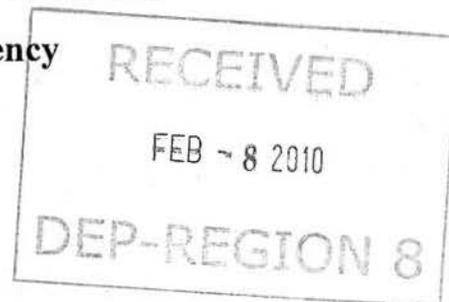


New York State Department of Environmental Conservation

Commissioner's Determination of Lead Agency

**Under Article 8 of the
Environmental Conservation Law**



PROJECT: Finger Lakes LPG Storage and Distribution Facility, Town of Reading, Schuyler County

DISPUTING AGENCIES: Town of Reading Planning Board and the New York State Department of Environmental Conservation, through its Region 8 office

I have been asked to designate a lead agency to conduct an environmental review under the New York State Environmental Quality Review Act (SEQR; Article 8 of the New York State Environmental Conservation Law [ECL]; *see also*, Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR Part 617]), for the proposed Finger Lakes LPG Storage and Distribution Facility (Finger Lakes LPG facility), a multi-cycle LPG storage system with a major pipeline connection and rail and truck load/unload racks, located in the Town of Reading, Schuyler County. The disputing agencies are the Town of Reading Planning Board (Planning Board) and the New York State Department of Environmental Conservation (DEC), through its Region 8 office. This designation of DEC, through its Region 8 office, is based on my finding that it has broader jurisdictional responsibilities over this project and a stronger capacity to conduct the review than the Planning Board.

ACTION AND SITE

The proposed action involves an application by Finger Lakes LPG to construct and operate a liquid petroleum gas (LPG) underground storage and distribution facility system on an approximately 67 acre parcel of land in the Town of Reading, Schuyler County. The project would involve the construction of the following facilities:

- a 20-acre brine pond;
- a railroad siding for loading and unloading LPG rail tank cars;
- truck unloading facilities, office and control facilities;
- related processing equipment including storage tanks, pumps and compressors; and
- LPG storage facilities at a depth of approximately 2000 feet involving the use of two existing subsurface caverns that were previously created by solution salt mining.

The project would also involve:

- drilling five new storage wells into the existing subsurface caverns:
- converting several existing wells to storage service:
- plugging several older wells currently accessing the caverns; and
- connecting the facility to an existing interstate pipeline.

REGULATORY SETTING

Based on the dispute resolution request letter from Peter Lent, Regional Permit Administrator, DEC Region 8, dated October 28, 2009, and the other papers submitted in this dispute, the regulatory jurisdictions of the Planning Board and the DEC are as follows:

The Planning Board possesses site plan review and special use permit jurisdiction (*see* Town Law §§274-a and 274-b, and, Town of Reading Local Law No. 1 of the Year 1995), according to Part 1 of the environmental assessment form submitted with the application. By letter dated November 22, 2009, DEC staff asked the Planning Board to provide more detail on its special use jurisdiction over the Finger Lakes LPG facility. The Planning Board did not respond to this request for additional information.

DEC's regulatory jurisdiction comes from ECL Article 23, through which the applicant would be required to obtain permits for the following activities: underground storage of LPG, well drilling, well conversion, and well plugging. This jurisdiction would give DEC regulatory control over most aspects of the Finger Lakes LPG facility. In 1992, DEC issued a Final Generic Environmental Impact Statement on the oil, gas, and solution mining regulatory program, through which it began to identify and assess the environmental impacts of LPG facilities. The FEIS also sets the parameters for future environmental reviews of facilities such as the Finger Lakes LPG facility. *See Final Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program* (July 1992, reprinted 2003).¹

Mr. Lent's October 28, 2009 letter points out that ECL Article 23 contains an important caveat, namely an express preemption, which provides that "[t]he provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; [stet] but shall not supersede local government jurisdiction over local roads or the rights of local governments under the Real Property Tax Law." Courts have held that ECL Article 23 preempts any municipal law that *purports* to regulate gas and oil well drilling operations, unless the law relates to local roads or real property taxes. *Matter of Envirogas v. Kiantone*, 112 Misc2d 432 (Sup. Ct. Erie Co. 1982), *affd* 89 AD2d 1056 (4th Dept. 1982), *appeal denied* 58 NY2d 602 (1982). Thus, Article 23 prohibits the Planning Board

¹ The Finger Lakes LPG facility also requires coverage under the "stormwater general permit" (GP-0-08-001) (issued pursuant to the State Pollution Discharge Elimination System ["SPDES"; ECL Article 17]) and may require a SPDES permit for discharge from the brine pond.

from regulating any matters that are specific to the LPG and solution mining activities or from imposing regulations that would impair State policies advanced by ECL Article 23. *See* ECL §23-0301 (McKinney's 2007). The specific components of the project that are likely preempted are those dependent on, or ancillary to, the subsurface storage application which includes at least all work at the caverns, the brine pond, connection between the brine pond and caverns, pipeline connections and truck loading / unloading docks. Since the Planning Board did not reply as to its exact jurisdiction for this project, it is beyond the scope of this decision to determine the outer bounds of the Article 23 preemption, i.e., whether the Planning Board is preempted from exercising site plan or special use permit jurisdiction over any part of the project or imposing regulations that are not specific to the industry and that do not impair State policies. For purposes of this decision, I will therefore assume that the Planning Board does possess some level of site plan review and special use permitting under its Local Law No. 1 of the Year 1995 (General Land Use Performance Standards, Chapter 4.1, and Seneca Lake Protection Area, Chapter 4.10), albeit this jurisdiction may be limited by Article 23.

Lead agency for a SEQR review may be assumed only by an involved agency with authority to make discretionary decisions on one or more components of the overall plan. Both DEC, through its Region 8 office, and arguably the Planning Board appear to satisfy the criteria to be considered involved agencies, and both have stated their interest in serving as lead agency. No other involved agencies have sought lead agency status or commented on the request for lead agency designation.

DISCUSSION

As an initial matter, the applicant's attorney, in his letter dated November 6, 2009, asks that the lead agency role for the Finger Lakes LPG facility project be divided between the Planning Board and DEC. The reason offered for this request to segment lead agency roles is to avoid losing a full season of gas storage services for which customers have already been obtained, if the underground storage component of the project is also part of the review. Segmentation is defined as "the division of the environmental review of an action so that various activities or stages are addressed as though they were independent, unrelated activities needing individual determinations of significance." 6 NYCRR 617.2(ag). Except in special circumstances, considering only a part, or segment, of an overall action is contrary to the intent of SEQR. *See* 6 NYCRR 617.3(g)(1).

Segmentation is only lawful under limited circumstances. For example, segmentation may be warranted when a project has the following combined circumstances: the project has several phases; information on a future project phase is too speculative; the future phase may not occur; and the future phase is functionally independent of the current phase. *See DEC SEQR Handbook*, Chapter 2, <http://www.dec.ny.gov/permits/45577.html>. Segmentation of the project is not appropriate here as the brine pond and loading areas (and perhaps other proposed operation areas) are dependent on, and an integral component of, the larger project that also includes underground storage. Therefore, it is appropriate to select one agency to act as lead for the SEQR review of this project.

In resolving a lead agency dispute, I am guided by the three criteria listed in order of importance in 6 NYCRR §617.6(b)(5)(v):

- 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.

My designation of a lead agency must be based strictly on applying these criteria to the facts of each individual case.

A. First Criterion

The first criterion asks whether the potential impacts from the proposed action are of local, regional or statewide significance. In this case, it is clear that construction of the brine pond, storm water detention system, road and office and activities related to reuse of the underground caverns may result in noise, dust and traffic, which are impacts that are primarily local in nature. The use of the former salt cavern for LPG storage may involve impacts that are regional, and perhaps even statewide, as use of the caverns involves re-use of expansive subsurface environmental features. DEC Region 8 staff point out possible impacts that may run across municipal boundaries and to Seneca Lake. In addition, the LPG acceptance and delivery is directly linked to an interstate gas system.

The lead agency criteria (6 NYCRR 617.6[b][5][v]) provide that when impacts are primarily local in significance, all other considerations being equal, the local agency involved will be lead agency. In this case, the parties have identified impacts that are local, as well as regional to Statewide. In addition, as discussed in Item B below, all other considerations are not considered equal for this project. Therefore, the first criterion offers no distinction as to which of the disputing agencies should serve as lead agency.

B. Second Criterion

The second criterion, breadth of authority to conduct the environmental review, favors DEC with its greater authority to review this project based on its ECL Article 23 jurisdiction and the corresponding preemption against local regulation contained in that article. DEC's review will need to consider all components of the action, including use of the caverns as well as the brine pond, roads and storm water. DEC's permit approval authority of the underground storage is a compelling jurisdiction which will incorporate consideration of not just re-use of salt caverns but also connection pipes, roadway uses and the brine pond. As indicated above, the Planning Board is prohibited from using its special use permit or site plan review authority to impose conditions that are specific to the LPG or solution mining aspects of the project, which greatly impairs its jurisdiction over the key components of the Finger Lakes LPG facility. Thus, even assuming the Planning Board may have certain rights of review, they do not incorporate the key components of the project.

Therefore, I find that the second criterion strongly favors DEC taking the lead agency role.

C. Third Criterion

The third criterion asks which agency possesses the greatest capability for providing the most thorough environmental assessment of the proposed action. This criterion strongly favors DEC. DEC has prepared an FGEIS for LPG and solution mining facilities, demonstrating its capability and preparedness to understand, for review purposes, all aspects of the proposed project. DEC staff includes individuals with specific expertise to conduct an environmental review of the Finger Lakes LPG facility such as geologists and engineers. While the Planning Board has experience in the management and implementation of environmental reviews under SEQR and may have the ability to contract for outside consultants, its expertise would likely still not be as comprehensive as DEC's due to DEC's familiarity with both the ECL Article 23 regulatory program and the Finger Lakes LPG facility.

Therefore, given the DEC's in-house expertise for LPG issue review, the third criterion favors DEC to act as lead agency.

FINDING

I find that the DEC, through its jurisdiction over the major components of the underground storage system and its greater capacity to conduct the review, should serve as lead agency for the environmental review of the proposed Finger Lakes LPG facility. This designation in no way changes or diminishes the responsibilities or authority of other involved and interested agencies with jurisdiction over the project.

While designating DEC, through its Region 8 office, as lead agency, I must remind Region 8 staff to remain aware of all potential impacts that have been identified during this lead agency dispute, or which may be identified during the course of the environmental review. I am directing DEC Region 8 office to ensure that the Planning Board's concerns are factored into the environmental review process. Continued consultation with the Planning Board and other interested agencies will enable DEC, through its Region 8 office, to better identify the full range of potential impacts of the project and, if necessary, explore alternatives and mitigation to avoid or minimize those impacts. Such consultation will also enable other agencies to identify SEQR and other related analyses, which may be warranted.

Dated: FEB 02 2010

Albany, New York



Alexander B. Grannis, Commissioner

Lead Agency Dispute
Finger Lakes LPG Storage and Distribution

Distribution of Copies:

Disputing Parties

Town of Reading Planning Board
NYSDEC Region 8

Applicant

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Kevin M. Bernstein, Esq., Bond, Schoenneck & King PLLC (for the applicant)

Interested Parties

NYS Department of Health

New York State Department of Environmental Conservation

Lawrence H. Weintraub, Esq., Office of General Counsel, Central Office
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