



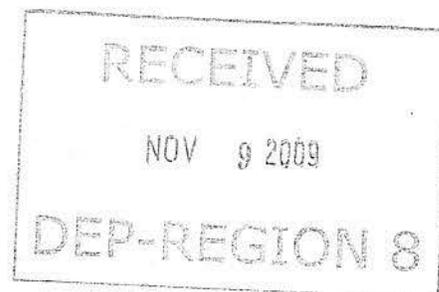
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November 6, 2009

VIA OVERNIGHT MAIL

Hon. Alexander B. Grannis
Commissioner
New York State Department of
Environmental Conservation
625 Broadway
14th Floor
Albany NY 12233-1010



Re: *Inergy Midstream/Finger Lakes LPG Storage, LLC*
Liquefied Petroleum Gas Storage Facility
Town of Reading, Schuyler County
Lead Agency Determination Comments; Response to DEC Staff Letter of October
28, 2009

Dear Commissioner Grannis:

We are counsel for Inergy Midstream, LLC and Finger Lakes LPG Storage, LLC (Finger Lakes) and submit this letter in response to DEC Region 8 Staff's October 28, 2009 letter to you regarding lead agency. The purpose of this letter is to provide additional information relative to identifying the appropriate lead agency and to respond to certain comments contained in Staff's October 28 letter. In summary, this is to request that, if you determine the Town has jurisdiction under the Environmental Conservation Law (ECL) to issue local permits, the Town should be lead agency over its site plan review and the DEC should be lead agency for its review of the underground storage permit and any subsequently issued well permits. As explained below, having two lead agencies would be permissible under 6 NYCRR § 617.3(g).

Background

On September 1, 2009, Finger Lakes submitted its application to the Town of Reading (Town) for a special permit under its Land Use Law for its LPG storage and distribution facility (the description of which in DEC Staff's October 28, 2009 is substantially correct and need not be repeated here). Pursuant to the SEQRA regulations, the Town sought lead agency and sent out lead agency coordination letters to involved agencies. On October 1, 2009, DEC responded stating that it wished to be lead agency, citing the 1992 Final Generic Environmental Impact

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Statement (FGEIS) for the Oil, Gas & Solution Mining Regulatory Program and Department policy. We received this letter on October 5 and I immediately contacted the Regional Attorney, Regional Permit Administrator and DEC program counsel in Central Office by e-mail. In this communication, I asked DEC to reconsider its position. On October 7, I met with DEC program counsel in Central Office, with DEC regional counsel joining by phone. At that time, we discussed the lead agency issue and the necessity of a dam permit.

On the same day this meeting occurred, DEC Region 8 Staff issued a second letter to the Town dated October 7, 2009, in which Staff identified the need for a dam permit and an underground storage permit and the possibility of other permits, including a modification to US Salt's SPDES permit. As I had previously explained to DEC Staff, if Finger Lakes must wait until the Underground Storage Permit is issued before SEQRA is complete, this will result in the loss of one full season of providing critical gas storage services (for which customers have already been obtained).

Upon our receipt of DEC Region 8 Staff's October 7 letter (received on October 10), I communicated by e-mail with DEC Central Office program counsel, the Regional Attorney, the Regional Permit Administrator, and the Regional Director requesting that the DEC allow the Town to be lead agency, disputing the need for a dam permit, and responding to the possible need to modify US Salt's SPDES Permit. We also indicated that the Project had already received from DEC an acknowledgement of Finger Lakes' Notice of Intent under the SPDES Stormwater General Permit (on September 10) and a 5-acre waiver (on September 15) with regard to soil disturbance under the General Permit.

In a letter dated October 9, 2009, DEC Region 8 Staff issued a correction, noting that a dam permit was not necessary, but indicating that "other issues in the October 7 letter remain." This letter also indicated that the Town had granted DEC an extension of time for establishing lead agency, until October 28, 2009.

In our letter of October 23, 2009 to DEC (a copy of which Staff has provided you), we addressed lead agency, but also provided a response (along with appropriate documentation) to other comments of Staff. We noted that a geotechnical engineer with C.T. Male Associates had addressed issues relating to safety and the design of the brine pond to ensure structural integrity. We addressed the issue of runoff from the watershed upgradient of the brine pond. We explained to Staff how the design of the pond would account for any annual increase in volume in the pond due to precipitation. Based on the information provided, we stated that there would be no stormwater discharges and therefore no requirement for a SPDES permit.

With regard to any other potential discharge from the lined brine pond, we explained that there would be piping installed to ensure that should there be any excess brine, it would be piped to US Salt for use in the brine production process, but not discharged under US Salt's SPDES permit. Therefore, no modification to US Salt's SPDES permit is necessary or required. Staff

apparently continues not to either believe this or understand this because it still suggests the possible need for a modification to US Salt's SPDES permit.

Finger Lakes' Permissive Segmentation Proposal

The purpose of SEQRA is well settled and that is to "incorporate environmental considerations into the decision making process at the earliest opportunity." Matter of Neville v. Koch, 79 N.Y.2d 416, 426, 583 N.Y.S.2D 802, 806 (1992). SEQRA regulations define "segmentation" as "the division of the environmental review of an action such that various activities or stages are addressed ... as though they were independent, unrelated activities, needing individual determinations of significance." 6 NYCRR §617.2(ag). Section 617.3(g) in turn provides that "[a]ctions commonly consist 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." The prohibition against segmentation guards against two related concerns. The first concern occurs when a project which would have a significant effect on the environment is split into two or more smaller projects, with the result that each falls below the threshold for an EIS. See Gerrard, Ruzow and Weinberg, Environmental Impact Review in New York §5.02[1]. The second concern occurs when a project developer wrongly excludes certain activities from the definition of the project because they may be occurring at different times or places, for the purpose of avoiding an EIS. See id. **Neither of these concerns exist in the present case.**

The regulations recognize that there may be some circumstances where segmented review is acceptable. In this regard, the SEQRA regulations provide:

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.

6 NYCRR §617.3(g). In this case, segmented review will be no less protective of the environment where the remaining portion of the project will be subject to a full SEQRA review before any approval or permit is issued.

Application of Lead Agency Dispute Criteria

In resolving a lead agency dispute, the Commissioner must be guided by the three criteria listed in order of importance in 6 NYCRR §617.6(b)(5)(v) as follows:

- a) whether the anticipated impacts of the action being considered are primarily of statewide, regional or local significance (i.e., if such impacts are of primarily local significance, all other considerations being equal, the local agency involved will be lead agency);

- b) which agency has the broadest governmental powers for investigation of the impacts of the proposed action; and
- c) which agency has the greatest capability for providing the most thorough environmental assessment of the proposed action.

The Commissioner's designation of lead agency must be based strictly on applying these criteria to the facts of each individual case. In this particular case, these criteria should be applied in the context of permissively segmenting the environmental review as discussed above.

A. First Criterion

The first criterion asks whether the potential impacts from the proposed action are of local, regional or statewide significance. The impacts of the Project are mixed in terms of their significance. One of the reasons Finger Lakes has attempted thus far without success to expedite the process by which it can commence clearing and grading of the rail/truck area is the importance of this kind of energy infrastructure project to the State and region. Although Finger Lakes has been thwarted from proceeding in this regard, it is important to note the important local value this project has on the economy of Schuyler County.

B. Second Criterion

The second criterion is the breadth of authority to conduct the environmental review. According to DEC Staff, the New York State Legislature has granted NYSDEC exclusive authority. In this regard, DEC Staff cites ECL 23-0303(2) for the proposition that the Town has limited jurisdiction over this Project. If that is the case, as determined by the Commissioner, it will be unnecessary for Finger Lakes to continue to proceed with its special permit application. Since the Project does not involve local roads (the facilities are accessed via NYS Routes 14 and 14A), then the Town's "jurisdiction" over this Project would be limited to real property taxation issues. Clearly, if the ECL supersedes local regulation of this Project, then DEC has greatest authority to conduct the environmental review. If your determination is that DEC does not have such exclusive authority, then the Town has shown that it has the capacity to conduct a thorough environmental review and the Town should be lead agency for its site plan review (under the permissive segmentation proposal addressed above).

C. Third Criterion

The third criterion asks which agency possesses the greatest capability for providing the most thorough environmental assessment of the proposed action. Clearly DEC has the greatest capacity to provide a review of Finger Lakes' Underground Storage Permit application and any well drilling permit applications. However, the Town has shown that it is capable of assessing the impacts associated with the other aspects of the Project, including with respect to the truck/rail area, the office and control facilities, and the brine pond. Indeed, the narrative report required as part of the Town's application required Finger Lakes to provide information about

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numerous environmental assessment areas (e.g., traffic, noise, lighting). Subsequent information requested by the Town and provided by Finger Lakes have addressed the integrity of the brine pond, visual impacts, and transportation/traffic issues. Based on the local approval process to date, it is clear that members of the Town Planning Board (including Chairman Gordon Wright, who works for the Village of Watkins Glen as its Code Enforcement Officer) is capable of asking the right questions to enable it to perform a thorough environmental assessment.

Conclusion

In conclusion, if you determine that under ECL 23-0303(2) the Town is preempted from any local regulation (other than regarding local roads and real property taxation), then it is clear that DEC would have sole jurisdiction to be lead agency. Otherwise, we ask that the Commissioner determine that the Town be the lead agency for its own site plan review. Under a permissive segmentation approach, the Department would conduct the environmental review under SEQRA for the underground storage permit and any well drilling permit applications it receives after the underground storage permit is issued. The Town has scheduled a public hearing for November 19, 2009 and therefore we ask for an expeditious and timely decision on this issue per the DEC's regulations.

Finally, we ask that Staff expeditiously review Finger Lakes' Underground Storage Permit application (submitted on October 12, 2009) and provide us comments so that the approvals may be obtained expeditiously for this proposed \$40 million project.

Thank you

Sincerely,

BOND, SCHOENECK & KING, PLLC



Kevin M. Bernstein

cc: *via first class mail*

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Hank Wodarski, Town of Reading Code Enforcement Officer
Jack Dahl, DEC
Linda Collart, DEC
Dixon Rollins, DEC
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