

New York State  
Department of Environmental Conservation  
Commissioner's Determination  
of  
Lead Agency Under Article 8  
Of the  
Environmental Conservation Law

PROJECT: Application by Pilgrim Transportation of New York Inc., for a use and occupancy permit and other permits.

DISPUTING AGENCIES: New York State Thruway Authority and the New York State Department of Environmental Conservation v. Town Board of the Town of New Paltz, v. Town Board of the Town of Newburgh v. Town Board of the Town of New Windsor

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], with implementing regulations at Part 617 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR Part 617]). The review is of a proposal by the Pilgrim Transportation of New York State, Inc. (Pilgrim) to construct and operate two proposed approximately 170 mile long petroleum pipelines from Linden, New Jersey to the Port of Albany, Albany, New York. (The New York State portion spans approximately 116 linear miles — mostly along the New York State Thruway right-of-way). This designation of the New York State Department of Environmental Conservation (DEC) and the New York State Thruway Authority (NYSTA), as co-lead agencies, is based on my finding that the impacts of the proposal are primarily regional in scale and DEC and NYSTA have the broadest governmental powers to investigate the impacts of the proposed pipelines as well as greater capability than the municipal entities for providing the most thorough assessment of the proposed action.

#### ACTION AND SITE

The proposed action is the construction of two pipelines ("mainlines") that would run parallel to each other between Albany, New York to Linden, New Jersey (project). One of the two mainline pipelines would carry crude oil southbound from Albany and the second mainline would carry refined petroleum products (gasoline, diesel, heating oil, and kerosene) northbound from Linden.

The project proposal indicates that each mainline would span approximately 169.89 linear miles from Linden, New Jersey to Albany, New York, with each pipeline running 116.4 linear miles in New York State. In New York, Pilgrim proposes to install approximately 79 percent of the pipelines within the NYSTA right-of-way (ROW); 7.5 percent of the pipelines would be co-located with other roads, utilities or railroads; and the remaining 13.5 percent of the pipelines would be located in newly acquired ROWs. The mainline pipelines would each be up to 20 inches in diameter and capable of transporting the equivalent of 200,000 barrels per day. In addition to the mainline pipelines, Pilgrim would construct five single product lateral pipelines totaling 13.52 miles in length in New York to intermediate delivery points (existing terminals), four pump stations and 10 metering stations. Seven Contractor/Pipe Laydown yards are proposed for use during construction. The project would result in a total of 1,250 acres of temporary land disturbance including lands both within and outside the New York State Thruway ROW. The project would cross 232 streams and waterbodies, including the Hudson River and multiple major and minor tributaries of the Hudson. There are also 19 crossings of protected freshwater wetlands. Approximately 296 acres would be permanently affected by the project.

## REGULATORY SETTING

The agencies shown on the attached list were preliminarily identified as having one or more discretionary decisions that could affect one or more components of the proposed action. A subset of those agencies (disputing agencies), as set out below, have requested that the Commissioner designate them as lead agency status and are therefore parties to this dispute:

- The Town Board of the Town of Newburgh
- The Town Board of the Town of New Windsor
- The Town Board of the Town of New Paltz
- DEC and NYSTA

During the 30-day lead agency coordination period (see 6 NYCRR §617.6[b][3]), DEC and NYSTA agreed to become co-lead agencies for the project. They subsequently entered a memorandum of understanding (MOU), dated February 1, 2016, concerning the management of the SEQR process which includes a dispute resolution process if a

disagreement were to arise between the two agencies during the review process. Therefore, there is no dispute regarding the lead agency role between DEC and NYSTA. Indeed, both agencies have affirmatively asked to act as co-lead agencies for the review of the project.

The lead agency dispute arises from the objections of the disputing agencies to the co-lead agency arrangement between DEC and NYSTA. The disputing agencies separately requested that the Commissioner either designate DEC as the sole lead agency or alternatively that the project be segmented and that each municipality be designated as co-lead agency for portions of the project within their relative jurisdictions. Pilgrim supports the designation of DEC and NYSTA as co-lead agencies.

I have also received letters or resolutions from other towns and boards along the project route and a letter from the County Executive of the County of Rockland asking the Commissioner to designate DEC as the sole lead agency. These towns and boards have not offered to assume the role of lead agency for the project or expressly indicated that they do not want to be designated as lead agency.<sup>1</sup> Thus, I will consider their letters advisory only.

## DISCUSSION

Under ECL §8-0111(6), a lead agency should be an agency principally responsible for carrying out or approving the action. DEC implemented this statutory direction in the criteria for choosing lead agencies set out in the regulations. Under 6 NYCRR §617.6 (b)(5)(v), I am guided by the three criteria for the selection of lead agency listed in order of importance 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);

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<sup>1</sup> Under 6 NYCRR §617.6(5) any agency raising a dispute must be ready to assume the lead agency functions if such agency is designated by me. Since these municipalities are not ready to assume the role of lead agency if they were designated by me as lead agency, I construe their letters and resolutions merely as expressions of opposition to the co-lead arrangement between DEC and NYSTA.

- (b) which agency has the broadest governmental powers to investigate the impacts of the proposed action; and
- (c) which agency has the greatest capability to provide 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.

DEC and NYSTA, both involved state agencies, agreed to act as “co-lead agencies,” and announced that agreement on December 21, 2015. A threshold question here is whether I have statutory authority to designate DEC and NYSTA as co-lead agencies, which I conclude that I do.

The statute and regulations relevant to the authority of the Commissioner to appoint a lead agency (ECL §8-0111[6]) refers to the appointment of a lead agency rather than co-lead agencies, using the singular noun. I find that the use of the singular noun does not foreclose the designation of co-lead agencies. Under the rules of statutory construction “[w]ords in the singular number include the plural, and in the plural number include the singular.” General Construction Law §35 (McKinney’s 2003). The Department’s SEQR Handbook also supports my interpretation of the statute, which states:

17. Are Co-Lead Agencies allowed under SEQR?

The concept of co-lead agency is not specifically authorized by 6 NYCRR 617 nor is it expressly prohibited. DEC has used this approach for direct actions that involve another state agency. However, other agencies have found the co-lead agency procedure less desirable. It seems that when the two agencies are in agreement concerning decisions, the co-lead agency approach can work. But, when there are differences of opinion between the two agencies the resolution of the disagreement becomes a problem usually resulting in a delay in decision-making. When the action involves an applicant, the delay and the uncertainty regarding resolution of the dispute is unfair to the applicant.

The use of co-lead agencies should be avoided unless the two agencies can devise a formal mechanism for resolution of disputes. This mechanism should

not result in a delay in timely decision-making. Absent a formal dispute resolution process, it is suggested that a single lead agency be established with the other agency actively involved in the process but not as a co-lead agency.

*SEQR Handbook*, 2010 Printed Edition, at p. 63. Consequently, the Department, through the *SEQR Handbook*, recognizes that agencies can agree to a co-lead agency arrangement under limited circumstances and that the Commissioner could designate co-lead agencies based on an agreement of the agencies to act as such and where the designation would not impeded decision-making in the *SEQR* process.

Additionally, the President's Council on Environmental Quality promulgated regulations under the National Environmental Policy Act (NEPA, codified at 42 U.S.C. A. §4321 et seq.) that expressly allow for agencies of the federal government or agencies of the federal government and state agencies to enter a co-lead arrangement. 40 CFR 1501.5 and NEPA's Forty Most Asked Questions, #22, published by the President's Council on Environmental Quality on the internet at <https://ceq.doe.gov/nepa/regs/40/40p3.htm>, last visited on April 7, 2016. Inasmuch as *SEQR* was substantially modelled on NEPA, judicial and regulatory constructions of NEPA are persuasive where the two statutes are similar. See *Fourth Branch Association v. DEC*, 146 Misc. 2d 334, 550 (Sup Ct. Albany Co. 1989). While *SEQR* differs from NEPA in important respects, there is nothing in the *SEQR* statute that would lead me to conclude that my interpretation of the *SEQR* regulations should differ from how the lead agency designation rules under NEPA are implemented by federal agencies.<sup>2</sup>

In several lead agency disputes, the Commissioner has been asked to designate co-lead agencies by one of the parties to a lead agency dispute. My predecessors have denied such requests. In the Commissioner's lead agency determination in *Town of Putnam Valley v. Town of Yorktown*, December 28, 1999, then Commissioner Cahill wrote that "the *SEQR* regulations [617.6(b)(5)] only provide me with the authority to designate a [single] lead agency." In the Commissioner's lead agency determination in *Village of Briarcliff*

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<sup>2</sup> Recently, the Federal Highway Administration, acting as federal lead agency under NEPA, and the New York State Department of Transportation and NYSTA, acting as joint lead agencies under *SEQR*, completed an environmental impact statement for the new Tappan Zee Bridge. [http://tzbsite.com/tzbsite\\_2/feis\\_2.html](http://tzbsite.com/tzbsite_2/feis_2.html), last visited on April 19, 2016. Pilgrim, like the Tappan Zee Bridge replacement, lends itself to the co-lead agency arrangement as discussed above.

*Manor v. Village of Tarrytown*, Westchester County, September 15, 2008, then Commissioner Grannis wrote that “the SEQR regulations do not explicitly recognize agencies serving as co-lead agencies, so I will resolve this dispute by designating a single lead agency.” See also, Commissioner’s lead agency designation in *Town of Covington Planning Board and Town of Middlebury Town Board v. DEC Division of Mineral Resources*, at footnote “1,” July 15, 2014.

My predecessors’ views are readily reconcilable with the Handbook and my analysis of the statute. Simply put, DEC has and will continue to discourage the co-lead agency arrangement as a policy matter rather than on account of the fact that the statute uses the singular noun in referring to the designation of a lead agency. DEC’s policy, as expressed in its SEQR Handbook, does not encourage the co-lead agency arrangement, but recognizes that there may be some limited circumstances where such an arrangement makes sense. In terms of policy, the SEQR regulations state that “[a]gencies must carry out the terms and requirements of this Part with minimum procedural and administrative delay, must avoid unnecessary duplication of reporting and review requirements by providing, where feasible, for combined or consolidated proceedings, and must expedite all SEQR proceedings in the interest of prompt review.” 6 NYCRR §617.3. In the overwhelming majority of cases, my fear would be that the designation of co-lead agencies could thwart the policy objective of providing for a timely and efficient environmental review. While I agree with my predecessor Commissioners that the appointment of a single lead agency is the favored approach under the statute and regulations, policies should not be blindly followed without regard to the facts. This is the case here.

In the lead agency disputes before then-Commissioner Cahill and then-Commissioner Grannis, lead agency status would had to have been imposed upon an unwilling partner. To impose such an arrangement would not have resolved the dispute in a manner that would allow for the efficient and thorough environmental review as envisioned by SEQR.<sup>3</sup>

In this case, both agencies determined early in the process that co-lead agency status would result in a more robust environmental review than either agency could provide alone

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<sup>3</sup> Co-lead Agency reviews have occasionally been undertaken during the establishment of lead agency without the need for lead agency dispute resolution. See, e.g. *Save Audubon Coalition v City of New York*, 180 AD2d 348 (1st Dept. 1992).

and made a significant commitment of staff and resources as documented by the MOU, to ensure the effectiveness of the review.

In the case before me, as discussed below, the impacts of Pilgrim's pipelines are mostly regional, only two statewide agencies have vied for lead agency designation and they have agreed to act as co-lead agencies. They have gone so far as to enter into the MOU to implement the co-lead arrangement to avoid the potential for regulatory delay and decisional paralysis. My studied conclusion is that this arrangement should not be disturbed.

The particulars of reviewing a pipeline project that would span the area from Albany, New York to New Jersey lends itself to the combined expertise of DEC and NYSTA. DEC possesses the broad governmental powers to investigate the potential for impacts to natural resources along with experience in reviewing other kinds of pipeline and transmission projects (e.g., under the Federal Natural Gas Act [15 U.S.C.A. § 717 et seq.]) and agency staff that are specifically equipped to conduct expansive and complex environmental reviews. NYSTA has extensive and unique expertise to analyze transportation related impacts.

In opposition to the co-lead arrangement, the municipal boards have cited DEC's greater experience and regulatory powers to conduct environmental reviews over that of NYSTA, whose jurisdiction is limited to the Thruway right of way. They offer their own municipal jurisdictions in its stead. I reject this position because NYSTA's jurisdiction extends to a majority of the route, giving it great ability to review and control potential impacts resulting from the project while any individual municipality's jurisdiction and control is limited to a small fraction of this regionally significant project. The municipal boards have, alternatively, asked me to designate their boards to act as co-lead agencies with DEC for their portion of the project. Aside from the sheer impracticality of such an arrangement, it would amount to sequential review that was explicitly rejected in two prior lead agency determinations.

Commissioner's lead agency designation in *Town of Shandaken Town Board v. Planning Board v. NYC DEP v. DEC*, March 20, 2000 and Commissioner's lead agency designation in *Town of Reading Planning Board v. NYS DEC, through its Region 8 office, February 2, 2010*.<sup>4</sup> The municipal boards will have ample opportunity during the environmental impact

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<sup>4</sup> Commissioner lead agency determinations are published on the Department's website at <http://www.dec.ny.gov/permits/6186.html>.

statement process and to ensure their informational needs as I have affirmatively directed below.

#### A. FIRST CRITERION

The potential impacts of the project are predominantly regional in nature, in part, because the mainlines would extend approximately 116 miles from Albany through Rockland County to the New Jersey boundary. The project would cross 232 streams and waterbodies regulated in New York State under the state Protection of Waters program, including the Hudson River and multiple major and minor tributaries of the Hudson. See ECL §15-0501 *et seq.* There are also 19 crossings of freshwater wetlands protected under New York's Environmental Conservation Law. Each of these state protected resources, which call upon the core of DEC's regulatory authority under ECL articles 15 and 24, are vulnerable to impacts during both the construction and operational phases of this project. Cumulatively, they warrant significant, concerted analysis and oversight that only DEC and NYSTA can supply for the project's entire length in New York. See ECL §3-0301 (1)(b). The installation of a pipeline that disrupts so many wetlands and streams can result in extensive impacts to water quality and natural resources if not analyzed cumulatively and designed and constructed with measures to avoid, minimize or mitigate potential impacts. Potential impacts to water supply and natural resources in multiple communities will also be experienced along the entire route of the proposed pipeline.

In addition to environmental impacts, construction of the Pilgrim pipeline could result in disruption of a major transportation corridor that spans from Albany County to Rockland County. The pipeline necessarily implicates numerous significant impacts relating to Thruway maintenance and operations, including future use of the Thruway, as to which NYSTA possesses exclusive knowledge. In connection with Pilgrim's application to NYSTA, NYSTA will also need to determine whether the Project is consistent with, and permissible under, applicable State and federal laws, rules, regulations and policies regulating highway use. Furthermore, the safety and security of the travelling public as well as people living along the entire 116 mile route may be impacted by the proposed pipeline project and must not be considered in a segmented fashion.

The first criterion therefore weighs in favor of DEC or NYSTA to act as lead agency or together as co-lead agencies. Simply put, the lead agency role here should be played by an agency with regional or statewide jurisdiction.

## B. SECOND CRITERION

The second criterion favors the proposed co-lead arrangement between DEC and NYSTA. Unlike a natural gas pipeline subject to the jurisdiction of the Federal Energy Regulatory Agency under the Natural Gas Act, the Pilgrim Pipeline does not preempt local zoning. Each of the municipal agencies are therefore assumed to have approvals under the Transportation Corporation Law, zoning (Article 16 of the Town Law) and site plan approvals (Town Law §274-a). However, each municipality only has jurisdiction within its territorial limits, though SEQR does allow a lead agency to study extra-territorial impacts of an action. Nonetheless, the pipeline spans an area from New Jersey to Albany, an area far beyond the reach of any of the individual municipalities.

The DEC and NYSTA alone have statewide jurisdiction to investigate the impacts of the project. DEC's jurisdiction includes Water Quality Certification jurisdiction under the federal Clean Water Act to the extent that the pipeline would affect federally designated wetlands. The pipelines would cross 232 streams and waterbodies as well as approximately 226 federally regulated wetlands. The crossings of 226 wetlands regulated by the Army Corps of Engineers may also require Water Quality Certificates under section 401 of the Clean Water Act. Nineteen of these crossings will impact wetlands protected under Article 24 of the ECL which will require a state wetlands permit from the Department. Pilgrim's crossings may also require stream disturbance permits under Article 15 of the ECL.

Significant issues of law and policy are implicated by the proposal to use and occupy the Thruway right of way for the majority of the route in New York State. Whether such use is consistent with, and permissible under, applicable State and federal laws and policies regulating highway use is an important issue to be resolved in connection with this application. NYSTA has jurisdiction and considerable expertise on this and other related issues, including how the safety of the travelling public would be effected, traffic impacts in general, and conflicts with the future needs of the Thruway, all of which will be critical in evaluating the impacts of the project. NYSTA's expertise in operating and maintaining the Thruway and the implementation of State and Federal highway laws and policies will be an essential component of the environmental impact review of the Project. DEC does not have similar expertise in these areas and would need to lean heavily on the Thruway Authority expertise in any event. In addition, as the major landowner for the project, NYSTA has the ability to control the implementation and assess mitigation of almost 80% of the total project area.

The second criterion clearly favors DEC and NYSTA as co-lead agencies over the municipal boards

### C. THIRD CRITERION

DEC has significant experience and expertise in managing complex SEQR proceedings, directing the preparation of comprehensive, regional environmental impact statements and managing input from a multitude of stakeholders and involved agencies. DEC has also reviewed virtually all pipeline and transmission projects throughout the state under the Natural Gas Act and Article VII of the Public Service Law and is familiar with the construction related impacts of those proposals. DEC has dedicated staff with specialties in natural resource protection relevant to this review. Similarly, NYSTA has successfully conducted comprehensive SEQR proceedings and has significant experience with utility crossings of Thruway rights of way. A threshold question is whether the proposed pipelines should be allowed in the Thruway ROW and NYSTA is the agency most capable of studying and answering that question. Both DEC and NYSTA have the capability to conduct an extensive environmental review for a regional project of this magnitude. None of the municipalities have been called on to review a project of this scale or have the dedicated staff of DEC and NYSTA. Therefore, the third criterion also strongly favors the two state agencies.

### FINDING

Each of the three lead agency criteria unequivocally favor DEC and NYSTA. At the same time, NYSTA and DEC have established a collaborative inter-agency relationship for conducting the appropriate review. That being the case, it is incumbent upon me not to choose between them and upset their agreement. In addition, based on the common regional jurisdictions of both NYSTA and DEC, and the complementary nature of technical expertise needed to review the impacts of the project, NYSTA and DEC have provided a compelling case showing that being co-lead agencies will result in a more comprehensive, thorough and efficient SEQR review than either agency could provide alone. I therefore let stand the existing agreement and MOU between DEC and NYSTA.

The decision that DEC and NYSTA shall serve as co-lead agencies in no way limits the jurisdiction and responsibilities of any other involved agencies. I direct NYSTA and DEC to work closely with and coordinate with all involved agencies, both State and local, to ensure that all environmental impacts associated with the project are assessed in a transparent

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and comprehensive manner. I encourage the staff of NYSTA and DEC to reach out as early as possible to solicit the study and informational needs of the other involved agencies to insure that the scope of review covers their environmental concerns. I further direct DEC and NYSTA to develop a publically available website to post all project related information to ensure that the environmental review is being conducted in the most transparent and open manner possible.

Dated: April 27, 2015  
Albany, New York



Basil Seggos, Acting Commissioner

**Distribution of Copies:**  
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