

**STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1550**

In the Matter

- of -

the Application for Permits Pursuant to Environmental
Conservation Law (ECL) Articles 19 and 27 for the Rensselaer
Engineered Fuels Solid Waste Mechanical-Biological Treatment
Facility

- by -

RENSELAER RESOURCE RECOVERY, LLC,

Applicant.

DEC Permit Application ID No. 4-3814-00084/00001

**RULING OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON
ISSUES AND PARTY STATUS
AND ORDER OF DISPOSITION**

December 22, 2020

Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Anthony Luisi, Regional Attorney, of counsel), for staff of the Department of Environmental Conservation.
- The West Firm, PLLC (Thomas S. West of counsel), for applicant Rensselaer Resource Recovery, LLC.
- Riverkeeper, Inc. (Victoria Leung of counsel), for Riverkeeper, Inc.

**RULINGS OF THE CHIEF ADMINISTRATIVE LAW JUDGE ON
ISSUES AND PARTY STATUS AND ORDER OF DISPOSITION**

I. FACTS AND PROCEDURAL BACKGROUND

A. Background

Rensselaer Resource Recovery, LLC, also referred to as “BioHiTech” and “Rensselaer Engineered Fuels” (Applicant), proposes to construct and operate a municipal solid waste processing facility at 36 Riverside Avenue in the City of Rensselaer (Project). The Project, which would have an annual throughput of up to 150,000 tons, would process municipal solid waste using a high efficiency mechanical-biological treatment technology to produce a solid recovered fuel that is an EPA-approved marketable commodity substitute for coal.¹

Environmental review of the Project pursuant to the State Environmental Quality Review Act (Environmental Conservation Law article 8 [SEQRA]; see also 6 NYCRR part 617) began in March 2018 when Applicant filed an application with the Planning Commission of the City of Rensselaer for site plan approval and a special use permit.² On May 14, 2018, the Planning Commission designated the Project as a Type I action, declared itself lead agency, and commenced a coordinated review of the Project under SEQRA.³ At a special meeting on August 27, 2018, the Planning Commission issued a negative declaration for the Project under SEQRA, approved the site plan, and granted a special use permit. At its next regular meeting on

¹ Issues Conference Exhibit (IC Exh) 29 at 1.

² See IC Exhs 1-5.

³ See IC Exh 12.

September 10, 2018, the Planning Commission ratified the negative declaration and the local approvals.⁴ Notice of the negative declaration was published in the Department’s electronic Environmental Notice Bulletin (ENB) on September 26, 2018.⁵

Beginning on January 25, 2019, as supplemented in subsequent filings, Applicant filed an application with the Department seeking a 6 NYCRR part 360 (Part 360) solid waste management facility permit and an air State facility permit for the Project.⁶ In a December 26, 2019, notice of incomplete application (NOIA), Department staff noted that pursuant to the City of Rensselaer Zoning Code, site plan approvals in the City automatically terminate after one year unless a building permit has been issued and significant work on the project has commenced, or the applicant obtains a 6-month extension of the site plan approval from the Planning Commission and the Building and Zoning Administrator. Accordingly, Department staff requested that Applicant provide information regarding whether the Project’s site plan approval had expired, whether Applicant would be submitting a new application to the Planning Commission for site plan approval and, if so, whether the new application would be identical to the previous site plan application or would contain any modifications or amendments.⁷

In response, Applicant asserted that the status of its local approvals was a matter of local zoning law and could not form the basis of an incompleteness determination under the Department’s Uniform Procedures Act (ECL article 70 [UPA]). Applicant argued that “given that the site plan approval issue is the only ground asserted in the NOIA, this is a *de facto* concession by the Department that all technical issues have been resolved and that the Application is, in fact, complete.”⁸ Applicant stated that it wished to proceed with the application and “assumes all risk relative to obtaining any necessary local zoning approvals.”⁹ As to the local approvals, Applicant stated that it disagreed that they have expired and would be requesting confirmation from the City that the approvals remained in effect or would seek an extension once the new administration took office in January 2020.¹⁰

Department staff subsequently issued a notice of complete application (NOCA) dated January 10, 2020. In its transmittal letter to Applicant, Department staff noted that the status of Applicant’s local approvals was relevant to the Department’s review of the application under the UPA because if the Planning Commission, as SEQRA lead agency, rescinded its

⁴ See IC Exh 16.

⁵ See https://www.dec.ny.gov/enb/20180926_not4.html (last accessed Dec. 22, 2020).

⁶ See e.g. IC Exhs 26-30, 34-35.

⁷ See IC Exh 59.

⁸ IC Exh 60 at 2.

⁹ Id.

¹⁰ See id. at 3.

negative declaration prior to renewing or extending Applicant's site plan approval, the pending Part 360 permit application would be rendered incomplete by operation of law until the lead agency accepted a draft environmental impact statement (DEIS).¹¹ Department staff further asserted that answers to its questions in the NOIA would likely affect the UPA process, the ultimate design of the Project, and the Department's technical review of the application. Accordingly, Department staff requested that:

“[i]n order to avoid the potential waste of both State and [Applicant] resources in processing an application for a project that does not have, or may not have, all applicable local governmental approvals, and avoiding the commencement of an environmental justice public participation process and a technical review process that could potentially require repetition in the future after the local permit and approval issues are fully and finally resolved, DEC requests [Applicant's] consent to suspend the time periods under the [UPA] for DEC to further process the Application until such time as the City of Rensselaer Planning Commission adopts a resolution either confirming that [Applicant's] site plan approval has not expired or confirming that it has expired but that it will be renewed or extended without rescission of the . . . Planning Commission's negative declaration.”¹²

Applicant declined to consent to the Department's request.

After publication of the NOCA, Department staff began technical review of the application, and Applicant began the environmental justice public participation process consistent with Commissioner Policy CP-29. During the Department's technical review, the Mayor of the City of Rensselaer, Michael Stammel, held a public meeting at Rensselaer City Hall on January 25, 2020, to address public concerns about the Project and another solid waste management facility in the City known as the Dunn Landfill.¹³ With respect to the August 2018 negative declaration and local approvals issued by the Planning Commission, Mayor Stammel stated:

“When it comes to the Bio Tech [sic] plant in the, down at the lower end of the

¹¹ See IC Exh 64 at 1 (citing 6 NYCRR 617.3[c]); see also Notice of Complete Application, IC Exh 64 (“In the event the City of Rensselaer Planning Commission rescinds its negative Declaration for the proposed project prior to renewal or extension of site plan approval, then this Notice of Complete Application shall be rescinded without further notice” [citing 6 NYCRR 617.3(c); Matter of Global Cos. LLC v New York State Dept. of Envtl. Conservation, 155 AD3d 93 (3d Dept 2017)]).

¹² Id. at 2.

¹³ See IC Exh 103 at sixth unnumbered page n 16 (citing Dave Lucas, Rensselaer Mayor Hosts Dunn Landfill Meeting At City Hall, <https://www.wamc.org/post/renselaer-mayor-hosts-dunn-landfill-meeting-city-hall> [last accessed Dec. 22, 2020]).

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 say, 'no, just continue to do what you're doing.'"¹⁴

In a Times Union article about the Project published on June 29, 2020, Mayor Stammel was again quoted as saying his administration “would require BioHiTech to go through the planning process anew – this time with a full environmental impact study.”¹⁵

After Department staff’s time under the UPA to act on the Departmental permit application expired, on August 4, 2020, Applicant delivered to the Department a demand, pursuant to ECL 70-0109(3)(b) and 6 NYCRR 621.10(b), that staff issue a final decision on the application within five days of receipt of that demand (the Five-Day Demand).¹⁶

In response to the Five-Day Demand, Department staff issued a notice of permit denial denying the Part 360 and air State facility permits without prejudice to resubmit.¹⁷ In its notice, Department staff stated that with respect to the Planning Commission’s 2018 negative declaration:

“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.”¹⁸

¹⁴ IC Exh 103 at seventh unnumbered page (quoting Dave Lucas, “I’m at Rensselaer City Hall . . . TOXIC WASTE press conference Listen to . . .,” <https://pscp.tv/davelucas/1djGXRWqBoexZ> [last accessed Dec. 22, 2020] [video beginning at the 10:00 minute mark]).

¹⁵ Id. (quoting Chris Churchill, How much garbage can this city take?, <https://www.timesunion.com/news/article/Churchill-How-much-garbage-can-this-city-take-15374333.php> [last accessed Dec. 22, 2020]).

¹⁶ IC Exh 102.

¹⁷ IC Exh 103 at ninth unnumbered page.

¹⁸ Id. at fifth unnumbered page (citing 6 NYCRR 617.7[e]-[f]).

With respect to the Department's role as an involved agency under SEQRA, Department staff noted:

“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.”¹⁹

Department staff further noted that in this matter, Applicant's site plan approval had expired and that at some time in the future, Applicant would need to return to the Planning Commission with a new application for site plan approval and a special use permit for the Project. Department staff stated that at that time, the Planning Commission would have the legal duty under SEQRA 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. Based on Mayor Stammel's public statements regarding the City's intention to require an environmental impact statement when Applicant returns to the Planning Board, Department staff stated that it was reasonable to conclude that future proceedings under SEQRA will occur regarding the Project. Staff noted that as an involved agency, the Department could not lawfully approve the application for Departmental permits until SEQRA has been fully complied with and unless the approval is fully informed and based upon final SEQRA findings where such findings are issued. However, as a result of the Five-Day Demand, staff indicated that the Department could no longer wait to see how the Planning Commission would determine to proceed with SEQRA on the resubmitted application but, instead, was presently required to make its permit decision.²⁰

Department staff concluded that:

“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 [Project] among all involved agencies prior to final decisions on all applicable

¹⁹ Id. (citing 6 NYCRR 617.3[a]).

²⁰ Id. at seventh to ninth unnumbered pages.

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 [Project], 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 a project until that process has run its course and any potential resulting changes are incorporated into a future permit application.”²¹

B. Part 624 Permit Hearing Proceedings

By letter dated August 12, 2020, Applicant requested a hearing to challenge the Department’s notice of permit denial.²² The matter was referred to the Department’s Office of Hearings and Mediation Service (OHMS) for permit hearing proceedings pursuant to 6 NYCRR part 624 (Part 624) and the undersigned Chief Administrative Law Judge (ALJ) was assigned to preside.

On September 4, 2020, the undersigned presiding ALJ issued a notice of legislative public comment hearing, issues conference, and adjudicatory hearing.²³ On September 9, 2020, the notice was published in the Department’s ENB and in The Record, a daily newspaper published in the City of Troy, Rensselaer County, New York.²⁴ The notice established September 30, 2020, as the deadline for the filing of petitions for party status. The notice also scheduled the legislative public comment hearing for October 6, 2020, and the issues conference and adjudicatory hearing, if any, to begin on October 10, 2020. All hearings were noticed to be conducted electronically through the Webex Events electronic webinar platform. Written comments were scheduled to be due October 9, 2020. By memorandum dated September 4, 2020, I requested that Applicant and Department staff also file and serve a preliminary statement of proposed issues by September 30, 2020.

²¹ Id. at ninth unnumbered page.

²² See IC Exh 104. As the basis for its request for hearing, Applicant cited 6 NYCRR 621.11(g), which is applicable to applications for permit renewals, reissuances, and modifications. Inasmuch as the application in this matter is for a new permit, the correct basis for the hearing request is 6 NYCRR 621.10(a).

²³ See IC Exh 105 (ENB version); IC Exh 106 (newspaper version); IC Exh 107 (notice of permit hearing distribution list).

²⁴ See IC Exhs 108, 109.

By letter dated September 29, 2020, special counsel to the City of Rensselaer and the Planning Commission informed the parties that because this proceeding relates solely to the denial of the Departmental permits and would not adjudicate the Planning Commission's original issuance of the site plan and special use permit to Applicant, the expiration of those permits, or the processing of any application resubmittal, the Planning Commission would not be seeking party status. The special counsel confirmed, however, that during the Department's review of the Project, the Planning Commission's site plan and special use permit approvals had expired. With respect to the expired Planning Commission approvals, the special counsel stated:

“the Applicant has been notified that the Commission will require submission of new applications for review by the Commission and City Planning Department. Such complete applications have not yet been received. Until they are received, the Commission will be unable to make a determination of the appropriate SEQRA classification of the Project's applications or to take any other relevant actions under SEQRA. Once the Commission receives such complete applications, it will, of course, proceed expeditiously, consistent with all legal requirements.”²⁵

On September 30, 2020, a timely petition for amicus party status was filed by Riverkeeper, Inc.²⁶ Applicant and Department staff each filed timely preliminary statements of proposed issues.²⁷

1. Legislative Public Comment Hearing and Written Comments

The legislative public comment hearing was convened as noticed at 5:00 PM on October 6, 2020, via electronic webinar. About 45 individuals attended with 19 offering comments. Of those offering comments, three were elected or local officials: New York State Assembly Member John McDonald, Albany County Legislator Sam Fein, and City of Rensselaer Director of Planning Ketura Vics. Ms. Vics, speaking on behalf of the Planning Commission, reiterated the points made in the Planning Commission's September 29, 2020 letter.²⁸

The remaining commenters opposed the Project and supported the Department's denial of Applicant's permit application. The concerns raised by the commenters included concerns that as a result of the Dunn landfill and other facilities, the community is already overburdened with adverse environmental impacts such as truck traffic and exhaust. Commenters also raised concerns about the lack of a full environmental impact analysis of the Project, the potential adverse health impacts from the Project to the local community and natural

²⁵ IC Exh 120.

²⁶ See IC Exh 121.

²⁷ See IC Exhs 122, 123.

²⁸ See Public comment hearing transcript, Oct. 6, 2020, at 20-22.

resources such as the Hudson River, and the lack of direct benefits to the community from the Project. Some commenters also urged that the materials Applicant proposes to process into a fossil-fuel based replacement for coal should instead be recycled and reused, not burned for fuel.

In addition to the oral comments offered at the legislative public comment hearing, 11 individuals filed written comments opposing the Project. The written comments echoed many of the concerns raised in the oral comments, including the need for a full environmental impact review of the Project.

Finally, the Rensselaer City Clerk, Nancy Hardt, filed an October 9, 2020, letter forwarding a resolution of the Common Council of the City of Rensselaer unanimously passed on October 7, 2020. In the resolution, the Common Council urged Applicant to voluntarily withdraw the Project from consideration in the City of Rensselaer.²⁹

2. Issues Conference

The issues conference convened as noticed at 10:00 AM on October 7, 2020, via electronic webinar. The participants were Department staff, Applicant, and amicus party status petitioner Riverkeeper, Inc.

Beginning with Riverkeeper's petition, neither Applicant nor Department staff objected to joining Riverkeeper as an amicus party. Accordingly, Riverkeeper's petition to participate in the proceeding as an amicus party was granted.³⁰ Thereafter, oral argument was held on the issues raised in the parties' preliminary statement of proposed issues.

At the conclusion of the issues conference, the following briefing schedule was established: closing briefs were due to be served and filed October 21, 2020; replies on October 28. The parties each timely filed memoranda of law in support of their respective positions, and reply memoranda of law. Applicant and Department staff thereafter requested leave to file sur-reply memoranda, which was granted and a November 6, 2020, deadline for filing was set. Only Applicant filed a sur-reply memorandum; Department staff opted not to file a sur-reply.

II. DISCUSSION

A. Standards of Review

Among the purposes of a Part 624 issues conference is to determine whether disputed issues of fact raised by an applicant and proposed intervenors require adjudication (see

²⁹ See IC Exh 124.

³⁰ See Issues conference transcript, Oct. 7, 2020, at 6-7.

6 NYCRR 624.4[b][2][iii], [5][ii]). The issues conference is also used to determine legal issues whose resolution is not dependent on facts that are in substantial dispute (see 6 NYCRR 624.4[b][2][iv], [5][iii]). In Part 624 proceedings, the applicant bears the ultimate burden of proving that its application meets all applicable laws and regulations administered by the Department (see 6 NYCRR 624.9[b][1]).

At the issues conference and in briefing, the parties generally agreed that the initial issue presented is whether the grounds for permit denial as articulated by the Department in its August 10, 2020 notice are valid bases for denial. The parties also generally agreed that the initial issue is a legal issue not dependent on facts that are in substantial dispute and can be handled through oral argument and briefing.

Accordingly, the standard of review of legal issues is whether the agency's determinations were "affected by an error of law" (Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404-405 [1979]). An agency's discretionary acts and policy decisions are reviewed under the "abuse of discretion" standard and may be set aside only if there is no rational basis for the exercise of discretion or the act complained of is arbitrary and capricious (see Matter of Peckham v Calogero, 12 NY3d 424, 430-431 [2009]; Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974] [the test is one of rationality]). Similarly, the review of the construction of statutes and regulations by the agency responsible for their administration are adjudged against the rationality and reasonableness standard (see Matter of Natural Resources Defense Council, Inc. v New York State Dept. of Env'tl. Conservation, 25 NY3d 373, 397 [2015]).

B. Analysis

Section 617.7(f) of 6 NYCRR provides:

"At any time prior to its decision to undertake, fund or approve an action, a lead agency must rescind a negative declaration when substantive:

- (i) changes are proposed for the project; or
- (ii) new information is discovered; or
- (iii) changes in circumstances related to the project arise; that were not previously considered and the lead agency determines that a significant adverse environmental impact may result."

The central issue in dispute among the parties is whether a negative declaration issued on a prior approval that has since expired may be rescinded, pursuant to section 617.7(f), by the SEQRA lead agency on an application to renew the prior approval. Applicant argues that under the regulations, a lead agency may only rescind a negative declaration prior to its final decision on the original approval. Thereafter, the negative declaration remains valid and binding on the lead agency and any involved agencies, and cannot be rescinded. Citing the

SEQR Handbook, Applicant argues that only if the prior final decision is revoked or overturned would a new determination of significance be allowed for any reconsideration of the prior action.³¹ Accordingly, Applicant argues that Department staff was without authority to ignore the negative declaration and, therefore, the permit denial must be reversed.

In response, Department staff, supported by Riverkeeper, argues that consistent with SEQRA's legislative mandates, a lead agency's determination of significance or non-significance is not the conclusion of the SEQRA review process or the end of the lead agency's environmental review responsibilities. Department staff argues that neither ECL article 8 nor the regulations provide an expiration or sunset date for the lead agency's duties and responsibilities. Rather, Department staff asserts that the rescission provisions at 6 NYCRR 617.7(f) require a lead agency to rescind a negative declaration when previously unconsidered substantive changes are proposed for a project, new information is discovered, or changes in circumstances related to the project arise that may result in a significant adverse environmental impact. Department staff concludes that the lead agency's obligation to consider the standards for rescission of a previously issued negative declaration does not expire and is not excused upon the issuance of an agency's approval, "particularly where such approval eventually expires by its express terms or by operation of law and therefore requires further agency discretionary action, whether in the form of an agency determination upon an application for renewal or extension or as a new and separate application for administrative approval of the same SEQR action."³²

The parties do not cite, and research fails to reveal, case law directly addressing the issue presented here. While the cases cited by Applicant do hold that a lead agency may not rescind a negative declaration after it issues its final decision, none of the cases cited involve an expired prior approval or an application before the lead agency to renew or extend a prior approval. Nor does the express language of section 617.7(f) expressly foreclose its application in the context of a new or renewal application to renew an expired prior approval. Thus, Applicant has not identified an error of law.

In contrast, Department staff's interpretation of section 617.7(f) is reasonable based on the plain language of the regulation and the policies and legislative mandates underlying SEQRA. The terms of section 617.7(f) are sufficiently broad so as to require a lead agency to rescind a prior negative declaration "[a]t any time prior to its decision to undertake, fund or approve an action" on a new or renewal application, provided the criteria for rescission are satisfied. Department staff's interpretation of section 617.7(f) in this context furthers SEQRA's goal of assuring that any unexamined environmental impacts are identified and that

³¹ See Applicant Mem of Law at 8 (citing Department of Env'tl. Conservation, The SEQR Handbook 88-89 [4th ed 2020], available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf [accessed on Dec. 22, 2020]).

³² Department Staff Mem of Law at 10-11.

adverse environmental effects are minimized to the maximum extent practicable (see e.g. Matter of Jackson v New York State Urban Dev. Corp., 67 NY2d 400, 414-415 [1986]).

The reasonableness of staff's interpretation of section 617.7(f) is further supported by other provisions of the SEQRA regulations. For example, permit renewals are listed as Type II actions, or actions not subject to review under SEQRA provided, however, that "there will be no material change in permit conditions or the scope of permitted activities" (6 NYCRR 617.5(c)[32]). It is implicit from this provision that renewal applications that involve substantive changes to the permitted activity, new information, or changed circumstances that require material changes in permit conditions or the scope of the permitted activities are excepted from the Type II list. To conclude that a prior negative declaration cannot be rescinded in the context of such a permit renewal would effectively render section 617.5(c)(32)'s exception a nullity for applications involving proposed changes to a project, new information, or changed circumstances not previously considered when the project received a negative declaration. Such an interpretation would be unreasonable and inconsistent with SEQRA's goals and mandates.

Case law interpreting the regulatory provisions governing final EISs (FEIS) and when supplemental EISs (SEIS) may be required by the lead agency further supports Department staff's interpretation of section 617.7(f). Based upon similar regulatory language and the "letter and spirit of SEQRA," at least one court has concluded that a lead agency's obligations to require an SEIS based on proposed changes to a project, new information, or changed circumstances continues even after the agency has issued its SEQRA findings based on an FEIS and taken the proposed action (see Matter of Committee for Environmentally Sound Dev. v City of New York, 190 Misc 2d 359, 369-371 [Sup Ct, NY County 2001]). This authority supports Department staff's assertion that a lead agency's obligations under SEQRA do not terminate when it issues its prior final approval.

Contrary to Applicant's assertion, the cited provision of the SEQR Handbook also supports Department staff's assertion that a SEQRA lead agency must revisit a negative declaration after issuing a final approval on that declaration. Nothing in the cited section or the remaining portions of the Handbook expressly addresses the status of a negative declaration on an application before a lead agency to renew or extend an expired prior approval. Moreover, to the extent the expiration of a prior local approval is the equivalent of the vacatur or overturning of the prior approval, a fair reading of the Handbook suggests not only that the prior determination of significance must be revisited on reconsideration of the prior approval, but that such review is de novo.

In any event, Department staff's conclusion that a negative declaration issued on a prior approval that has since expired may be rescinded by the SEQRA lead agency pursuant to section 617.7(f) on an application to renew the prior approval is a reasonable interpretation of the regulations that is supported by the legislative goals and mandates of SEQRA. Accordingly, as the agency charged with promulgating the SEQRA regulations (see ECL 8-0113), the Department's interpretation of section 617.7(f) should be upheld.

Applicant goes on to argue that it was improper for the Department to deny the

application based on the “off-the-cuff statements by the newly-elected City major” that the Project will require an EIS upon Applicant’s reapplication for the local approvals that have expired.³³ Applicant observes that at the time of the Department’s permit denial, the 2018 negative declaration was in effect and had not been rescinded. Moreover, Applicant asserts that the Project has not changed in any way since its approval in 2018 and, accordingly, no basis exists for rescission of the negative declaration. Accordingly, Applicant contends that the comments by the Mayor, who has no review or approval authority over the Project, are speculative and do not provide a valid basis for denying the application before the Department.

Under the circumstances of this matter, Department staff’s denial based upon possible future SEQRA proceedings before the Planning Board on any application by Applicant for renewal of its 2018 local approvals had a rational basis. As stated by Mayor Stammel at the time the Department made its permit decision, and as confirmed by the counsel and director of the Planning Commission in these proceeding, Applicant’s 2018 local approvals have expired and Applicant will be required to submit new applications for review by the Planning Commission and the City Planning Department if it wishes to proceed with the Project.³⁴ Moreover, as noted by Mayor Stammel, and as subsequently confirmed by the counsel and director of the Planning Commission, any application to renew the prior local approval will undergo further review under SEQRA, including a determination of the appropriate classification of the Project under SEQRA.³⁵

Given the Mayor’s public statements as confirmed by the Planning Commission, one potential outcome of the Commission’s SEQRA review is a rescission of the prior negative declaration pursuant to section 617.7(f), and the issuance of a positive declaration, which would necessitate preparation of a DEIS for the Project. Although Applicant asserts that its Project has not changed since the 2018 approvals, that cannot be determined in this proceeding and on this record. Nor can it be determined whether new information or changed circumstances will be presented to the Commission on any future renewal application. Even accepting Applicant’s assertion that the Project has not changed, the possibility of a rescission of the negative declaration cannot be ruled out.

Based upon the uncertainties regarding the SEQRA status of the Project, Department staff acted rationally in seeking an extension of the UPA timeframes for decision pending resolution of the issue before the Planning Commission. As noted by Department staff in its NOCA and its notice of permit denial, if the Planning Commission rescinds the negative declaration and issues a positive declaration, Applicant’s application for Departmental permits will be rendered incomplete unless and until a DEIS is accepted by the lead agency. Moreover, as noted by Department staff, the preparation of a DEIS would involve further coordinated

³³ Applicant Mem of Law at 1.

³⁴ See e.g. IC Exh 120.

³⁵ See id.

review under SEQRA and could potentially result in modifications to the Project pursuant to that review that could render review of the current Project academic. Accordingly, it was rational for Department staff to seek to adjourn proceedings under the UPA until the SEQRA status of the Project is finally resolved before the Planning Commission. Similarly, in response to Applicant's Five-Day Demand, it was also rational for Department staff to deny the application on procedural grounds under SEQRA without prejudice to resubmit once the Project's SEQRA status is resolved by the Planning Commission.

In sum, Department staff's denial of Applicant's permit application without prejudice to resubmit is based on a reasonable interpretation of SEQRA and is rationally based. Accordingly, the notice of permit denial should be upheld. In light of this conclusion, Applicant's additional proposed issues, which concern whether Applicant is entitled to a permit approval in the event the permit denial on SEQRA grounds is reversed, are rendered academic and will not be addressed in this ruling.

III. CONCLUSION, RULING, AND ORDER OF DISPOSITION

For the reasons stated above, Department staff's denial of Applicant's permit application without prejudice to resubmit is based on a reasonable interpretation of SEQRA and is rationally based. Accordingly, Department staff's August 10, 2020, notice of permit denial is affirmed, and Applicant's application for the Part 360 solid waste management facility permit and air State facility permit are denied without prejudice to resubmit. There being no further issues requiring adjudication in this matter, further proceedings in this matter are hereby canceled.

IV. APPEALS

Pursuant to 6 NYCRR 624.8(d)(2), a ruling on the merits of any legal issue made as part of an issues ruling is appealable to the Commissioner as of right. Although the regulations provide that appeals must be filed in writing within five days of the disputed ruling (see 6 NYCRR 624.6[e][1]), the period for filing appeals is hereby extended. Any appeals are due by 4:00 P.M. on Friday, January 29, 2021. Replies are authorized and are due by 4:00 P.M. on Friday, February 19, 2021.

The original and two copies of each appeal and reply thereto must be filed with Commissioner Basil Seggos (Attention: Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services), at the New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, NY 12233-1010. In addition, one copy of each submittal must be filed with the undersigned and served on Department staff, Applicant, and Riverkeeper at the same time and in the same manner as the submittals are sent to the Commissioner. Service of papers on the Commissioner, the parties, and the undersigned by electronic mail is permitted provided conforming hard copies are sent by regular mail and post marked by the due date.

Service of papers by facsimile transmission (FAX) is not permitted, and any such service will not be accepted.

_____/s/_____
James T. McClymonds
Chief Administrative Law Judge

Dated: December 22, 2020
Albany, New York

Attachment: Issues Conference Exhibit List

cc: Louis A. Alexander, Deputy Commissioner for Hearings and Mediation Services

To: Attached Service List

RENSELAER RESOURCE RECOVERY, LLC

DEC Permit Application ID No. 4-3814-00084/00001

ISSUE CONFERENCE EXHIBIT LIST

Updated Dec. 22, 2020

Issues Conference Exhibit No.	Date	Description
ADMINISTRATIVE FILE		
1	2018.02.21	initial site plans
2	2018.02.23	EJ Map with truck route
3	2018.02.23	Jurisdictional review map
4	2018.03.05	Meeting sign-in sheet
5	2018.03.05	site plan delivered at pre-application meeting
6	2018.03.05	meeting summary to applicants
7	2018.05.07	Traffic Route Map
8	2018.05.07	EAF Parts 1 & 2, expanded narrative
9	2018.05.07	Traffic Evaluation
10	2018.05.14	Lead Agency Request (dated 4/11/18, received 5/14/20)
11	2018.05.14	Jurisdictional response to City-with transmittal email to hold on lead agency agreement
12	2018.05.16	City Declaration of Lead Agency
13	2018.07.00	Stormwater Pollution Prevention Plan (SWPPP)
14	2018.08.10	Flood Assessment
15	2018.08.27	Town SEQR documents
16	2018.09.10	City Site Plan Approval and Reaffirmation
17	2018.09.10	Transmittal of unsigned negative declaration
18	2018.09.27	Kornak to City requesting SEQR items
19	2018.09.27	Kornak email to City requesting signed negative declaration
20	2018.11.28	Second request for signed negative declaration
21	2018.12.06	Millspaugh-request for DER meeting
22	2018.12.07	signed negative declaration
23	2018.12.19	Site Change of Use Form - DER
24	2018.12.19	J. Strang email - handling of water on site
25	2019.01.14	DEC response to change of use form
26	2019.01.21	Application form - Part 360
27	2019.01.21	Record of Compliance Application Supplement
28	2019.01.22	Application for Solid Waste Management Permit
29	2019.01.24	Application cover letter from Sterling
30	2019.01.29	Certificate of LLC, Delaware
31	2019.02.20	Dave Ellis comments and response
32	2019.02.28	Notice of Incomplete Application with email transmittal
33	2019.03.29	Sterling to Rensselaer Co. Sewer-waste questionnaire
34	2019.03.29	Air Registration Application - to V. Schmitt

35	2019.03.29	Sterling Resubmission with Air registration application and 2019.01.22 Operations and Maintenance Plan
36	2019.04.12	Meeting sign-in sheet
37	2019.04.18	Notice of Incomplete Application - EJ, Air, Part 360
38	2019.06.07	Sterling to DEC EJ Office-submission of PPP
39	2019.06.19	Notice of Incomplete Application with email transmittal
40	2019.06.27	Air Registration Application
41	2019.06.28	Revised Part 360 application
42	2019.06.28	Public Participation Plan
43	2019.07.02	Sterling resubmission cover letter
44	2019.07.02	Sterling resubmission - Air Registration Application
45	2019.07.03	Appendix D - Facility Design Plans
46	2019.07.03	Process Flow Chart
47	2019.07.03	Public Participation Plan-Sterling Environmental
48	2019.07.09	Rensselaer SW Moratorium
49	2019.08.02	Kornak to Sterling - email request for information
50	2019.09.11	Notice of Incomplete Application-technical comments
51	2019.10.08	Application for Air State Facility Permit
52	2019.11.01	Sterling resubmission-product end use and wastewater
53	2019.11.20	Notice of Incomplete Application-EJ
54	2019.11.22	Email to request suspension of UPA timeframes
55	2019.11.26	Notice of Incomplete Application - with email transmission
56	2019.11.26	Goertz to Mayor Mooney - SEQR process
57	2019.12.10	Goldman Law to Goertz re: City Lead Agency process
58	2019.12.10	Sterling resubmission-with updated traffic eval. 8/9/18
59	2019.12.26	Notice of Incomplete Application
60	2019.12.27	Tom West letter regarding local approvals
61	2020.01.03	Coastal Assessment Form
62	2020.01.03	Coastal Consistency Determination
63	2020.01.10	Notice of Complete Application with email transmittal
64	2020.01.10	Luisi to Tom West with NOCA
65	2020.01.15	ENB public notice
66	2020.01.16	City Hall Submittal
67	2020.01.16	Rensselaer Library Submittal
68	2020.01.17	Proof of publication
69	2020.01.17	Sterling re: NOCA distribution
70	2020.01.22	DEC to Soriano - EJ responsibilities
71	2020.01.27	Kornak to Sterling - extension of public comment period
72	2020.01.27	Tom West email re: public notice
73	2020.01.28	Notice of extension of public comment period
74	2020.01.29	ENB Notice of comment period extension
75	2020.01.31	Proof of publication
76	2020.02.00	Public comments - compiled
77	2020.02.03	Sterling email - first EJ meeting scheduled
78	2020.02.04	O'Neill letter re: storm sewer impacts

79	2020.02.19	Request for Additional Information
80	2020.02.19	Attorney General letter to Tom West - Env. Justice process
81	2020.02.19	Attorney General letter to City - Justice process
82	2020.02.23	Final Stakeholder List
83	2020.02.25	Public EJ Meeting Documents
84	2020.03.03	Kornak to Sterling-transmission of public comments
85	2020.03.09	Site cross-section
86	2020.03.12	Request for Additional Information
87	2020.03.24	Request to extend UPA timeframes
88	2020.04.06	Response to Mayor Stammel
89	2020.04.07	Sterling resubmission letter
90	2020.05.22	RFAI - air questions
91	2020.05.26	DAR request for info to applicant
92	2020.05.27	Resubmission email for Air
93	2020.05.27	Derby Waste Master results for DEC
94	2020.05.28	UPA Timeframe Extension
95	2020.06.04	Public EJ Meeting Documents
96	2020.06.12	Email to Sterling - project added to DEC website
97	2020.06.16	Soriano email about new project website
98	2020.06.17	response to Riverkeeper
99	2020.06.23	DEC response to Stammel
100	2020.07.09	Final EJ Compliance Report
101	2020.08.04	Request for Additional Information
102	2020.08.04	5-day letter demand
103	2020.08.10	letter of permit denial
104	2020.08.12	Request for Hearing
ISSUES CONFERENCE FILE		
105	2020.09.04	Notice of Legislative Public Comment Hearing, Issues Conference, and Adjudicatory Hearing (for publication in Environmental Notice Bulletin [ENB])
106	2020.09.04	Notice of Legislative Public Comment Hearing, Issues Conference, and Adjudicatory Hearing (for publication in newspaper)
107	2020.09.04	Notice of Permit Hearing Distribution List
108	2020.09.09	Notice of Legislative Public Comment Hearing, Issues Conference, and Adjudicatory Hearing (ENB Version)
109	2020.09.09	Affidavit of Publication in <u>The Record</u>
120	2020.09.29	Letter from P. Dixon to Chief Administrative Law Judge (ALJ) James T. McClymonds RE: Rensselaer Resource Recovery, LLC
121	2020.09.30	Petition of Riverkeeper, Inc. for <i>Amicus</i> Status in the Adjudicatory Hearing
122	2020.09.30	DEC Staff Preliminary Statement of Proposed Issues
123	2020.10.01	Applicant Preliminary Statement of Proposed Issues

124	2020.10.09	Letter from N. Hardt, Rensselaer City Clerk, to Chief ALJ McClymonds RE: BioHiTech/Rensselaer Resource Recovery LLC
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