

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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THE STATE OF VERMONT,

Petitioner,

-against-

AFFIRMATION

THE NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION and
INTERNATIONAL PAPER COMPANY,

Respondents,

For a Judgment Pursuant to Article 78 of the New York
Civil Practice Law and Rules.

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STATE OF NEW YORK)
)SS.:
COUNTY OF ALBANY)

CHRISTOPHER A. AMATO, an attorney duly admitted to practice before the Courts
of the State of New York, hereby affirms under penalty of perjury:

1. I am of counsel to the firm of Dreyer Boyajian, LLP, attorneys for Petitioner the
State of Vermont ("Vermont"). I submit this Affirmation in support of Vermont's request that its
Petition be granted an expedited return date, and that a Temporary Restraining Order ("TRO") be
issued enjoining Respondent New York State Department of Environmental Conservation
("NYSDEC") from permitting or otherwise approving Respondent International Paper
Company's ("IP") proposed test burn of Tire-Derived Fuel at its Ticonderoga Mill, located in the
Town of Ticonderoga, Essex County, New York, until a final determination of the merits of this
action by this Court. I have personal knowledge of the facts stated herein.

Factual and Procedural Background

2. Vermont brings this Article 78 proceeding to annul a determination by Respondent NYSDEC to approve a significant modification to the air pollution permit for Respondent IP's Ticonderoga Mill without first subjecting that modification to environmental review pursuant to the State Environmental Quality Review Act ("SEQRA"), Environmental Conservation Law ("ECL") Article 8. *See Verified Petition, dated February 7, 2006 ("Petition")* ¶ 1.

3. IP plans to permanently burn tire-derived fuel ("TDF") in the power boiler at its Ticonderoga Mill. IP has applied to NYSDEC for a modification to its air pollution permit to allow it to conduct a preliminary two-week "test burn" of TDF at the Mill. As stated by IP in its application, this test firing is the first step in its plan to permanently switch its fuel mix to include TDF as a fuel. *See International Paper Company's Revised Title V Permit Application for Tire-Derived Fuel Trial, dated June 2005, ("Application")*, annexed to Petition as Exhibit A.

4. IP concedes in its application for an air permit modification that the test burn may result in new or increased emissions of *twenty-two* air pollutants. *See Affidavit of John H. Nuckles, sworn to on February 2, 2006 ("Nuckles Aff.")*, annexed to Petition as Exhibit B, ¶¶ 8, 10. Of these, twenty are classified by NYSDEC as "toxic air contaminants," with eight of these being classified as "High Toxicity Air Contaminants" (defined as "[h]uman carcinogens, potential human carcinogens, and other substances posing a significant risk to humans"); and eight others classified as "Moderate Toxicity Air Contaminants" (defined as "[a]nimal oncogens, developmental and reproductive toxicants, genotoxic chemicals, and other chemicals posing a health hazard to humans"). *See Affidavit of Dr. William Bress, sworn to on February 6, 2006*

(“Bress Aff.”), annexed to Petition as Exhibit C, ¶¶ 5-7. IP also concedes that fine particulate matter “may tend to increase” as a result of burning TDF. Fine particulate matter has been linked to severe adverse respiratory effects in humans. *See* Bress Aff., ¶¶ 8-12.

5. IP’s Application also concedes that the test burn is likely to result in emissions of dioxins. Nuckles Aff. ¶ 12. Dioxins are highly toxic. Bress Aff. ¶ 13. The U.S. Environmental Protection Agency has classified TCDD, the most toxic of the dioxins, as a human carcinogen and characterizes the complex mixtures to which humans are exposed as a “likely human carcinogen.” In addition, human exposure to dioxins is associated with adverse effects on reproduction and development; suppression of the immune system; and skin lesions. *Id.*

6. Vermont contends that, in addition to increasing emissions of the twenty-two air pollutants identified in IP’s application, the test burn will result in increased emissions of sulfur dioxide. Nuckles Aff. ¶ 11. Sulfur dioxide is a criteria pollutant for which ambient air quality standards have been set under the federal Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* Sulfur dioxide adversely affects human health, according to numerous published studies. Petition ¶ 5.

7. NYSDEC has determined that the proposed test burn requires a “significant modification” of IP’s air pollution permit. Petition ¶ 6.

8. In its application, IP also concedes that the test burn will result in new and/or different wastewater discharges from the Ticonderoga Mill. NYSDEC has classified these discharges as “new or increased discharges of [water] pollutants” requiring a modification of IP’s water pollution permit issued pursuant to the State Pollution Discharge Elimination System (“SPDES”), ECL Article 17. Petition ¶ 7.

9. Thus, the proposed test burn of TDF (i) is the first step in IP’s plan to permanently

switch to burning TDF, and (ii) will result in new or increased emissions of air and water pollutants, including pollutants that are classified as human carcinogens and potential human carcinogens. In spite of this, NYSDEC classified the test burn as a “Type II” action exempt from environmental review under SEQRA. Petition ¶ 8.

10. Vermont contends that, in classifying the test burn as a Type II action, NYSDEC has impermissibly segmented its environmental review under SEQRA. IP states in its application that the test burn is for the express purpose of assembling data for a planned permit modification to allow permanent burning of TDF as a fuel. NYSDEC’s SEQRA regulations expressly require that the entire sequence of contemplated activities be considered the “action” for purposes of SEQRA review. *See* 6 NYCRR § 617.3(g) (“Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.”). Thus, for purposes of SEQRA review, DEC is required under the regulations to consider the “action” as including IP’s plan to permanently burn TDF as a fuel. NYSDEC’s classification of the test burn as a Type II action is based on NYSDEC’s consideration of the test burn in artificial isolation from the planned permanent burning of TDF at the Ticonderoga Mill, and is therefore in violation of SEQRA. Petition ¶ 9.

11. Vermont further contends that, even if NYSDEC was correct in considering the test burn as a separate and independent action for purposes of SEQRA, its classification of the test burn as a Type II action violates SEQRA. The sole basis for NYSDEC’s Type II classification is that, as part of the test burn, IP intends to monitor emissions of some, though not all, pollutants emitted from the stack. On this ground alone, NYSDEC has concluded that the

entire proposed test burn constitutes mere “data collection” and that it therefore is exempt from SEQRA. However, the “data collection” exemption relied upon by NYSDEC applies only to collection of data on *existing* environmental conditions; it does not exempt from SEQRA review new actions that, as here, will result in increased air and water pollution simply because some data will be incidentally collected as part of the action. Indeed, under NYSDEC’s interpretation of the data collection exemption, any new polluting activity could be exempted so long as it incidentally includes some data gathering – an interpretation grossly at odds with SEQRA’s purpose and intent. In fact, NYSDEC’s own SEQRA regulation expressly provide that an action otherwise subject to SEQRA *cannot* be exempted from SEQRA review solely because data will be collected as part of the action. Thus, even if viewed as independent from IP’s long-range to permanently switch to burning TDF as fuel, NYSDEC’s classification of the test burn as a Type II action exempt from environmental review violates SEQRA. Petition ¶ 10.

12. Vermont seeks judgment pursuant to CPLR Article 78 (i) annulling NYSDEC’s classification of the IP test burn as a Type II action under SEQRA; (ii) enjoining NYSDEC to perform the duty imposed upon it by law to consider IP’s long-range plan to permanently convert to burning TDF as a fuel as the “action” for purposes of environmental review under SEQRA; (iii) remanding this matter to Respondent NYSDEC for a new determination as to the environmental significance of the proposed action (defined as including IP’s long-range plan to permanently convert to burning TDF), and whether an environmental impact statement should be required; and (iv) enjoining Respondent NYSDEC from permitting or otherwise approving Respondent IP’s test burn, or any component thereof, unless and until NYSDEC has made a new determination as to the environmental significance of the proposed action and fully complied

with all procedural and substantive requirements of SEQRA.

The Need For an Expedited Hearing and TRO

13. In two public notices published in the Environmental Notice Bulletin, dated October 12 and October 26, 2005, NYSDEC has stated that it has “tentatively determined” to approve IP’s application for a significant modification to its air pollution permit to allow the test burn of TDF. *See* Exhibits H and I to Petition.

14. The public comment period on IP’s proposed test burn closed on December 23, 2005.

15. Given that the public comment period has been closed for over one month and NYSDEC’s previous statements that it has “tentatively determined” to approve IP’s proposed permit modification, there is a substantial likelihood that NYSDEC approval of the proposed permit modification is imminent. Thus, it is respectfully submitted that an expedited hearing on Vermont’s Petition is warranted.

16. It is further submitted that a TRO enjoining NYSDEC from acting on the proposed permit modification before a determination of the merits is warranted.

17. Vermont meets the three-prong test for a TRO. First, Vermont will suffer irreparable harm if the permit is approved by NYSDEC and the test burn occurs without any environmental review. As noted in the Petition, Vermont is located less than one mile, and directly downwind, from IP’s Ticonderoga Mill, and is an “affected state” within the meaning of NYSDEC’s air pollution regulations. Petition ¶¶ 15, 35-36. Indeed, much of the air dispersion analysis for the test burn focused on potential impacts within Vermont. *Id.*

18. As noted above, IP has conceded that emissions of twenty-two pollutants –

including twenty pollutants classified by NYSDEC as “toxic air contaminants” – may increase as a result of the test burn. Many of the pollutants are associated with serious human health impacts, including cancer. *See* Bress Aff. ¶¶ 5-14.

19. Because Vermont is downwind of the Ticonderoga Mill, it is likely that people living in Vermont will be exposed to the increased emissions of this array of toxic pollutants. Dr. William Bress, State Toxicologist for the State of Vermont and Chief of the Toxicology and Risk Assessment Program for the Vermont Department of Health, offers his expert opinion that “to a reasonable degree of scientific certainty . . . the pollutants to be emitted during the IP test burn pose a risk to human health.” Bress Aff. ¶ 14. It is respectfully submitted that the permitting of the test burn, and the consequent exposure of Vermont’s citizens to highly toxic air pollutants, without any environmental review under SEQRA constitutes irreparable harm. *See* Petitioner’s Memorandum of Law in Support of Application for Temporary Restraining Order and Article 78 Petition (“Pet. Mem.”) at Point III.

20. Vermont is also likely to succeed on the merits. As discussed in detail in Petitioner’s Memorandum of Law, NYSDEC’s classification of the test burn as a Type II action exempt from SEQRA review constitutes impermissible segmentation under SEQRA and, further, is based on a misapplication of the regulatory exemption for “data gathering.” *See* Pet. Mem. at Points I and II.

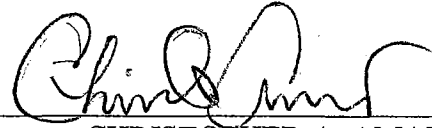
21. Finally, the balance of equities also favors Vermont. IP’s permit application has been undergoing review from at least January 2005. *See* Application, Exh. A to Petition, at 1-1. Given the already lengthy permitting process, a slight further delay in the permitting process pending determination of the merits of this action will not significantly postpone the test burn

and, upon information and belief, IP will therefore not be unduly burdened or prejudiced thereby. On the other hand, the citizens of Vermont will be severely prejudiced from a public health standpoint if the test burn is allowed to proceed without any environmental review.

22. Petitioner has not previously sought the relief requested herein in this or any other court.

WHEREFORE, Petitioner respectfully requests that its application for an expedited hearing and a TRO be granted in all respects.

Dated: Albany, New York
February 7, 2006


CHRISTOPHER A. AMATO