

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

PROJECT: Westchester Joint Water Works Filtration Plant and Ultraviolet Facility, Town of Harrison, Westchester County.

DISPUTING AGENCIES: The Town of Harrison Planning Board ("Planning Board") v. Westchester Joint Water Works ("WJWW").

I have been asked to designate a lead agency to conduct an environmental review of a proposal by WJWW to construct and operate a Water Filtration Plant and their other proposal to construct and operate an Ultraviolet Treatment Facility.¹² 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]). This designation of WJWW to serve as lead agency is based on my findings that WJWW, as project sponsor, has broader jurisdiction than the Planning Board to investigate the environmental impacts of the projects.

ACTION AND SITE

- A. Filtration Plant - This project involves a proposal by WJWW to construct and operate a Dissolved Air Flotation/Filtration water treatment facility ("Filtration

¹ The Department acknowledges statements from WJWW that the Planning Board's lead agency objection is untimely and, therefore, their objection and the dispute should not be considered. However, due to the ambiguity created by both agencies entertaining a "co-lead" agency arrangement and the original lead agency coordination initiated by WJWW and subsequent extensions thereof, the timeliness of the Planning Board's objection is in dispute and my decision does not resolve this matter. Instead, my decision is based on the merits of the dispute and a strict application of the relevant lead agency designation criteria.

² The Department notes the disputing agencies differ in their conclusions of whether these two planned projects are separate and independent of each other or if the projects should be reviewed together to evaluate potential environmental impacts under SEQR. WJWW has determined the UV Facility to be a separate action from the Filtration Plant and has classified the action associated with the SEQR review of the UV Facility to be Type II under 6 NYCRR 617.5. WJWW has initiated coordinated review (as has the Planning Board), for the Filtration Plant, however, the Planning Board, while acknowledging the UV Facility on its own is Type II, determined it should be considered part of a comprehensive plan by WJWW to improve their water supply treatment and believes the actions should be reviewed together under SEQR. My decision does not resolve this difference. Rather, my decision is based on the presumption that each agency has jurisdiction over both projects and the application of the lead agency designation criteria to the projects collectively.

Plant") for its Rye Lake (Kensico Reservoir) water source. The project would include a filtration facility with a capacity of 30 million gallons per day (MGD), access road, parking lot, installation of utilities including water and sewer connections, and stormwater management features on 9.7 acres of a 13.4-acre project site. The project site would be located on a portion of property owned by Westchester County, located adjacent to Westchester County Airport and accessed by Tower Road. According to WJWW, the proposal will require acquisition of a portion of the County Airport property and plans for an equal land swap for 13.4 acres.

- B. Ultraviolet Facility – This project involves a proposal by WJWW to install a new 2,900 square foot, 2-1/2 story, prefabricated, 30 MGD Ultraviolet (UV) Treatment Facility ("UV Facility") located at their Rye Lake pumping station/treatment facility on property owned by the New York City Department of Environmental Protection ("NYCDEP"). WJWW would construct the UV Facility to comply with EPA's Long Term 2 Enhanced Water Treatment requirements regarding the treatment of *Giardia* and *Cryptosporidium*.

The two project sites are located more than a 1/3 of a mile apart and are on opposite sides of Interstate 684.

REGULATORY SETTING

The Town of Harrison Planning Board states that its jurisdiction over the proposed projects is based on the following authorities: 1) site plan approval (for both facilities); 2) special exception permit for the UV Treatment Facility; 3) Town of Harrison freshwater wetlands permit (for both facilities); and 4) subdivision approval for the Water Filtration Facility Plant.³

WJWW is the project sponsor of the Filtration Plant having authority over all aspects of project design, funding, land acquisition, construction, and operation. WJWW supplies water to its member municipalities (the Town/Village of Harrison, Town of Mamaroneck and Village of Mamaroneck) and to portions of the cities of Rye and New Rochelle, serving 59,629 people through 14,682 service connections. WJWW also sells water to the Village

³ WJWW asserts that it is immune from the land use jurisdiction of the Town under the doctrine of governmental immunity from zoning described by the New York Court of Appeals in *Monroe County Airport Authority v. City of Rochester*, 72 NY2d 338 (1988). I am, however, not empowered to rule on assertions of governmental immunity. Generally, in past lead agency decisions where one governmental agency has asserted governmental immunity from the land use jurisdiction of the other agency, the Commissioner decided the lead agency dispute by assuming that the agencies have the jurisdiction they assert to qualify them to be lead agency. See, e.g., *Commissioner's Lead Agency Determination in Pine Island Fire District v. Town of Warwick Planning Board*, March 6, 2015, published on the Department's website at <https://www.dec.ny.gov/permits/6534.html>. I continue to do so here.

of Larchmont and Suez Water Westchester, which supplies water to the City of Rye, Village of Rye Brook and Village of Port Chester. In all, WJWW provides drinking water to some 120,000 residents in Westchester County. The Supreme Court for Westchester County has issued a permanent injunction requiring WJWW to construct and operate the Filtration Plant, pursuant to an action brought by New York State Department of Health. WJWW is also under separate administrative order from the United States Environmental Protection Agency to submit a corrective action plan to achieve compliance with the disinfection byproduct maximum contaminant levels. Under the order, WJWW was required to commence design of the Filtration Plant and begin the SEQR process by January 31, 2020, and it must be operational by October 15, 2024. Likewise, WJWW is responsible for directly undertaking the design, funding, construction and operation of the UV Treatment facility.

The role of lead agency for a SEQR review may only be assumed by an involved agency with authority to make discretionary decisions on one or more components of the overall plan. Both the Planning Board and WJWW satisfy the criteria to be considered involved agencies. No other involved agencies have sought lead agency status.

DISCUSSION

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

1. 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);
2. which agency has the broadest governmental powers for investigation of the impacts of the proposed action; and
3. 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.

First Criterion

The Planning Board asserts the anticipated impacts are entirely local and include impacts to Town-regulated wetlands, stormwater impacts, visual impacts from Interstate 684, Rye Lake, and the County Airport, and the cumulative impacts associated with the same applicant constructing two industrial facilities within a relatively small (geographic) area. They include typical construction-related impacts such as noise, truck traffic and dust.

WJWW asserts the potential adverse local environmental impacts of the Filtration Plant are likely minimal: Under the Town's zoning law, water treatment is a permitted use

requiring a special exception use permit and no variances. There are no steep slopes on the project site; the facility will encroach upon a wetlands buffer but WJWW will undertake measures to address any potential for adverse impact to the adjoining wetlands; the facility will not generate hazardous waste; the facility's operation will not generate any significant traffic, air pollution, water pollution or noise; and the proposed site is currently part of the County Airport (a far more intrusive use than the Filtration Plant). Notwithstanding expectations that adverse significant impacts will be minimal, WJWW has already issued a positive declaration and prepared a draft scoping document for preparation and evaluation of the Filtration Plant through the environmental impact statement process, through which other involved agencies and the public can participate in the environmental review.

The potential environmental impacts, as identified by the disputing agencies, are primarily of local significance. While WJWW provides water to several municipalities within the County, for all intent and purpose it is essentially a local agency. I conclude that because the impacts are primarily local, and for the purposes of this determination both agencies are local, the first criterion favors neither agency.

Second Criterion

Here, I find distinctions between the disputing agencies that favors WJWW. WJWW, as sponsor, designer, builder, funding agency, and facility operator, possesses, through its design and financial control, a substantial ability to add, modify or even eliminate project elements. This becomes especially important if design changes would be needed to avoid or minimize environmental impacts.

By contrast, the Planning Board's responsibilities under its land use jurisdictions and freshwater wetlands permit (for both facilities), are not as broad as WJWW's abilities to investigate impacts of the projects and influence their design, as noted above.

I conclude therefore that the second criterion favors WJWW as lead agency.

Third Criterion

The Planning Board indicates it should be lead agency because it was the lead agency responsible for evaluating the potential environmental impacts of a previous similar proposal (for a filtration plant) by WJWW in the same geographic area. This review, according to WJWW, initially resulted in the Planning Board issuing a negative declaration, but for which it later evaluated through the EIS process after the initial Town approvals for the project had been rescinded. WJWW, on the other hand, as the project sponsor and agency directly undertaking the action, was also involved in those previous reviews. WJWW was responsible for supporting studies and documentation, relied on by the Planning Board for its issuance of a negative declaration, and subsequently for preparing a draft EIS as part of the Planning Board's review of the action through the EIS process. In addition, WJWW has already evaluated potential alternatives to the proposed

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action and prepared plans required to comply with both the EPA administrative order and the Supreme Court injunction. WJWW has also prepared a draft scoping document for the current proposed Filtration Plant and has stated its intentions to continue to evaluate the action through the EIS process.

Recognizing the involvement and experience of both agencies with regard to this action and the ability of each agency to hire consultants to assist in their review, I conclude that this third criterion favors neither agency.

FINDING

Given the broad range of authority of WJWW as the project sponsor to investigate impacts and to avoid or mitigate them through its complete control of all aspects of the project funding, design, land acquisition, construction and operational decisions, I conclude that WJWW should be lead agency for the review of the projects.

This designation does not change or diminish the responsibilities or authority of the Planning Board or other involved agencies with jurisdiction over the projects.

While designating WJWW as lead agency, I must remind it to remain aware of any potential impacts already identified by the Planning Board during this lead agency dispute, or which may be identified during the course of the environmental review through the EIS process. In making its determination of significance under SEQR, I encourage WJWW to solicit the advice of the Planning Board and other involved agencies, such as NYCDEP and Westchester County. I remind other involved agencies of their ongoing responsibility under 6 NYCRR § 617.3 (e) to provide the lead agency with any information that may assist the lead agency in completing the SEQR process.



Basil Seggos, Commissioner

Dated: March 10, 2021

Albany, New York

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Disputing Agencies/Applicant

Nancy Seligson, Chair, Westchester Joint Water Works, Board of Trustees (e-copy)
Thomas Heaslip, Chairman, Town of Harrison Planning Board (e-copy)

New York State Department of Environmental Conservation

Lawrence H. Weintraub, Assistant Counsel, Office of General Counsel, Central Office
(e-copy)
John Petronella, Regional Permit Administrator, DEC Region 3 (e-copy)