statutory and regulatory environmental review process required under the State Environmental Quality Review Act ("SEQR") and 6 NYCRR Part 617.

State Environmental Quality Review Act

In enacting SEQR at Article 8 of the New York State Environmental Conservation Law ("ECL") in 1975, the New York State Legislature specified its intent that, to the fullest extent possible, the policies, statutes, regulations, and ordinances of the state and its political subdivisions should be interpreted and administered in accordance with the environmental policies set forth in ECL Article 8. Such statutory policies, which form the backbone of SEQR, include that:

1. all agencies conduct their affairs with an awareness that they are stewards of the air, water, land, and living resources, and that they have an obligation to protect the environment for the use and enjoyment of this and all future generations;
2. all agencies that regulate activities of individuals, corporations, and public agencies that are found to affect the quality of the environment shall regulate such activities so that due consideration is given to preventing environmental damage;
3. the enhancement of human and community resources depends on a quality physical environment;
4. every citizen has a responsibility to contribute to the preservation and enhancement of the quality of the environment; and

5. the government of the state shall take all coordinated actions necessary to prevent any critical thresholds for the health and safety of the people of the state from being reached.²

Central to SEQR's requirement that agencies fully comply with the purposes and provisions of ECL Article 8³ is the directive that state and local agencies provide, where feasible, for combined or consolidated proceedings so that all governmental agencies involved in a particular action may coordinate their respective reviews of all potential significant adverse environmental impacts before such agencies make final decisions regarding environmental impacts and whether to approve or deny required permits or approvals for the action.⁴

Consistent with its statutory obligations, DEC promulgated regulations at 6 NYCRR Part 617 to provide a statewide regulatory framework for the implementation of SEQR by all state and local governmental agencies and political subdivisions, including procedural requirements for compliance with the law, provisions for coordinating multiple agency environmental reviews through a single lead agency, criteria to determine whether a proposed action may have a significant adverse impact on the environment, model environmental assessment forms to aid in determining whether an action may have a significant adverse impact on the environment, and examples of actions and classes of actions that are likely to require an environmental impact statement and those that will not require an environmental impact statement.⁵

DEC regulations define an "action" for purposes of SEQR as including, in pertinent part, "projects or physical activities, such as construction or other activities that may affect the environment by changing the use, appearance, or condition of any natural resource or structure, that require one or more new or modified approvals from an agency or agencies."⁶ An "action" is the underlying physical activity that is the subject of an application for a permit or approval—it is not the permit or approval itself—and commonly consists of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.⁷ In this case, the construction of the Proposed Facility is the SEQR action, and it is the same action that is the subject of all state and local governmental permits and approvals required for the Proposed Facility, including all permits from DEC and all local approvals and permits from the City of Rensselaer.

As soon as an agency receives an application for approval of action, it must determine whether the action is subject to SEQR, and if so, the agency must determine whether the action may involve a federal agency or one or more state or local agencies and must make a preliminary classification of the action as Type I or Unlisted, using the

² ECL § 8-0103.

³ ECL § 8-0107.

⁴ ECL § 8-0111(3); 6 NYCRR Part 617.3(h).

⁵ 6 NYCRR Part 617.1(e).

⁶ 6 NYCRR Part 617.2(b)(1)(iii).

⁷ 6 NYCRR Part 617.3(g).

information available and comparing it to the thresholds set forth in 6 NYCRR 617.4. When more than one agency is involved in a Type I action, a lead agency must be established prior to a determination of significance and coordination among the lead agency and all involved agencies must proceed in accordance with the procedures set forth in 6 NYCRR 617.6(b).

The lead agency is an agency that is principally responsible for approving an action and is therefore responsible for determining whether an environmental impact statement is required in connection with the action and for the preparation and filing of the statement if one is required. The lead agency is also an involved agency.⁸ An involved agency is an agency that has jurisdiction by law to undertake, fund, or approve an action but is not the agency that is principally responsible for approving the action.⁹

Involved agencies bear regulatory responsibilities and rights that are not shared by other agencies that lack the jurisdiction to approve a SEQR action.¹⁰ Recognizing that a lead agency often is not expert in a given area of environmental concern and can benefit from the responses of specialized involved agencies, SEQR imposes specific legal responsibilities and rights on involved agencies to:

1. provide the lead agency with information it may have that may assist the lead agency in making its determination of significance;
2. identify potentially significant adverse impacts in the scoping process;
3. comment in a timely manner on the environmental impact statement if it has concerns that need to be addressed;
4. participate as may be needed in any public hearing;¹¹ and
5. evaluate project impacts, alternatives, and mitigation measures in order to make a fully informed final decision based upon the final SEQR findings.

After the lead agency is established for review of a Type I action, the lead agency must determine the environmental significance of the action. To determine that an environmental impact statement will not be required for the action, the lead agency must consider applicable regulatory criteria to determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant, including by considering reasonably related long-term, short-term, direct, indirect, and cumulative impacts.¹² If a lead agency determines for a Type I action that either there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant, then the lead agency will issue a negative

⁸ 6 NYCRR Part 617.2(v).

⁹ 6 NYCRR Part 617.2(t).

¹⁰ 6 NYCRR Part 617.2(u).

¹¹ 6 NYCRR Part 617.3(e).

¹² 6 NYCRR Part 617.7(a)-(c).

declaration. Otherwise, the lead agency will issue a positive declaration and require the preparation of an environmental impact statement. New York courts recognize that Type I actions carry a rebuttable presumption of significance that there need be only one potentially significant impact to trigger the requirement for an environmental impact statement.

Although a lead agency's acceptance of a draft environmental impact statement or issuance of a negative declaration is part of a complete application,¹³ the issuance of a negative declaration does not terminate the lead agency's overall duties under SEQR. Under New York law, all involved agencies have continuing duties to ensure that conditions derived through the SEQR process are properly observed and followed and to continue to evaluate new evidence relevant to the environmental impact of its actions so that important new information will not be ignored during the decision-making process. For this reason, SEQR provides the lead agency the ability to rescind a negative declaration when changes are proposed for a project, or new information is discovered, or changes in circumstances related to the project arise. Further, although the SEQRA process and individual agency permitting processes are two distinct avenues of environmental review, New York courts recognize that they are intertwined and that SEQR is a step in the permitting or approval process.

New York law requires, in circumstances where a prior agency approval in connection with a negative declaration has expired and it is necessary for the applicant to submit a new application on the expired approval for the same SEQR action, the lead agency has a continuing duty to determine whether the prior negative declaration must be amended or rescinded for a positive declaration based on changes to the action, new information discovered, or changes in circumstances relating to the action.¹⁴

No agency involved in an action may provide final approval of an action until there has been full compliance with the provisions of SEQR. An involved agency may not issue its final decision for an action that is subject of an environmental impact statement until a final environmental impact statement has been filed if the involved agency has reasonable grounds to believe that any other involved agency, including the lead agency, has determined that the action may have a significant adverse impact on the environment.¹⁵

¹³ 6 NYCRR Part 617.3(c)(1).

¹⁴ 6 NYCRR Part 617.7(e)-(f).

¹⁵ 6 NYCRR Part 617.3(a).

The Application Process

After receiving the Applicant's application for site plan approval and a special use permit in March 2018 and designating the Proposed Facility as a Type I action, the Planning Commission designated itself as lead agency for the environmental review of the Proposed Facility on May 14, 2019. The Planning Commission determined during its environmental review process that, among other things: 1) the construction of the Proposed Facility would disturb more than 10 acres; 2) that the Proposed Facility would involve a substantial increase in traffic above present levels; 3) that the construction of the Proposed Facility would disturb portions of the composite cover system at the site and may result in the unearthing of solid or hazardous waste and the release of contaminated leachate; and 4) that the Proposed Facility has the potential to produce odors for more than one hour per day. Nevertheless, the Planning Commission issued a negative declaration for the Proposed Facility at a special meeting on August 27, 2018.

At the same meeting, the Planning Commission approved the Proposed Facility's site plan and granted the special use permit. At the Planning Commission's next regular meeting on September 10, 2018, the Planning Commission ratified the negative declaration and then sent a copy of the negative declaration to DEC on September 19, 2018 for publication in DEC's *Environmental News Bulletin*, which occurred on September 26, 2018.

Four months later, on January 25, 2019, Applicant submitted its Application to DEC for a Part 360 Solid Waste Management permit and Air State Facility permit for the Proposed Facility.

Approximately one year after the initial submission of the Part 360 Application to DEC, on January 10, 2020, DEC deemed the Part 360 Application to be complete based upon the applicable regulatory standards and requirements of the Uniform Procedures Act, ECL Article 70 and DEC regulations at 6 NYCRR Part 621, as well as the program-specific requirements under 6 NYCRR Part 201 for the Air State Facility permit and Parts 360 and 362 for the Solid Waste Management permit. Upon publication of notice of completeness of the Part 360 Application, DEC commenced technical review of the Application and Applicant commenced the environmental justice public participation process as required under DEC Commissioner Policy CP-29.

During DEC's technical review of the Part 360 Application, the Mayor of the City of Rensselaer, The Honorable Michael Stammel, held a public meeting at Rensselaer City Hall on January 25, 2020 to address public concerns relating to the Proposed Facility and another solid waste management facility in the City of Rensselaer, including public concerns arising from the fact that the Planning Commission issued a negative declaration for the Proposed Facility and that the previously approved site plan and special use permit for the Proposed Facility had expired.¹⁶ During the public meeting,

¹⁶ <https://www.wamc.org/post/rensselaer-mayor-hosts-dunn-landfill-meeting-city-hall>

Mayor Stammel made the following statements to the attendees regarding the Proposed Facility in response to such concerns:

*When it comes to the BioTech [sic] plant in the, down at the lower end of the city, they have informed me that they want to resubmit an application, they want to continue with their application. I informed them that their permit is expired, so they are going to have to go through that permit process again if they want to do it. I can assure you that when they go through their permit process again, they will not, **they will have to do an environmental impact study. That'll definitely happen to see how it affects anybody.** There will be no waiving the wand and saying, 'no, just continue to do what you're doing'.¹⁷*

In a news article published in the *Times Union* on June 29, 2020, Mayor Stammel reiterated his public comments from the meeting on January 25, 2020 and was quoted as saying his administration “would require BioHiTech to go through the planning process anew—this time with a full environmental impact study.”¹⁸

As noted above, although the SEQR process and individual agency permitting processes are two distinct avenues of environmental review, New York courts recognize that they are intertwined. DEC does not adjudicate or interpret the City of Rensselaer’s Zoning Code or any legal issues regarding local zoning, site plan, or special use permit processes between Applicant and the City of Rensselaer insofar as such permitting processes do not involve SEQR. In addition, DEC takes no position on any potential claims or defenses that may be asserted by or against Applicant or the City of Rensselaer in the event the Planning Commission, in exercising its legal duties, determines that its previously issued negative declaration must be rescinded for any reason when Applicant returns to the Planning Commission with its new application for site plan approval and a special use permit.

However, as an involved agency with its own continuing duties to evaluate new evidence relevant to the environmental impact of its actions so that important new information will not be ignored during the decision-making process for all past, present and future permits and approvals required for the construction of the Proposed Facility, DEC not only has the jurisdiction and authority but the legal responsibility to consider, for purposes of satisfying the requirements of SEQR, the following:

1. that Article VI, Section 179-77 of the City of Rensselaer Zoning Code provides that site plan approval automatically terminates one year after the same is granted, unless a building permit has been issued and significant work has been

¹⁷ <https://www.pscp.tv/davelucas/1djGXRWgBoexZ> (beginning at the 10:00 minute mark of the meeting’s online video coverage) (emphasis added).

¹⁸ <https://www.timesunion.com/news/article/Churchill-How-much-garbage-can-this-city-take-15374333.php>

commenced on the project or applicant files an extension of site plan approval for a period of six months upon approval of the Planning Commission and Building and Zoning Administrator;

2. that nearly two years have now passed since the Planning Commission's site plan approval for the Proposed Facility and that significant work has not commenced on the Proposed Facility;
3. that to date Applicant has chosen not to return, but will at some unknown time in the future need to return, to the Planning Commission with a new application for site plan approval and a special use permit for the Proposed Facility;
4. that at such time, the Planning Commission will have the legal duty under SEQR to determine whether its prior negative declaration must be rescinded for a positive declaration based on changes to the action, new information discovered, or changes in circumstances relating to the action;
5. that by virtue of the public statements and actions taken by the Mayor of the City of Rensselaer after the issuance of the negative declaration on August 27, 2018 confirming the City of Rensselaer's intentions to require an environmental impact statement when Applicant returns to the Planning Commission with a new application for site plan approval and a special use permit for the Proposed Facility, it is neither speculative nor unreasonable for DEC, as an involved agency, to rely on such public statements and actions by the Mayor of the City of Rensselaer to believe that there may be future SEQR proceedings regarding the Proposed Facility;
6. that DEC, as an involved agency, cannot lawfully approve the Part 360 Application until there has been full compliance with SEQR and unless the approval is fully informed and based upon final SEQR findings where such findings are issued; and
7. that, by virtue of Applicant having issued its demand on August 4, 2020 pursuant to ECL § 70-0109(3)(b) and 6 NYCRR Part 621.10(b) that DEC issue its final decision on the Part 360 Application within five days of receipt of the demand, DEC is presently required by law to approve or deny the Part 360 Application.

For DEC to issue a Part 360 Solid Waste Management permit and Air State Facility permit now, before resolution of such potential future SEQR proceedings, would deprive DEC of its status as an involved agency in such future proceedings and would therefore compel DEC to unlawfully abdicate and waive its statutory and regulatory responsibilities and rights as an involved agency, including its responsibilities and rights to provide the Planning Commission with information DEC may have that may assist the Planning Commission in exercising its SEQR duties to continue to determine the environmental significance of the Proposed Facility, to identify potentially significant adverse impacts in the scoping process, to comment in a timely manner on the

environmental impact statement if DEC has SEQR concerns that need to be addressed, to participate as may be needed in any public hearing, and to evaluate project impacts, alternatives, and mitigation measures in accordance with the purposes and provisions of SEQR to exercise its own judgment in making a fully informed final decision on the Part 360 Application based upon any final SEQR findings by the Planning Commission.

During DEC's processing of the Part 360 Application, DEC requested information from Applicant in a Notice of Incomplete Application regarding the status of the expired site plan approval and Applicant's intentions for the new application to the Planning Commission and included language in DEC's Notice of Complete Application to attempt to harmonize DEC's individual agency permitting process with the Planning Commission's future SEQR proceedings. Applicant declined to provide the requested information in response to the Notice of Incomplete Application and declined to submit its new application to the Planning Commission for site plan approval and a special use permit during the pendency of DEC's processing of the Part 360 Application. With Applicant now having issued its demand on August 4, 2020 pursuant to ECL § 70-0109(3)(b) and 6 NYCRR Part 621.10(b) that DEC issue its final decision on the Part 360 Application within five days of receipt of the demand, Applicant has placed DEC in the position of no longer being able to wait to decide the permits on the Part 360 Application until the Planning Commission determines how to proceed with SEQR on the resubmitted application.

Although the outcome of such future SEQR proceedings before the Planning Commission is not certain, the waiver and abdication of DEC's SEQR rights and responsibilities as an involved agency that would necessarily arise as a result of DEC approving the Part 360 Solid Waste Management permit and Air State Facility permit at this time would in fact be certain—and it would improperly circumvent the statutory and regulatory requirements under SEQR for meaningfully coordinated and complete environmental impact assessment of the Proposed Facility among all involved agencies prior to final decisions on all applicable state and local permits and approvals.

Moreover, recognizing the intention of the City of Rensselaer to require an environmental impact statement when Applicant returns with a new application for site plan approval and a special use permit for the Proposed Facility, it is possible that the scope of the project may change from the original application. One hallmark of SEQR is the iterative process that often leads to changes or adjustments from how a project is originally conceived to what is ultimately approved in order to avoid or mitigate potential significant environmental impacts. Here, it would be premature for DEC to approve any permits associated with the project until that process has run its course and any potential resulting changes are incorporated into a future permit application.

For the reasons stated above, the Part 360 Solid Waste Management permit and Air State Facility permit are denied, without prejudice to resubmit.

Please be advised that the regulations that implement the Uniform Procedures Act provide that an applicant may request a hearing if a permit is denied or contains

conditions which are unacceptable to the applicant. Should you object to DEC's decision, you may request a hearing from the Regional Permit Administrator. Any such request must be made in writing, within 30 calendar days of the date of permit issuance and must be addressed to the Regional Permit Administrator at the address listed above. A copy of the request should also be sent to the Chief Administrative Law Judge at NY SDEC, 625 Broadway, 1st Floor, Albany, NY 12233-1550.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Berkman', with a long horizontal flourish extending to the right.

Thomas S. Berkman
Deputy Commissioner
and General Counsel

c: A. Luisi