

# City of Kingston

Andrew P. Zweben  
Corporation Counsel



Daniel Gartenstein  
Assistant Corporation Counsel

*Office of the Corporation Counsel*

*City Hall  
420 Broadway  
Kingston, New York 12401*

*Telephone (845) 331-0080  
Extension 3947  
Fax (845) 334-3959*

October 24, 2014

Martin Brand  
Regional Director  
N.Y.S. Department of Environmental Conservation, Region 3  
21 South Putt Corner Road  
New Paltz, New York 12561

Re: SEQRA Coordinated Review for Niagara Water Bottling Facility

Dear Regional Director Brand:

The City of Kingston has received the October 14, 2014 letter of Kate Hudson, Watershed Program Director of Riverkeeper, suggesting that the City express an opinion as to whether it is an "involved agency" with respect to the above action. Specifically, the letter requests that the City determine whether

other approvals may be required with respect to the acquisition of water from Mink Hollow Brook, the Sawkill and/or Cooper Lake and with respect to the construction of the facilities necessary to transmit water from these water sources to the proposed bottling facility

For the reasons stated below, the City, as distinct from the City of Kingston Water Department, is not an "involved agency" as defined by New York State Environmental Conservation Law and Regulations

The City of Kingston is a municipal corporation established by the New York State Legislature by Chapter 150 of the Laws of 1872. The City Charter was approved by the Legislature of the State of New York as Chapter 747 of the Laws of 1896 and became law on May 5, 1896 with the approval of the Governor. The Charter was amended in its entirety by the Common Council of the City of Kingston on September 2, 1993 Local Law. No. 5-1993, adopted by a Charter Revision Committee and approved by referendum at a general election on November 2, 1993. The Charter was further amended by the Charter Revision Commission on September 7, 1994 and approved by referendum at a general election on November 8, 1994

The City of Kingston Water Department was created on May 27, 1895 by a special act of the New York State Legislature to provide potable water to the residents of the City of Kingston. It is a financially and administratively independent department of the City of Kingston and is

governed by the Board of Water Commissioners. The Board is a continuously sitting body and each member is appointed to a five (5) year term by the Mayor. The Mayor is a voting member of the Board.

Among other responsibilities, the Board sets Department policy and establishes all rules and regulations which it deems essential to the protection of the public interest in the management of the Water Department as defined by the Kingston City Charter. The daily operation is under the direction of Superintendent Judith Hansen. As a financially independent Department, all revenues received from water rents and other related activities remain within the Department to fund its operation. The sales of water accounts for approximately 95% of the Department's revenue and no revenues are received from Federal, State, or local taxes. The Board establishes all water rates and approves all expenditures and the Department currently operates on an annual budget of \$2,488,000.

Specifically, with respect to the sale of water outside the City of Kingston the Charter of the City provides:

§ C11-5

In addition thereto, said Board may supply water to other than inhabitants of the City of Kingston and outside the corporate limits of said city under the following conditions:

A.

Each nonresident applicant for the purchase of water shall file an application therefore, citing all pertinent facts, on a form to be prescribed by the Board of Water Commissioners.

B.

The Board of Water Commissioners shall certify by resolution of a majority of the members of the Board that the water supply of the city is adequate to furnish such water without inconvenience, risk or peril to the residents of the City of Kingston, and that the circumstances described in the application must, in the opinion of the Board, justify the sale of city water.

C.

Such sale or sales must be approved by the New York State Water Power and Control Commission.<sup>1</sup>

D.

---

<sup>1</sup> Now the New York State Department of Environmental Protection.



A deposit of not less than \$10 shall accompany each application for the purchase of water, such sum to be deposited in a special fund by the Treasurer of the Water Board to indemnify the city against nonpayment of water bills.

E.

The Board of Water Commissioners shall be authorized to assess such costs against such nonresident property owner's for the installation of waterlines and facilities as the Board, in its judgment, may deem proper and necessary.

F.

A water meter shall be installed on the premises of each nonresident user of water and all such water shall be paid for on the basis of quantity consumed.

G.

Water meter rates for nonresident consumption shall be fixed by the Board of Water Commissioners at least 10% more than water meter rates for resident consumption.

H.

Before any water facilities are provided outside of the corporate limits of the city, the governmental authority of the area to be served shall give permission to the Board of Water Commissioners to construct, inspect and repair its water facilities, whenever necessary, in the opinion of the Board of Water Commissioners, and that said governmental authority enter into a signed agreement with the Board of Water Commissioners agreeing that the pipelines and other water facilities and services installed upon the petition of and for the purpose of providing water to the residents of such area shall be tax free.

The right, and the parameters, regarding the drawing of water from Mink Hollow and the Sawkill were approved by the New York Department of Conservation Water Power and Control Commission on May 27, 1929. The City of Kingston Water Department advises that the proposed action does not entail the construction of any facilities by the Kingston Water Department. Therefore, the City of Kingston, as distinct from the City of Kingston Water Department, will not be making "a discretionary decision to fund, approve or undertake an action", the criteria by which an involved agency is defined pursuant to the pertinent regulation of the New York State Department of Environmental Conservation Law. See below.<sup>2</sup>

The regulations of the Department of Environmental Conservation (6 NYCRR 617.1, et.seq.) promulgated pursuant to Section 8-0113 of the New York State Environmental Conservation Law provide, inter alia:

#### **Section 617.6. Initial Review of Actions and Establishing Lead Agency**

---

<sup>2</sup> As pointed out above, according to the City Charter, the NYSDEC, acting as the successor to the Water Power and Control Commission, will have to approve the action of the City of Kingston Water Department if the latter ultimately decides to go ahead with the proposed action.

(a) Initial review of actions.

(1) As early as possible in an agency's formulation of an action it proposes to undertake, or as soon as an agency receives an application for funding or for approval of an action, it must do the following:

- (i) Determine whether the action is subject to SEQR. If the action is a Type II action, the agency has no further responsibilities under this Part;
- (ii) Determine whether the action involves a Federal agency. If the action involves a Federal agency, the provisions of section 617.15 of this Part apply.
- (iii) Determine whether the action may involve one or more other agencies.
- (iv) Make a preliminary classification of an action as Type I or Unlisted, using the information available and comparing it with the thresholds set forth in section 617.4 of this Part. Such preliminary classification will assist in determining whether a full EAF and coordinated review is necessary.

(b) Establishing lead agency.

(1) When a single agency is involved, that agency will be the lead agency when it proposes to undertake, fund or approve a Type I or Unlisted action that does not involve another agency.

(i) If the agency is directly undertaking the action, it must determine the significance of the action as early as possible in the design or formulation of the action.

(ii) If the agency has received an application for funding or approval of the action, it must determine the significance of the action within 20 calendar days of its receipt of the application, an EAF, or any additional information reasonably necessary to make that determination, whichever is later.

(2) When more than one agency is involved:

(i) For all Type I actions and for coordinated review of Unlisted actions involving more than one agency, a lead agency must be established prior to a determination of significance. For Unlisted actions where there will be no coordinated review, the procedures in paragraph (4) of this subdivision must be followed.

(ii) When an agency has been established as the lead agency for an action involving an applicant and has determined that an EIS is required, it must, in accordance with section 617.12(b) of this Part, promptly notify the applicant and all other involved agencies, in writing, that it is the lead agency, that an EIS is



required and whether scoping will be conducted.

(iii) The lead agency will continue in that role until it files either a negative declaration or a findings statement or a lead agency is re-established in accordance with paragraph 617.6 of this subdivision.

(3) Coordinated review.

(i) When an agency proposes to directly undertake, fund or approve a Type I action or an Unlisted action undergoing coordinated review with other involved agencies, it must, as soon as possible, transmit Part 1 of the EAF completed by the project sponsor, or a draft EIS and a copy of any application it has received to all involved agencies and notify them that a lead agency must be agreed upon within 30 calendar days of the date the EAF or draft EIS was transmitted to them. For the purposes of this Part, and unless otherwise specified by the department, all coordination and filings with the department as an involved agency must be with the appropriate regional office of the department.

(ii) The lead agency must determine the significance of the action within 20 calendar days of its establishment as lead agency, or within 20 calendar days of its receipt of all information it may reasonably need to make the determination of significance, whichever occurs later, and must immediately prepare, file and publish the determination in accordance with section 617.12 of this Part.

(iii) If a lead agency exercises due diligence in identifying all other involved agencies and provides written notice of its determination of significance to the identified involved agencies, then no involved agency may later require the preparation of an EAF, a negative declaration or an EIS in connection with the action. The determination of significance issued by the lead agency following coordinated review is binding on all other involved agencies.

Emphasis added

6 NYCRR 617.6

For purposes of the law Section 617.2 of the regulations define “involved agency” as:

(s) “Involved agency” means an agency that has jurisdiction by law to fund, approve or directly undertake an action. If an agency will ultimately make a discretionary decision to fund, approve or undertake an action, then it is an “involved agency”, notwithstanding that it has not received an application for

funding or approval at the time the SEQR process is commenced. The lead agency is also an "involved agency".

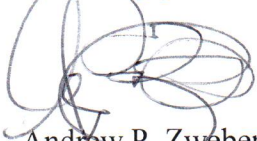
(u) "Lead agency" means an involved agency principally responsible for undertaking, funding or approving an action, and therefore responsible for determining whether an environmental impact statement is required in connection with the action, and for the preparation and filing of the statement if one is required.     Emphasis added.

By virtue of the Acts of the New York State Legislature and the Charter of the City of Kingston, as revised by referendum by the voters of the City of Kingston, the City of Kingston Water Department is a financially and administratively independent department of the City of Kingston and is governed by the Board of Water Commissioners and specifically charged to make all determinations with respect to supplying water outside the City of Kingston. As set forth above the City of Kingston Charter lays out a specific process to be followed by the Water Board which does not involve the City of Kingston, as distinct from the Water Board, in any respect.

The only role of the City in the operation of the Water Department in general, and specifically with respect to determinations regarding the sale of water to non-inhabitants, is the approval of any Water Department determination to bond improvements and to approve the construction of waterworks to supply the City and its inhabitants with water. City Charter Sec. C-11.4) The proposed action of the Niagara Bottling Company does not include any bonding by the Water Department or the construction by it of any capital improvements.

Based on the foregoing, it is my opinion as the primary legal advisor of the City of Kingston that the City, as distinct from the City of Kingston Board of Water Commissioners and Water Department, is not an "involved agency" with respect to the action proposed by the Niagara Bottling Company.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Andrew P. Zweben', with a stylized, looping flourish.

Andrew P. Zweben  
Corporation Counsel  
City of Kingston