

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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THE STATE OF VERMONT,

Petitioner,

-against-

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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**REPLY MEMORANDUM OF LAW OF
PETITIONER STATE OF VERMONT**

DREYER BOYAJIAN LLP

Attorneys for Petitioner

75 Columbia Street

Albany, NY 12210

(518) 463-7784

Of Counsel

Christopher A. Amato

STATE OF VERMONT

WILLIAM H. SORRELL

ATTORNEY GENERAL

Vermont Office of the Attorney General

109 State Street

Montpelier, VT 05609-1001

(802) 828-5518

Request for Admission Pro Hac Vice Pending

Erick Titrud

Kevin O. Leske

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PRELIMINARY STATEMENT

Petitioner State of Vermont (“Vermont”) submits this Reply Memorandum of Law in further support of its Article 78 Petition filed on February 7, 2006. Respondent International Paper Company (“IP”) has submitted an application to Respondent New York State Department of Environmental Conservation (“NYSDEC”) to modify the air pollution permit for IP’s Ticonderoga Mill. IP is requesting that its permit be modified to allow it to “test burn” tire-derived fuel (“TDF”) in the power boiler at the Mill for two weeks, in place of the mix of No. 6 fuel oil and bark/wood that is currently used as fuel. Because IP’s test burn application involves a major change in the type of fuel burned at the Mill and will result in new or increased emissions of air pollutants, NYSDEC has determined that the application constitutes a “significant modification” of the air pollution permit for the Mill. Further, as conceded by both NYSDEC and IP, the test burn is the first step in IP’s plan to permanently convert to burning TDF. Nevertheless, NYSDEC has determined that the test burn is a Type II action exempt from environmental review pursuant to the State Environmental Quality Review Act (“SEQRA”). Vermont’s Petition challenges NYSDEC’s SEQRA determination.

Vermont’s argument is straightforward: NYSDEC violated SEQRA’s prohibition against segmented environmental review by treating the proposed trial burn as separate and independent from IP’s plan to permanently convert to burning TDF at the Ticonderoga Mill. Vermont respectfully submits that the undisputed facts demonstrate that the trial burn is the initial phase or step in IP’s planned conversion to TDF. As announced by IP on the first page of its permit application, the test burn is a “necessary” first step in the planned conversion to TDF. *See* Exhibit A to Verified Petition at 1-1 (“IP is planning a two-week trial burn of TDF . . . to obtain information

necessary to establish the permitting requirements for use of TDF as a permanent fuel") (emphasis added).

Indeed, Respondents' opposing papers confirm, rather than dispute, the fundamental fact that the test burn and IP's permanent conversion to TDF are phases of a single action, and that its planned conversion is dependent on the test burn. *See e.g.*, Respondent NYSDEC's Memorandum of Law in Opposition ("NYSDEC Mem.") at 12 ("In the absence of such test data, it would be impossible for International Paper to prepare an accurate and complete application for a permit modification that would allow . . . long term use of TDF at the facility") (emphasis added); *Id.* at 18 ("DEC has explicitly acknowledged the existence of a potential link between the information to be generated by the test burn and any possible future application for the permanent use of TDF at the Ticonderoga Mill"); Respondent International Paper Company's Memorandum of Law in Opposition ("IP Mem.") at 8 (the test burn is "necessary to gather data and determine future permitting requirements [for permanent conversion to TDF]") (emphases added).¹

The SEQRA regulations expressly recognize that, as is true here, many projects consist of a series of steps or phases; in such cases, the regulations specify that "[t]he entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a

¹ Vermont questions Respondents' repeated assertions that the test burn is "necessary" for preparation of an application for permanent conversion to TDF. IP states in its opposing papers that "IP operates 8 facilities in 6 different states that have been authorized to burn TDF in power boilers." Affidavit of Donna Wadsworth, sworn to on April 10, 2006, ¶ 12. Emissions data from these other eight facilities are presumably available to IP to assist in its preparation of an application for permanent conversion to TDF at the Ticonderoga Mill. In any event, Respondents offer no explanation why the emissions projections developed for the test burn application could not be used instead for the application for permanent conversion to TDF. If and when an application for permanent conversion to TDF is approved (subsequent, of course, to a full SEQRA review), Respondents would be free to conduct whatever tests they deem necessary to verify the application's emissions projections.

whole or to only a part of it. Considering only a part or segment of an action is contrary to the intent of SEQRA[A].” 6 NYCRR §§ 617.3(g) and (g)(1) (emphasis added). Thus, under the SEQRA regulations, the test burn and the permanent conversion to TDF represent a single action for purposes of SEQRA review, and NYSDEC’s contrary decision constitutes clear error.

Because the test burn and the permanent conversion to TDF are phases of a single SEQRA action, Respondents’ attempts to justify classification of the test burn as a Type II action are beside the point. NYSDEC classified the test burn as a Type II action based on its incorrect treatment of the test burn as a separate “action” from the planned permanent conversion to TDF.² Thus, this Court need not consider Respondents’ arguments on this point. Nevertheless, even if the Court were to reach this issue, NYSDEC’s classification of the test burn as a Type II action is clearly wrong.

NYSDEC has determined that the proposed changes to IP’s air pollution permit (which are required to allow the test burn to proceed) constitute a “significant modification” of that permit. *See* Exhibit A to Petition at 1-1 (“NYSDEC requested that International Paper submit an application for a significant modification to the facility’s Title V Air Permit for approval to conduct a two-week TDF trial”) (emphasis added). NYSDEC has made the “significant modification” determination for good reason: the test burn involves a major change in the type of fuel used; will involve operating the combustion boiler differently than specified in the existing permit; and, as IP concedes, may

² NYSDEC’s argument that the test burn was not improperly segmented because it is a Type II action is circular. The purpose of the prohibition against segmentation is to avoid splitting an action into smaller pieces that do not meet the threshold for environmental review. NYSDEC’s Type II classification was made possible only by narrowly defining the “action” as the test burn, thereby excluding consideration of the next step in the action – permanent conversion to TDF. Indeed, were NYSDEC’s argument to be accepted, many multi-phase projects could be segmented without running afoul of the anti-segmenting regulation simply by classifying each segment as a Type II action.

result in new or increased emissions of twenty-two air pollutants. Of these, twenty are classified by NYSDEC as toxic air contaminants; eight are classified as “High Toxicity Air Contaminants,” meaning that they are “[h]uman carcinogens, potential human carcinogens, [or] other substances posing a significant risk to humans”); and eight others classified as “Moderate Toxicity Air Contaminants,” meaning that they are “[a]nimal oncogens, developmental and reproductive toxicants, genotoxic chemicals, [or] 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. These changes are, by any definition, significant.

Respondents do not – and cannot – offer any justification for NYSDEC’s arbitrary decision that a “significant modification” to an air pollution permit is not “significant” for purposes of SEQRA. Indeed, NYSDEC’s classification of the “significant modification” to IP’s air pollution permit as a SEQRA Type II action necessarily requires the assignment of two different and contradictory meanings to the word “significant.” *See* 6 NYCRR § 617.5(a) (Type II actions are those actions that “have been determined not to have a significant impact on the environment . . .”) (emphasis added).

Most troubling, however, is that NYSDEC’s application of the “data collection” exemption to IP’s test burn proposal vastly expands this narrow exemption in a way that was never intended and which, if allowed to stand, creates a gaping loophole in SEQRA. The plain language of the “data collection” exemption makes clear that it applies only to collection of data on existing environmental conditions – not to collection of data on entirely new polluting activities. This common sense interpretation is buttressed by NYSDEC’s own SEQRA implementing regulations. Those regulations also include a “data collection” exemption, which expressly provides that “[i]f an action

is not otherwise exempt, this exemption shall not apply solely because of an information gathering aspect of a particular action.” 6 NYCRR § 618.2(e); (emphasis added). NYSDEC’s contrary interpretation of the related “data collection” exemption in Part 617.5(c)(18) is thus clearly arbitrary.³

NYSDEC’s overly expansive interpretation of the data collection exemption would allow *any* new polluting activity to be undertaken on an indefinite, “temporary” basis without undergoing SEQRA review, so long as pollution data is collected. It is difficult to conceive of an interpretation more at odds with SEQRA’s intent and purpose, and the Court should thus reject Respondents’ invitation to simply defer to this wrong-headed approach.

Perhaps sensing the infirmity of their SEQRA arguments, Respondents devote a considerable amount of their opposition to attempting to convince the Court that there is no need for any environmental review of the proposed test burn because it will be “safe.” This argument must fail for two reasons: first, as noted above, the “action” for SEQRA purposes is the conversion to TDF (including the test burn and all steps leading to the permanent fuel switch). Thus, the emission projections (which Petitioner contests) for the test burn are not determinative of whether this SEQRA action requires preparation of an EIS.

Second, Respondents’ claims that the test burn will be “safe” are undercut by their own admissions that they cannot predict with any degree of certainty the types and levels of pollutants to be emitted during the test burn. Indeed, it is self-evident that if Respondents were as confident of their emissions projections as they pretend to be, there would be no need for a test burn at all.

³ Respondents argue that Part 618.2(e) applies only to actions directly undertaken by NYSDEC. Even if Respondents are correct on this point, the data collection exemptions in Parts 617 and 618 should be read in harmony. In essence, Respondents argue that one interpretation of the data collection exemption applies to actions directly undertaken by NYSDEC while an entirely different (and inconsistent) interpretation applies to actions that NYSDEC approves.

Any doubt as to the pervasive uncertainties underlying Respondents' analysis (and the consequent assurances of a "safe" test burn) are dispelled by NYSDEC's candid concession that "neither International Paper nor DEC can definitively predict the emissions profile that can be expected to result from the addition of TDF into the facility's larger fuel mix." (Emphasis added). *See also* IP Mem. at 27 ("the test will inform DEC and IP (as well as Vermont and the general public) about the potential impacts of using TDF at the Mill"). Indeed, IP characterizes its own emission projections as "speculative predictions." IP Mem. at 27 ("the test information will allow the interested parties to base their respective decisions on actual data from the Mill, not speculative predictions") (emphasis added).⁴

Respondents' argument that Vermont lacks standing to bring this challenge is without merit. As discussed *infra*, Vermont has standing to bring this action on behalf of itself and as *parens patriae* on behalf of its citizens. Respondents cite to no case in which a neighboring state has been denied standing under SEQRA; in fact, as discussed below, the only court to consider a SEQRA challenge to a New York action brought by citizens of a neighboring state granted the relief sought in the petition.

Moreover, Respondents' argument that injuries to Vermont and its citizens fall outside SEQRA' protected zone of interests is belied by Respondents' own actions. As acknowledged in their opposing papers, both NYSDEC and IP have for years actively engaged Vermont political

⁴ Respondents' assurances of a "safe" test burn are based on their predictions that emissions during the test burn will not violate any applicable air quality standards. However, as discussed *infra*, courts have recognized that where, as here, an action may result in emissions of new or greater amounts of pollutants, a mere showing that such emissions will not violate applicable standards is insufficient for purposes of SEQRA. Neither SEQRA nor its implementing regulations exempt a project from environmental review because of projected compliance with applicable regulatory standards.

leaders, citizens and regulatory agencies in an effort to convince them that the burning of TDF will have not have adverse public health or environmental effects in Vermont. The sole reason for the sustained public relations effort in Vermont is that Vermont and its citizens will be forced to absorb the brunt of public health and environmental impacts from IP's conversion to TDF. Having for years expended considerable time and effort attempting to win over Vermont and its citizens, Respondents cannot now credibly claim that Petitioner has no legitimate legal interest in ensuring a proper environmental review of IP's conversion to TDF.⁵

ARGUMENT

POINT I

EXCLUDING THE TEST BURN FROM SEQRA REVIEW CONSTITUTES UNLAWFUL SEGMENTATION

The SEQRA regulations contemplate that actions may consist of a series of discrete steps and expressly require that all such steps together be considered the “action” for SEQRA purposes:

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.

Considering only a part or segment of an action is contrary to the

⁵ Petitioner categorically denies IP's claims that Vermont is opposed to the proposed test burn, that it is opposed to the beneficial use of waste tires, that it is “afraid” of the test burn results, and that it is using this legal action solely to “thwart” IP's conversion to burning TDF. *See* IP Mem. at 1-2, 7. IP's claims are specious. Vermont simply seeks environmental review prior to the burning of TDF of the proposed significant change in the Mill's operations, and the consequent environmental and public health impacts, as required under New York State law.

intent of SEQRA

6 NYCRR §§ 617.3(g) and (g)(1) (emphasis added). This clear regulatory prohibition not only mandates that agencies consider the *entire sequence* of steps or phases as a single action for purposes of SEQRA but, further, expressly contemplates a situation such as this one where “the agency decision-making relates to . . . only a part of [the action].” NYSDEC’s decision to carve out the test burn from the permanent conversion to TDF, thereby enabling it to render a separate SEQRA determination (incorrectly) classifying it as a Type II action, is exactly the type of segmented review expressly prohibited by the SEQRA regulations. 6 NYCRR § 617.2(ag).

Respondents strive mightily to convince this Court that the proposed test burn may properly be viewed in isolation from IP’s plan to permanently convert to TDF. Respondents attempt to decouple the test burn from the permanent fuel switch by characterizing it as a “stand alone study” or a “feasability study.” However, NYSDEC and IP do not dispute – and in fact concede – that the test burn is the first step in IP’s permanent conversion to TDF. *See* Exhibit A to Petition at 1-1 (“IP is planning a two-week trial burn of TDF . . . to obtain information necessary to establish the permitting requirements for use of TDF as a permanent fuel”); NYSDEC Mem. at 11 (“The proposed TDF test burn is precisely such a preliminary step” in the planned permanent conversion to TDF) (emphasis added); *Id.* at 18 (“DEC has explicitly acknowledged the existence of a potential link between the information to be generated by the test burn and any possible future application for the permanent use of TDF at the Ticonderoga Mill”).

Moreover, Respondents’ argument rests on an artificial distinction between the test burn and IP’s plan for a permanent fuel switch to TDF. Respondents’ position is undercut, however, by their claims that IP *cannot* prepare an application to permanently burn TDF *without* the test burn data.

See e.g., NYSDEC Mem. at 12 (“In the absence of such test data, it would be impossible for International Paper to prepare an accurate and complete application for a permit modification that would allow . . . long term use of TDF at the facility”) (emphasis added); IP Mem. at 8 (the test burn is “necessary to gather data and determine future permitting requirements [for permanent conversion to TDF]”). Thus, by Respondents’ own admissions, the test burn is the first necessary step in the permanent conversion to TDF. Consequently, they must be treated as a single action for purposes of SEQRA.

NYSDEC’s argument that it has not segmented its environmental review because the test burn is a Type II action misinterprets the law, is illogical, and is circular in its reasoning. NYSDEC Mem. at 16-17. The SEQRA regulations define segmentation as the “division of the environmental review of an action such that various activities or stages are addressed under this Part as though they were independent, unrelated activities, needing individual determinations of significance.” 6 NYCRR § 617.2(ag) (emphasis added). This is precisely what NYSDEC has done here. NYSDEC has classified the test burn (incorrectly) as a Type II action only because it has segmented the test burn from the permanent conversion to TDF.⁶ Indeed, NYSDEC concedes as much in stating that “[t]o be sure, by classifying the test burn as a Type II [action], DEC has explicitly acknowledged the existence of a potential link between the information to be generated by the test burn and any possible future application for the permanent use of TDF at the Ticonderoga Mill.” NYSDEC Mem. at 18.

⁶ NYSDEC does not, and cannot, argue that IP’s permanent conversion to TDF is a Type II action. *See* NYSDEC Mem. at 22 (“It is quite likely that any future application by International Paper for permission to add TDF to the mill’s fuel mix will be subject to review under SEQRA . . .”).

NYSDEC's interpretation of the SEQRA regulations eviscerates the anti-segmentation rule. The purpose of the prohibition against segmentation is to avoid a situation where "a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review." Concerned Citizens for the Environment v. Zagata, 243 A.D.2d 20, 22 (3rd Dept. 1998), *lv. to appeal den.*, 92 N.Y.2d 808; (emphasis added). Here, NYSDEC is relying on the fiction that the test burn is unrelated to the permanent conversion to TDF in order to justify its determination that this initial phase of IP's permanent conversion is not subject to SEQRA review – precisely the danger that the Zagata court warned against.

The two cases cited by NYSDEC do not support its argument and are easily distinguishable. In Matter of Settco v. New York State Urban Dev. Corp., 305 A.D.2d 1026 (4th Dept. 2003), petitioner challenged a statutorily mandated sale of land on the ground that environmental review of the sale had been improperly segmented from the property's proposed end use as a casino. The Court found that the Type II classification of the sale was not improper because – in stark contrast to this case – it involved "official acts of ministerial nature, involving no exercise of discretion." 305 A.D.2d at 1026-27; (citations omitted). The Court went on to find that there was no improper segmentation because the two projects were wholly independent of each other:

The "actions" or "projects" in question are distinct and are not merely separate parts "of a set of activities or steps" in a single action or project . . . "Where, as here, projects are independent of each other and are not part of an integrated or cumulative development plan," and "their only common element is their general location," "the projects may be reviewed separately and are not subject to a claim of improper segmentation"

305 A.D.2d at 1027 (emphasis added) (internal citations omitted). Here, in contrast to the situation in Settco, the test burn and the permanent conversion to TDF *are* “merely separate parts of a set of activities or steps” of a single project, and the holding in Settco thus does not control here.

NYSDEC’s reliance on Matter of New York City Coalition for the Preservation of Gardens v. Giuliani, 175 Misc.2d 644 (Sup. Ct. N.Y. Co. 1997), *aff’d*, 246 A.D.2d 399 (1st Dept. 1998) is likewise misplaced. Coalition involved the proposed reconstruction of an “in kind” structure, which the Court found was properly classified as a Type II action. The Court’s holding that the classification did not constitute segmentation was expressly premised on its finding that the other projects that petitioners sought to have considered were entirely separate projects. 246 A.D.2d at 655 (“No part . . . of the regulation defining Type II actions or governing determinations with respect to such actions in any way suggests that such a broad environmental impact review of similar projects must be undertaken”). That is not the situation here, and Coalition is therefore inapposite.

Respondents’ attempts to distinguish the cases cited in Petitioner’s opening brief are based on their claim that those cases did not involve a test burn like the one at issue here. NYSDEC Mem. at 21-22; IP Mem. at 26-27. This argument misses the point. Petitioner relies on the cases cited because they articulate how the SEQRA regulations prohibiting segmentation are to be applied, and discuss the policy reasons for that prohibition. IP correctly notes that “[t]hose cases involve either the approval of the first phase of a development project or one of several projects that are part of any overall development plan for a particular area.” IP Mem. at 26. That is exactly what is at issue here: NYSDEC’s proposed approval of the test burn is the first step in IP’s planned permanent conversion to TDF. Thus, as the cited cases require, NYSDEC must conduct the environmental review at this

initial step.

Respondents claim that there is no segmentation because there is no guarantee that IP will proceed with its plan to permanently convert to TDF. NYSDEC Mem. at 20, 23; IP Mem. at 27. This argument does not pass muster. As IP states in its opposing papers, the company has devoted “several years” to developing and promoting its plan to burn TDF; it anticipates that conversion to TDF “would save millions of dollars each year;” and it has devoted two years of “rigorous and comprehensive” (and, presumably, costly) analysis to assess the potential effects of burning TDF at the Ticonderoga Mill. IP Mem. at 5, 8-9. In light of the substantial time and money that IP has already expended, and the substantial financial incentive estimated from its planned conversion to TDF, IP’s claim that it is as yet undecided about whether to pursue permanent conversion to TDF is, at best, disingenuous.⁷

Respondents’ reliance on the NYSDEC’s SEQR Handbook actually cuts against their claim that no segmentation has occurred.⁸ The eight factors recited in the Handbook to assist decision makers in determining whether segmentation has occurred demonstrate that this project has been impermissibly segmented. The test burn and the permanent conversion to TDF share a common purpose; the test burn is the first phase of the conversion; the location of the test burn and the

⁷ Notwithstanding IP’s new-found ambivalence concerning its intention to convert to TDF, its permit application leaves no room for doubt on this point: “IP is planning a two-week trial of TDF . . . to obtain information necessary to establish the permitting requirements for use of TDF as a permanent fuel.” Exhibit A to Petition at 1-1. There is no suggestion in the application that IP may abandon its plans for conversion to TDF based on the test burn results. To the contrary, the application states that IP intends to use the test burn data to prepare its application to permanently convert to TDF.

⁸ Of course, the SEQR Handbook is merely a non-binding guidance document and has no force or effect of law. Petitioner believes that the SEQRA regulations governing segmentation provide ample grounds for this Court to find unlawful segmentation.

permanent conversion are identical; taken together, the test burn and the permanent conversion will clearly have significant environmental impacts; there is common ownership; both the test burn and the permanent conversion are part of an overall plan; the test burn and permanent conversion are interdependent; and approval of the test burn places NYSDEC on track to approve the permanent conversion. Respondents' tortured analysis of these factors misrepresents the facts as stated in IP's application and, moreover, conflict with claims and statements made elsewhere in their opposing papers.⁹

Stripped to their essence, Respondents' arguments are premised on the belief that IP should be allowed to conduct the test burn to determine how much pollution will result from the permanent conversion to TDF. This novel proposition – that a proposed project must be undertaken prior to SEQRA review so that the amount of pollution it will cause can be included in the SEQRA review – stands SEQRA on its head. SEQRA's bedrock requirement is that environmental review must be completed *before* undertaking a project. *See E.F.S. Ventures Corp. v. Foster*, 71 N.Y.2d 359, 372 (1988) (“the environmental assessment . . . should be prepared as early as possible, thereby enabling the agency to make an early determination whether an EIS should be prepared”) (emphasis added); *see also* 6 NYCRR § 617.1 (“The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decisionmaking process of state,

⁹ NYSDEC offers the Affidavit of Betty Ann Hughes, sworn to on April 10, 2006 (“Hughes Aff.”) in support of its SEQRA arguments. That affidavit, however, consists largely of legal arguments and conclusions which are impermissible in an affidavit, particularly when submitted by an individual with no apparent legal training. *See, e.g.*, Hughes Aff. ¶¶ 2-4, 6, 14, 30-33, 37. Further, to the extent that NYSDEC purports to offer Ms. Hughes as an expert witness on SEQRA matters, Vermont objects on the ground that no information concerning her educational background is provided; no curriculum vitae or resume is included with her affidavit; and the minimal information concerning her prior work experience is insufficient to support her qualification as an expert in this area.

regional and government agencies at the earliest possible time") (emphasis added). While IP no doubt ardently desires to postpone for as long as possible any environmental review of its planned conversion to TDF, SEQRA plainly prohibits such after-the-fact environmental review.

Indeed, Respondents' interpretation cuts the heart out of SEQRA. Under Respondents' interpretation, any change in operations and any new pollution-causing activity – whether at an electric power plant, a large manufacturing facility, an open pit mine, or a regional shopping mall – could be commenced for “data collection” before undertaking the environmental review mandated by SEQRA. This interpretation is irreconcilable with the fundamental purposes and policies of SEQRA. *See* ECL § 8-0109(4) (“As early as possible in the formulation of a proposal for an action, the responsible agency shall make an initial determination whether an environmental impact statement need be prepared for the action”); Sun Beach Real Estate Development Corp. v. Anderson, 98 A.D.2d 367, 370 (2d Dept. 1983), *aff'd*, 62 N.Y.2d 965 (1986) (determination of significance must be made “[a]s early as possible in the SEQRA process”).

The marrow of SEQRA is that environmental analysis of a proposed project is conducted before the project is implemented. Although IP complains that its environmental analysis of the impacts of its conversion to TDF will be rendered more difficult without test burn data, IP is in no different position, and faces no greater difficulty, than numerous other project proponents who prepare environmental impact statements *before* their projects are built, as required by law.¹⁰

¹⁰ As noted above, IP states in its opposing papers that “IP operates 8 facilities in 6 different states that have been authorized to burn to burn TDF in power boilers.” Affidavit of Donna Wadsworth, sworn to on April 10, 2006, ¶ 12. Emissions data from these other eight facilities are presumably available to IP to assist in its analysis of the environmental impacts of permanent conversion to TDF at the Ticonderoga Mill.

POINT II

THE IP TEST BURN IS NOT A TYPE II ACTION

As noted above, NYSDEC's classification of the test burn as a Type II action violates SEQRA because the "action" for SEQRA purposes is IP's permanent conversion to TDF; the test burn is merely the first step in effectuating IP's long-term plan. However, even if this Court were to determine that NYSDEC was correct in treating the test burn as a separate and independent "action" for purposes of SEQRA, NYSDEC's determination must still be annulled because it erroneously classified the test burn as a Type II action.¹¹

By definition, Type II actions are those that have been determined not to have a significant effect on the environment. 6 NYCRR 617.5(a). Neither the conversion to a new fuel, nor the combustion of TDF, nor the conducting of "test burns" are listed in Part 617.5 as a Type II action. Nevertheless, NYSDEC has attempted to shoehorn the test burn into the Type II list by portraying it as an exempt "data collection" activity. The record makes clear that the TDF test burn is a far more intensive activity than simple data collection. The test burn will involve a significant change in the type of fuel utilized by the facility; will alter the combustion operation of the boiler; will release new types and greater amounts of pollutants (many of them highly toxic to humans); and will increase the risk of adverse health and ecological impacts. NYSDEC has determined that the proposed changes to IP's air permit to allow the test burn to proceed constitute a "significant modification" to that permit. Contrary to NYSDEC's claim, the mere fact that IP intends to monitor

¹¹ NYSDEC raises a red herring by claiming that "Vermont appears to argue that the Type II list should not contain the study provision contained in 6 NYCRR § 617.5(c)(18)." NYSDEC Mem. at 32. As the Petition makes clear, Vermont's claim is that the test burn does not qualify for the exemption set forth in that regulation, not that the regulation itself is invalid. *See* Petition ¶¶ 47-54.

pollution during the test burn cannot and does not transform this proposed significant change in the facility's operations and impacts into an environmentally benign activity warranting a SEQRA exemption.

The data collection regulation exempts from SEQRA review:

[I]nformation collection including basic data collection and research, water quality and pollution studies, traffic counts, engineering studies, surveys, subsurface investigations and soils studies that do not commit the agency to undertake, fund or approve any Type I or Unlisted action.

6 N.Y.C.R.R. § 617.5(c)(18); (emphasis added).

The plain language of Part 617.5(c)(18) makes clear that it is intended to exempt from SEQRA review only those types of activities that involve collecting “basic” information on existing environmental conditions. Respondents offer no pertinent legal authority to the contrary, but instead rely on past instances in which NYSDEC applied the data collection exemption. However, those examples support, rather than refute, Vermont's argument on this point.

NYSDEC identifies several prior actions it has exempted from SEQRA review as data collection, including “preliminary data collection activities like creating soil test pits, installing stream monitoring equipment, or even installing a meteorological tower to gather baseline information necessary to aid in assessments of site suitability for wind generation.” Hughes Aff. ¶ 16; (emphasis added).¹² Each of these actions are designed to measure *existing* environmental conditions, not the amount of pollution created by a new activity. NYSDEC cites to the drilling of test wells as a further example of the type of data collection it has exempted from SEQRA review.

¹² As noted *supra*, Vermont objects to the legal argument and conclusions set forth in the Hughes affidavit, as well as any attempt to proffer Ms. Hughes as an expert on SEQRA. The purely factual recitations in Ms. Hughes' affidavit are not objectionable.

Id. ¶ 18. The purpose of such test wells is, as described by NYSDEC, to measure parameters such as volume, flow and water quality. *Id.* Again, these measurements relate to existing conditions, not to measurements of new or increased discharges of pollutants.

The only data collection example NYSDEC offers that is similar to this one is a TDF test burn at another facility. *Hughes Aff.* ¶ 21. The prior test burn – which lasted for 30 days – illustrates the enormous loophole NYSDEC is seeking to create in SEQRA. Under NYSDEC’s expanded interpretation, a “test” of a new polluting activity can occur for two weeks – or thirty days, or any other indefinite period – without undergoing any environmental review under SEQRA.

Indeed, the fact that Part 617.5(c)(18) imposes no time limit for exempted data collection activities buttresses the common sense interpretation that the exemption is limited to collection of data on existing environmental conditions. It is inconceivable that the drafters of the regulation intended to create a wholesale, open-ended exemption from SEQRA review for any new polluting activity so long as the amount of new pollution created is monitored.

Any doubt that Respondents’ interpretation of the data collection exemption is incorrect is laid to rest by NYSDEC’s own version of the data collection exemption. Part 618.2(e) provides:

Class 5. Information collection consisting of basic data gathering for possible future actions of the department; short-range planning activities, research, experimental management and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource and which are not preliminary steps leading to a given action or project already identified. If an action is not otherwise exempt, this exemption shall not apply solely because of an information gathering aspect of a particular action. This class includes: water quality and pollution studies; traffic counts; engineering studies; boring studies; soil surveys and other materials sampling; feasibility studies; mineral and oceanographic surveys and research projects not involving the removal of more than 100 cubic yards of material in any one location; the sampling of fish and wildlife populations by netting, trapping, and

other acceptable scientific means; and inventory surveys conducted by department personnel in the field for game management, fish management, forestry, fire control, environmental protection, etc.

(Emphasis added).

Although Respondents argue (incorrectly) that this regulatory provision does not apply, at the very least it sheds considerable light on the proper interpretation of the corollary data collection exemption in Part 617.5(c)(18). As the regulation makes clear, an action that is otherwise subject to SEQRA cannot be exempted “solely because of an information gathering aspect” of the action. Yet, that is precisely what NYSDEC attempts to allow here. Latching on to the fact that emissions from the burning of TDF will be monitored, NYSDEC has improperly exempted an action that is otherwise clearly subject to SEQRA review.¹³ Any contrary interpretation would require this Court to accept the implausible proposition that “data collection” has one meaning when applied to actions directly undertaken by NYSDEC and an entirely different (and contradictory) meaning when applied to actions approved by NYSDEC.¹⁴

¹³ The SEQRA regulations identify a “major change in the use or either the quantity or type of energy” as an indication that the action may have a significant environmental impact. 6 NYCRR § 617.7(c)(1)(vi). The regulations also specify that a “substantial adverse change in the existing air quality . . .” constitutes a significant environmental impact. 6 NYCRR § 617.(c)(1)(i). The burning of TDF at the Ticonderoga Mill meets both of these criteria, because it constitutes a “major change” in the type of energy used and may result in a “substantial adverse change” in air quality. With respect to the latter criterion, Respondents claim that the test burn will not result in violations of any applicable air quality standard. However, as discussed *infra*, the fact that increased pollutant emissions may not violate air quality standards does not mean that there will not be “a substantial adverse change in existing air quality” within the meaning of Part 617.(c)(1)(i). In fact, were Respondents’ arguments on this point correct, the criteria for significance set forth in the regulations would be violation of an air quality standard, rather than “a substantial adverse change” in air quality.

¹⁴ In the absence of an irreconcilable conflict, Part 617.5(b)(18) and Part 618.2(e) should
(continued...)

NYSDEC and IP repeatedly assert that their estimates show that emissions from the test burn are unlikely to violate any federal or state air quality standard. However, the threshold for environmental review is not dependent on whether a regulatory standard will be violated. Indeed, were this the case, few environmental reviews would ever be conducted. Contrary to Respondents' contention, mere compliance with federal and state permit requirements does not exempt an action from SEQRA review where, as here, new or greater amounts of pollutants will be discharged into the air.

In LaFleur v. Whitman, 300 F.3d 256 (2d Cir. 2002), the Second Circuit Court of Appeals held, in the context of a standing challenge, that even though air emissions from facility would not exceed National Ambient Air Quality Standards (NAAQS), petitioner could nevertheless challenge EPA's determination that the facility was not subject to environmental review:

Petitioner Cohen has Article III standing even if the ambient level of SO₂ remains within the NAAQS. Indeed, Congress has recognized that there are potentially adverse affects from air pollution at levels *below* the NAAQS. The [Clean Air Act] states specifically that one of [its] purposes . . . is "to protect public health and welfare from any actual or potential adverse effect which ... may reasonably be anticipated to occur from air pollution or from exposures to pollutants in other media . . . *notwithstanding attainment and maintenance of all national ambient air quality standards.*" 42 U.S.C. § 7470(1) (emphasis added).

300 F.3d at 270 (footnote and citations omitted). *See also* DEP of City of New York v. NYSDEC

¹⁴(...continued)

be read together, pursuant to the fundamental principle that rule-making bodies are presumed to enact laws that are in harmony with each other. *See e.g.*, Statutes § 391 ("Statutes should be given such construction that enables them to be reconciled, and if the court, without violating the established canons of interpretation, can construe two statutes so that they will be in harmony, such construction should be adopted."); Statutes, §§ 97, 98 ("[I]f possible, all parts of an enactment shall be harmonized with each other as well as with the general intent of the whole enactment, and meaning and effect given to all provisions of the statute.").

and Central Hudson Gas & Electric Co., 120 A.D.2d 166, 170 (3d Dep't 1986) (annulling NYSDEC approval of change in sulfur content of oil burned by utility, ruling that even though change "would assure that this facility would meet the currently mandated Federal and State standards for air quality," SEQRA required that emissions be lowered in order to mitigate acid rain impacts). Thus, Respondents' predictions that the test burn will probably not result in violations of air quality standards are not determinative under SEQRA.

In any event, Respondents' predictions that the test burn will not violate any air quality standards are, by their own admission, subject to considerable uncertainty. *See, e.g.*, NYSDEC Mem. at 12 ("neither International Paper nor DEC can definitively predict the emissions profile that can be expected to result from the addition of TDF into the facility's larger fuel mix"); IP Mem. at 27 ("the test will inform DEC and IP (as well as Vermont and the general public) about the potential impacts of using TDF at the Mill"). Indeed, IP characterizes its own emission projections as "speculative predictions." IP Mem. at 27 ("the test information will allow the interested parties to base their respective decisions on actual data from the Mill, not speculative predictions") (emphases added).¹⁵

Finally, the cases cited by NYSDEC in support of its flawed interpretation of the data collection exemption are inapposite. Both Jamaica Chamber of Commerce v. Metropolitan Transp. Auth., 159 Misc.2d 601 (Sup. Ct. Queens Co. 1993) and Matter of Magee v. Rocco, 158 A.D.2d 53 (3rd Dept. 1990) involved facts significantly different from those at issue here. Jamaica involved

¹⁵ Likewise, NYSDEC's proffered public health expert is unwilling to state unequivocally that the test burn will be safe. *See* Affidavit of Thomas J. Gentile, sworn to on April 11, 2006, ¶ 48 ("It is my opinion that the pollutants that will be emitted during the two-week test burn will not likely result in adverse public health impacts") (emphasis added).

restoration of one-way streets in a downtown business district to their former two-way status. Magee involved mere participation in hearings on a proposed land use master plan. Neither case involved the type of significant operational and environmental changes at issue here.

The other cases cited by Respondents, Matter of City of Yonkers v. County of Westchester, 183 A.D.2d 823 (2nd Dept. 1992), Matter of Schiff v. Bd. of Est. of City of New York, 122 A.D.2d 57 (2nd Dept. 1986), and Matter of Programming & Systems, Inc. v. New York Urban Dev. Corp., 61 N.Y.2d 738 (1984), have no bearing on this case. Yonkers involved a challenge to a SEQRA negative declaration for an action that had *not* been classified as a Type II action. Schiff involved a challenge to a legislative resolution which the court found did not qualify as an “action” – Type II or otherwise – under SEQRA. And Progammig Systems involved a preliminary development plan that was not yet subject to any “significant authorization” by a regulatory agency – a far cry from the instant proposal, which requires approvals from both NYSDEC and the U.S. Environmental Protection Agency. *See* NYSDEC Mem. at 35-36.

In sum, the proposed test burn will involve a major change in the type of fuel used at the Ticonderoga Mill and is likely to result in new or increased emissions of over twenty pollutants, many of them highly toxic to humans. NYSDEC’s attempt to exempt this significant change in the Mill’s operations and environmental impacts from SEQRA review requires an unduly expansive reading of the narrow “data collection” exemption. If NYSDEC’s broad interpretation of that exemption is allowed to stand, it will open the door to granting SEQRA exemptions for any new polluting activity which collects data on the new pollution levels created. Such a result would strike at the very core of SEQRA, and this Court should reject NYSDEC’s arbitrary and unreasonable interpretation of the data collection exemption.

POINT III

VERMONT HAS STANDING TO CHALLENGE NEW YORK'S ENVIRONMENTAL REVIEW OF THE PROJECT

Respondents' challenge to Vermont's standing to maintain this action is based on inaccurate facts and flawed legal reasoning.¹⁶ By Respondents' own admissions, Vermont has for years been an active participant in both the formal and informal proceedings concerning IP's plan to burn TDF at the Ticonderoga Mill. Indeed, both Respondents claim credit in their opposing papers for their efforts to solicit and consider the views of Vermont's citizens and regulatory agencies regarding the conversion to TDF. Respondents' opposing papers and IP's application materials also make clear that the citizens of Vermont will bear the brunt of – and be at most risk of exposure to – air emissions from TDF burning. Given these facts, Respondents cannot now credibly claim, for the first time, that Vermont has no right to challenge a regulatory decision that has far-reaching implications for the health and welfare of its citizens.

As discussed below, Vermont meets the criteria enunciated by the New York Court of Appeals for establishing standing under SEQRA. First, Vermont has established injury in fact. Vermont lies less than one mile downwind of the Ticonderoga Mill, and it is highly likely that people living in Vermont will be exposed to the increased emissions of toxic pollutants likely to result from the test burn and the Mill's permanent conversion to TDF. *See* Affidavit of Douglas R. Elliot, Environmental Analyst in the Vermont Department of Environmental Conservation, sworn to on

¹⁶ In considering dismissal of an Article 78 proceeding on the issue of standing, "all of the allegations contained in the petition are deemed to be true ... and the facts contained in the petition must be considered in their most favorable light." Parisella v. Town of Fishkill, 209 A.D.2d 850, 851 (3d Dep't 1994).

May 19, 2006 (“Elliot Aff.”) ¶¶ 3-5, submitted herewith (“Vermonters residing and working in areas where air quality is affected by IP’s emissions will very likely be exposed to pollution, including toxic air pollutants, emitted from the Mill during the trail burn of [TDF]”); Affidavit of 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, Exhibit C to Petition, ¶ 14 (“to a reasonable degree of scientific certainty . . . the pollutants to be emitted during the IP test burn pose a risk to human health”). Because Vermont has brought the Petition on behalf of itself and as *parens patriae* on behalf of its citizens, Petition ¶ 11, it has established injury in fact.

Vermont’s injuries are also within the zone of interests protected by SEQRA. The definition of “environment” in SEQRA includes no geographic or political limit. *See* ECL § 8-0105(6). Thus, contrary to Respondents’ argument, the Legislature did not intend that SEQRA review be limited to New York’s environment. Respondents’ interpretation would leave projects situated along the State’s borders free to pollute the environment of neighboring states at will. Respondents refer to no valid legal authority in support of their sweeping claim that only citizens of New York State may mount a SEQRA challenge. To the contrary, the only New York court to have considered a SEQRA challenge by residents of a neighboring state granted the relief sought in the petition. *See First Taxing District of Norwalk, Conn. v. Lewis*, Slip. Op., Westchester Co., Sept. 14, 1989 (Index No. 1708/89).

A. Vermont Satisfies the Two-Prong Test for SEQRA Standing

In the SEQRA context, the Court of Appeals has enunciated a two-prong test for determining standing: first, the petitioner must first show “injury in fact,” which is defined as “an actual legal stake in the matter being adjudicated” or that the challenged action has an “adverse effect upon it.”

Society of the Plastics Industry, Inc. v. County of Suffolk, 77 N.Y.2d 761, 772-73 (1991). Second, the petitioner must show that “the interest or injury asserted fall[s] within the zone of interests protected by the statute invoked.” *Id.* at 773.

These standards are not to be perceived as “mechanical rules of general applicability.” Society of Plastics, 77 N.Y.2d at 772-73.¹⁷ As the Court of Appeals has instructed, “Standing principles, which are in the end matters of policy, should not be heavy-handed . . . It is desirable that . . . disputes be resolved on their own merits rather than by preclusive, restrictive standing rules.” Matter of Sun-Brite Car Wash, Inc. v. Bd. of Zoning and Appeals of Town of North Hempstead, 69 N.Y.2d 406, 413 (1987) (emphasis added) (internal citations omitted). The policy underlying the Society of Plastics holding was clearly articulated by the Court of Appeals as “limiting judicial review of remedial legislation when such challenges are made by pressure groups seeking to delay or defeat action in order to further their own economic interests.” Society of Plastics, 77 N.Y.2d at 779 (emphasis added) (internal citations omitted); *see also*, Matter of Ziemba v. City of Troy, 10 Misc.3d 581, 590 (Sup. Ct. Rensselaer Co. 2005) (“It will be remembered that Society of Plastics began as a piece of purported environmental litigation brought by an anti-environmental trade group to obstruct an environmental law”).

Here, far from being a “pressure group” seeking to advance its own economic interests,

¹⁷ In matters involving land use issues, the Court of Appeals has interpreted the injury in fact showing to require that the plaintiff “show that it would suffer direct harm, injury that is in some way different from that of the public at large.” Society of Plastics, 77 N.Y.2d at 774. As stated by the Court, “[t]he doctrine grew out of a recognition that, while directly impacting particular sites, governmental action affecting land use in another sense may aggrieve a much broader community.” *Id.* Because this challenge does not involve a land use decision, this injury in fact analysis does not apply. Moreover, Respondents cite to no New York case that has required a *sovereign government* bringing suit on behalf of its citizens to show that the injury complained of is different from that of the public at large.

Vermont is a sovereign state seeking to prevent injury to its environment and the health of its citizens. Thus, Vermont has standing as a matter of law because it satisfies both prongs of the standing test, and as a matter of public policy because it seeks to further, rather than obstruct, the purposes of SEQRA.¹⁸

1. Vermont Has Demonstrated Injury in Fact

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 as Exhibit B to Petition, ¶¶ 8, 10. Of these, twenty are classified by NYSDEC as “toxic air contaminants.” Eight are classified by NYSDEC as “High Toxicity Air Contaminants,” defined as “[h]uman carcinogens, potential human carcinogens, and other substances posing a significant risk to humans”); and eight other pollutants are 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, State Toxicologist for the State of Vermont and Chief of the Toxicology and Risk Assessment Program for the Vermont Department of Health, 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. *Id.* ¶¶ 8-12.

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

¹⁸ NYSDEC does not claim that Vermont has not shown injury in fact, but does question whether its injuries fall within SEQRA’s zone of interests. IP challenges Vermont’s standing on both injury in fact and zone of interest grounds.

Agency has classified TCDD, the most toxic of the dioxins, as a human carcinogen. EPA also characterizes the complex mixtures to which humans are exposed as likely human carcinogens. Human exposure to dioxins is associated with adverse effects on reproduction and development; suppression of the immune system; and skin lesions. *Id.*

In addition to the increase in emissions of the twenty-two air pollutants identified in IP's application, the test burn will result in an increase in emissions of sulfur dioxide pollution. 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.

As noted above, Vermont lies less than one mile downwind of the Ticonderoga Mill. Petition ¶ 35. Thus, it is likely that people living in Vermont will be exposed to the increased emissions of toxic pollutants from the test burn and the permanent conversion to TDF. *See* Elliott Aff. ¶ 4; Bress Aff. ¶ 14 (“to a reasonable degree of scientific certainty . . . the pollutants to be emitted during the IP test burn pose a risk to human health”). Vermont has brought the Petition on behalf of itself and as *parens patriae* on behalf of its citizens. Petition ¶ 11. Consequently, it has established injury in fact.

Parens patriae standing allows states to “represent the interests of their citizens in enjoining [a] public nuisance.” Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 603 (1982). Under this long-standing doctrine, a “sufficiently concrete” quasi-sovereign interest in the “well-being [of its residents] . . . create[s] an actual controversy between the State and the defendant.” *Id.* at 602; *accord Connecticut ex. rel. Blumenthal v. Cahill*, 217 F.3d 93, 97 (2nd Cir. 2000). Principles of *parens patriae* standing are distinct from those applicable to private parties because “a State is no

ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.” Snapp, 458 U.S. at 612 (Brennan, J., concurring).

The U.S. Supreme Court has held that to establish *parens patriae* standing, a State’s complaint must (i) “articulate an interest apart from the interests of particular private parties”; (2) “express a quasi-sovereign interest” (e.g., the “health and well-being – both physical and economic – of its residents in general”); and (3) “allege injury to a sufficiently substantial segment of its population,” including any “indirect effects of the injury.” Snapp, 458 U.S. at 602, 607. Each of these requirements is satisfied here.

First, Vermont’s interest in protecting its residents and natural resources from the harmful impacts of toxic emissions and wastewater discharges from the Ticonderoga Mill stands apart from any interest held by private parties. Safeguarding the public health, welfare, and natural resources of its citizens is a core State obligation. In fact, Vermont holds waters of the State in trust for the benefit of the public under the Public Trust Doctrine.

Second, Vermont seeks to vindicate a quasi-sovereign interest in the health and well-being of its residents, who are at risk from toxic emissions resulting from the burning of TDF at the Mill. *See* Bress Aff. ¶ 14. In the context of public nuisance cases, the U.S. Supreme Court has recognized that suits to protect citizens from harmful environmental impacts are consummate examples of a State’s pursuit of a quasi-sovereign interest. Snapp, 458 U.S. at 603-05 (*citing* New York v. New Jersey, 236 U.S. 296 (1921) (water pollution); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907) (air pollution); Missouri v. Illinois, 180 U.S. 208 (1901) (water pollution)). For the same reasons that the States could avail themselves of *parens patriae* standing in those cases, Vermont may

do so in this case as well.

Third, Vermont has established injury to a “sufficiently substantial segment” of its residents. *See Elliott Aff.* ¶ 5 (“Vermont’s Addison County is situated directly across Lake Champlain from the Mill and suffers the greatest air quality impacts in Vermont due to the Mill’s emissions. Residents of Addison County (pop. 36,550; est. 2002) very likely will be exposed to air pollution, including toxic air pollutants, emitted from the Mill during the trial burn of [TDF]”). With regard to this factor, the Supreme Court has given States broad discretion in determining whether litigation may vindicate their quasi-sovereign interests. The harm alleged by Vermont in this case – including exposure of its residents to new or increased emissions of twenty toxic air contaminants, many of which are known or suspected human carcinogens – is clearly sufficient.

IP cites a single trial level decision, New York v. NYC Conciliation & Appeals Bd., 123 Misc.2d 47 (Sup. Ct. N.Y. Co. 1984), to support its sweeping claim that “Vermont cannot rely on standing as *parens patriae* in this case.” IP Mem. at 14. However, that decision undermines, rather than supports, IP’s argument. As stated by that court:

The concept of *parens patriae* is a judicial recognition of the inherent power of the State to prevent injury to those who, for whatever reason, cannot protect themselves. In exercising its prerogative the State is not limited to representation of citizens suffering a particular disability but may bring suit to protect the welfare of any substantial segment of its population.

123 Misc.2d at 49 (emphasis added) (internal citations omitted).

Here, Vermont is bringing suit to protect the health and welfare of more than 35,000 people who reside in the probable zone of impact for the Ticonderoga Mill. *See Elliott Aff.* ¶¶ 3-5. Thus, it has established *parens patriae* standing in this case.

Moreover, Vermont has standing to assert its proprietary rights both as holder of record title

of property and as owner and steward, under the Public Trust Doctrine, of its land, air, water and other natural resources, including the Lake Champlain environment. *See e.g.*, Town of Orangetown v. Gorsuch, 544 F.Supp. 105 (S.D.N.Y. 1982) (“Thus, even assuming that plaintiff cannot bring this action on behalf of its residents, plaintiff’s claims nevertheless survive because political subdivisions such as cities and counties may ‘sue to vindicate such of their own proprietary interests as might be congruent with the interests of their inhabitants.’”); *see also* Davis v. EPA, 336 F.3d 965 (9th Cir. 2003) (holding California’s proprietary interest in its land, water and air was sufficient to give standing in suit against EPA); Hodges v. Abraham, 300 F.3d 432, 444-45 (4th Cir. 2002) (holding that South Carolina was not merely pursuing rights as *parens patriae* but had standing as “neighboring landowner” to challenge NEPA violation and threatened environmental injury); City of Rochester v. U.S. Postal Service, 541 F.2d 967 (2d Cir. 1976) (holding City of Rochester had standing to sue federal agency for violation of NEPA).

IP relies on other cases to support its argument that Vermont has failed to show injury in fact. IP Mem. at 14-17. Those cases are inapposite for several reasons. First, the petitioners in those cases were in every instance either private citizens or associations; none of the cases involved a sovereign bringing suit on behalf of itself and its citizens. Second, all of the cases cited by IP involved land use decisions. For this reason, those courts required the petitioner to demonstrate harm different in kind or degree from the public at large. This requirement, while appropriate for such land use cases, is not applicable where, as here, petitioner is a sovereign state and the SEQRA action is not a land use decision. *See* Society of Plastics, 77 N.Y.2d at 774.

Consequently, Vermont has demonstrated injury in fact.

2. Vermont's Injuries Are Within the Zone of Interests Protected by SEQRA

In Society of Plastics, the Court of Appeals specifically addressed the zone of interests protected by SEQRA:

The purposes of SEQRA, as stated by the Legislature, are to encourage productive and enjoyable harmony with our environment; “to promote efforts which will prevent or eliminate damage to the environment and enhance human and community resources; and to enrich the understanding of the ecological systems, natural, human and community resources important to the people of the state.”

77 N.Y.2d at 777. Significantly, SEQRA’s definition of “environment” imposes no geographical limits:

“Environment” means the physical conditions which will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance, existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.

ECL § 8-0105(6). Consequently, Respondents’ contention that the environment SEQRA was enacted to protect ends at New York’s borders is unsupported by the statutory definition of “environment.”

Moreover, Respondents’ past actions, as set forth in their opposing papers, belie their claim that SEQRA’s zone of interests ends at the New York/Vermont border. Both NYSDEC and IP have for years actively engaged Vermont political leaders, citizens and regulatory agencies in an effort to convince them that the burning of TDF will not have adverse public health or environmental effects in Vermont. *See, e.g.*, NYSDEC Mem. at 1 (NYSDEC required IP “to perform modeling to assure New Yorkers and Vermonters that the test will be safe”); *Id.* at 4 (“Throughout the application process, DEC has informed and consulted staff and executives of the Vermont Department of Environmental Conservation and Agency for Natural Resources”); *Id.* at 8; IP Mem. at 8 (“In May 2003 . . . IP began discussing the idea [of conversion to TDF] with the DEC and Vermont [Agency

for Natural Resources”); (“IP also . . . met with Vermont Governor Douglas’ staff, and with Senator Jeffords and his staff in Washington, D.C.”) (emphases added). *See also* Letter from NYSDEC Deputy Commissioner Carl Johnson to Vermont Governor James Douglas dated December 5, 2005, R. 279-80 (“Let me first assure you that [NYSDEC] is committed to the protection of the health and welfare of the citizens of New York and Vermont from any potential air pollution impacts . . . from a trial burn”) (emphasis added).

NYSDEC and IP have undertaken these efforts to gain support from Vermont for the conversion to TDF because Vermont and its citizens will bear the brunt of the public health and environmental impacts of TDF burning at the Ticonderoga Mill. Indeed, much of the effort to predict emission impacts from the test burn has focused on Vermont. *See, e.g.*, IP Application, Ex. B., *Air Dispersion Modeling Analysis for Tire-Derived Fuel*, at Figure 4-1 “Overall Maximum Impact Locations and Maximum Impact in Vermont for Tire-Derived Fuel” at 4-5. Indeed, Respondents go so far as to claim that the test burn is being conducted partly to provide *Vermont* with information on the emissions from TDF burning. NYSDEC Mem. at 20 (“the test will provide information to DEC, EPA, and Vermont essential to evaluate” permanent conversion to TDF); IP Mem. at 27 (“the test will inform the DEC and IP (as well as Vermont and the general public) about the potential impacts of using TDF at the Mill”) (emphases added). The efforts by Respondents to involve Vermont in discussions and review of TDF burning at the Mill are proof positive that Respondents recognize that Vermont’s citizens and environment will be profoundly affected by the burning of TDF at the Ticonderoga Mill. Thus, their new-found opposition to Vermont’s involvement in the regulatory process lacks credibility.

Case law makes clear that governmental bodies for neighboring states and municipalities may

sue under SEQRA to annul agency action based on the failure to address cross-border environmental impacts. In First Taxing District of Norwalk, Conn. v. Lewis, Slip. Op., Westchester Co., Sept. 14, 1989 (Index No. 1708/89),¹⁹ the First Taxing District of Norwalk, Connecticut challenged the issuance of a SEQRA negative declaration by the Planning Board of the Town of Lewisboro, Westchester County, for a residential subdivision. As proposed, the subdivision was to border a water supply reservoir owned and maintained by the Taxing District, as well as a stream that was tributary to a second Taxing District reservoir. The court annulled the Planning Board’s negative declaration, holding that, among other factors, “the serious impact that contamination from sewage run-off may have on the supply of drinking water for approximately 45,000 Connecticut residents” warranted re-evaluation of the project’s environmental impacts. Slip. Op. at 16.

Along the same lines, New York courts have repeatedly ignored political boundaries in holding that residents of neighboring political subdivisions have standing under SEQRA to challenge actions that have cross-border environmental effects. *See e.g.*, Steele v. Town of Salem Planning Bd., 200 A.D.2d 870 (3rd Dep’t 1994) (holding nonresident had standing to challenge neighboring Town’s negative declaration under SEQRA); Glen Head – Glenwood Landing Civic Council, Inc. v. Town of Oyster Bay, 88 A.D.2d 484, 490 (2nd Dep’t 1982) (same).

Furthermore, courts have held that the combination of geographical proximity and the right to consultation satisfies standing under the National Environmental Policy Act, the federal statute after which SEQRA is modeled.²⁰ *See e.g.*, State of California v. Block, 690 F.2d 753 (9th Cir.

¹⁹ For the Court’s convenience, a copy of the court’s decision in First Taxing District of Norwalk, Conn. v. Lewis is annexed to this memorandum.

²⁰ SEQRA “was modeled after the National Environmental Policy Act” (NEPA). *See* (continued...)

1982). In Block, the Court held that:

To demonstrate standing, a plaintiff must allege that the challenged action has caused ‘injury in fact’ and that the interest sought to be protected is ‘arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’ A governmental entity wishing to challenge an EIS satisfies these requirements if it is in geographical proximity to the Proposed Action’s site, and is one of the governmental entities a federal agency must consult in the EIS process under s 102(2)(C) of NEPA

690 F.2d at 776 (internal citations omitted). Here, Vermont is in geographical proximity to the proposed action and has the right to consultation as an “affected state” under NYSDEC’s air pollution regulations, 6 NYCRR § 201-6.4(b), and pursuant to the Lake Champlain Memorandum of Understanding. *See* Point III.C, *infra*.

Respondents fail to cite to a single case in which a non-New York governmental entity was denied SEQRA standing on the basis of a bright-line exclusionary rule.²¹ The only authority cited by Respondents is a statement by one treatise commentator that SEQRA has “been interpreted as geographically limiting [its] applicability to protecting New York State’s environment.” Environmental Impact Review in New York § 2.05(3) (2005). Although both Respondents cite the commentator’s statement, they neither cite or discuss the cases he relies on for this proposition – and

²⁰(...continued)

Governors Message, 1975 N.Y. Laws at 1761 (McKinney’s 1975). The threshold for requiring agencies to prepare EIS, however, is significantly lower under SEQRA than under NEPA. *See Williamsburgh Around the Bridge Block Ass’n v. Giuliani*, 223 A.D.2d 64, 71 n.5 (1st Dep’t 1996); *H. O. M. E. S. v. New York State Urban Development Corp.*, 69 A.D.2d 222, 232 (4th Dep’t 1979).

²¹ Contrary to Respondents’ arguments, *Society of Plastics* is not on point because it involved the standing of a trade association with members in New York; the issue of whether a neighboring state has standing to challenge a SEQRA determination for a New York action having cross-border environmental impacts was not before the Court of Appeals there.

for good reason. The commentator obviously misread the holdings of the cases he cites, because they do not support his claim.²²

Thus, because Vermont “has a significant interest in having the mandates of SEQRA enforced,” it satisfies the traditional two-prong test for establishing standing under SEQRA. Society of Plastics, 77 N.Y.2d at 778.

B. Vermont Has Standing As An Adjacent Landowner

Petitioner, as owner and steward of Vermont’s land, water, air and other natural resources, has a legally cognizable interest in ensuring proper environmental review of the proposed action. *See Har Enterprises v. Town of Brookhaven*, 74 N.Y.2d 524, 529 (1989); Schulz v. Lake George Park Comm’n, 180 A.D.2d 852 (3d Dep’t 1992). Courts have presumed that property owners who may be adversely affected by an agency action suffer environmental injury that falls within the zone of interests protected by SEQRA. This fundamental principle was articulated by the Court in Har:

In deciding whether an owner has standing to ask a court to review SEQRA compliance, the question is whether it has a significant interest in having the mandates of SEQRA enforced. An owner’s interest in the project may be so substantial and its connection to it so direct or intimate as to give it standing without the necessity of demonstrating the likelihood of resultant environmental harm. For even though such an owner cannot presently demonstrate an adverse environmental effect, it nevertheless has a legally cognizable interest in being assured that the decision makers have not proceeded without

²² Two of the cases cited are not reported and could not be found on any legal research database. The two decisions that were located do not support the commentator’s contention. To begin with, neither case involves standing. Further, the cases do not hold that SEQRA’s zone of interest does not apply to extraterritorial impacts of in-state facilities. Niagara Mohawk Power Corp. v. Public Serv. Comm. Of State of New York, 137 Misc.2d 235, *aff’d*, 138 A.D.2d 65, *appeal denied*, 73 N.Y.2d 702 (1988) involved the application of SEQRA to a facility constructed in another state. Sierra Club v. Power Authority of State of New York, N.Y.L.J. Dec. 17, 1990 at 25, col. 3 (Sup. Ct. N.Y. Co) was dismissed on statute of limitations grounds, and the court’s decision includes no ruling on the SEQRA issue.

considering all of the potential environmental consequences, taking the required “hard look”, and making the necessary “reasoned elaboration” of the basis for their determination.

74 N.Y.2d at 529; *see also* Schulz, 180 A.D.2d at 853 (“Claiming environmental injury as a resident of and property owner in the Park wherein the wastewater and stormwater management regulations are in effect, petitioner is ‘presumptively adversely affected by the violation of SEQRA requirements [so] that no [allegation of specific environmental harm] is necessary.’”).

Courts have routinely upheld standing of petitioners who own property “adjacent” or in “close proximity” to the proposed action. *See e.g.*, Heritage Co. of Massena v. Belanger, 191 A.D.2d 790 (3d Dep’t 1993) (“Petitioner is an adjacent landowner and, as such, may indeed suffer noneconomic harm from the environmental impacts of the project, as it claims in the petition, *i.e.*, consequential increases in air and noise pollution and in traffic. Petitioner’s proximity to the proposed project makes it readily inferable that its risk of environmental harm is different from that of the public at large.”); Chase v. Board of Educ. of Roxbury Cent. School Dist., 188 A.D.2d 192 (3d Dep’t 1993) (upholding standing of petitioner whose well water supply was in “close proximity” to proposed action, which the parties acknowledged was in a “critical environmental area”).

In sum, in contrast to the perceived standing abuses the Court of Appeals sought to correct in Society of Plastics, this is not a case where Vermont has “contrived” claims of environmental harm, or where Vermont seeks to gain an economic or other advantage unrelated to the purposes of SEQRA.²³ To the contrary, Petitioner here has legitimate public health and

²³ As illustrated in Society of Plastics, while a court’s analysis of a party’s standing should be mindful of preventing abusive use of SEQRA, legitimate claims should not be denied. As noted by the Court, “[g]roups whose interests are only marginally related to, or even inconsistent with, the purposes of the statute cannot use the courts to further their own purposes (continued...) ”

environmental concerns of the type which SEQRA was specifically designed to address. Consequently, this Court should reject a bright-line rule that automatically excludes a neighboring state from mounting a challenge under SEQRA.

C. **Vermont Has Standing By Virtue of the Lake Champlain Memorandum of Understanding With New York**

In response to environmental concerns surrounding Lake Champlain and its environment, New York, Vermont, and the Province of Quebec, Canada, entered into a “Memorandum of Understanding on Environmental Cooperation on the Management of Lake Champlain Among the State of New York, the State of Vermont, and the Government of Quebec” (“Lake Champlain MOU”). *See* Exhibit A to Reply Affirmation of Christopher A. Amato, Esq., dated May 18, 2006 (“Amato Reply Aff.”). The Lake Champlain MOU was first entered into in 1988 and has been renewed four times, in 1992, 1996, 2000 and 2003.

The Lake Champlain MOU recognizes that the Lake Champlain environment is an “extremely valuable” and “sensitive” natural resource, and notes the “critical and complementary role” that New York, Vermont and Quebec have in the environmental review of projects that may affect the Lake. One of the stated purposes of the Lake Champlain MOU is to “provide a mechanism for the participation of each jurisdiction in regulatory proceedings addressing significant actions affecting the Lake.” *See* Exhibit A to Amato Reply Aff. at Section 1.4;

²³(...continued)

at the expense of the statutory purposes. This is particularly meaningful in SEQRA litigation, where challenges unrelated to environmental concerns can generate interminable delay and interference with crucial governmental projects. We have recognized the danger of allowing special interest groups or pressure groups, motivated by economic self-interests, to misuse SEQRA for such purposes.” Society of Plastics, 77 N.Y.2d at 774. Petitioner respectfully submits that such is clearly not the case here.

(emphasis added). The MOU also provides for notice and consultation on any action that could affect the environmental quality of the Lake. *Id.* at Section 4.

As part of the implementation of the Lake Champlain MOU, New York and Vermont entered into the “Vermont-New York Permit Exchange Agreement” dated August 18, 1992. *See* Exhibit B to Amato Reply Aff. The purpose of the Permit Exchange Agreement is, inter alia, to “[f]acilitate the participation of the states in the environmental review processes of the other jurisdiction when a proposed project may threaten Vermont’s or New York’s interest.” Permit Exchange Agreement at 1 (emphasis added). Among the types of projects identified as subject to the Agreement are “[a]ir pollution sources that are within 50 miles . . . of the states’ border [that are] subject to Title V of the 1990 Clean Air Act Amendments.” *Id.* at 2. The Ticonderoga Mill is subject to Title V of the Clean Air Act, is within one mile of the Vermont border, and is therefore covered by the Permit Exchange Agreement.

Petitioner respectfully submits that the Lake Champlain MOU and Permit Exchange Agreement establish New York’s recognition of Vermont’s legally cognizable interest in the environmental review, under New York law, of the proposed conversion to TDF at the Ticonderoga Mill. Consequently, these agreements confer standing on Vermont to challenge defects in the environmental review of the Mill’s proposed conversion to TDF.

POINT IV

RESPONDENTS’ REMAINING ARGUMENTS HAVE NO MERIT

A. The Petition is Ripe for Review

NYSDEC argues that the Petition is not ripe for review because it has not yet acted upon IP’s proposed permit modification, and Vermont has therefore not sustained “actual, concrete

injury.” NYSDEC Mem. at 33-36. This argument misconstrues Vermont’s challenge. The injury complained of is not approval of the permit modification, but the failure to conduct the requisite SEQRA review. This crucial distinction – that failure to conduct an adequate SEQRA review is itself an actual concrete injury independent of permit issuance – has been recognized by New York courts, but is ignored by NYSDEC.

As noted in Petitioner’s opening brief, the Court of Appeals has disposed of this argument by holding that issuance of a SEQRA determination terminating environmental review constitutes a final agency action ripe for judicial review, regardless of whether the permit applied for has already been issued. *See Stop-the-Barge v. Cahill*, 1 N.Y.3d 218, 223-24 (2003) (“the issuance of the [negative declaration] resulted in actual concrete injury to petitioners because the declaration essentially gave the developer the ability to proceed with the project without the need to prepare an [EIS]”); *see also Matter of Eadie v. Town Board of Town of North Greenbush*, 22 A.D.2d 1025 (3rd Dept. 2005) (final agency action rendering matter ripe for review was when “the Town Board reached a final determination regarding its SEQRA review”); *Coalition Against Lincoln West, Inc. v. Weinshall*, 21 A.D.3d 215, 220 (1st Dep’t 2005) (“When the FEIS was certified as complete, agency action was final as to those components of the project, even if formal approvals were necessarily deferred until such time as construction of the project reached that point. Accordingly, the challenge here is properly to the FEIS, not the issuance of a construction permit or approval”); *McNeill v. Town Board of Town of Ithaca*, 260 A.D.2d 829, 830 (3rd Dep’t 1999) (“Where the challenged action relates to SEQRA review, the limitations period commences with the filing of a decision which represents the final determination of SEQRA issues, notwithstanding the fact that such determination may be embodied in preliminary

or conditional plan approvals”); Matter of Application of Metropolitan Museum Historic District Coalition v. De Montebello, 3 Misc.3d 1109; 2004 WL 1326706 (Sup. Ct. New York County 2004) (final agency action for purposes of SEQRA occurred then “the Parks Department took the ‘definitive position’ that it would not conduct a SEQRA review”).

NYSDEC does not discuss this binding precedent, and its argument on this point is consequently devoid of merit.

B. NYSDEC’s Mandamus Argument is Based on a Flawed Reading of the Petition

NYSDEC attempts to transform Vermont’s First Cause of Action into a mandamus claim, and then proceeds to argue that the claim must be dismissed because mandamus is not available under these facts. NYSDEC Mem. at 28-31. This argument is a straw man. An action in the nature of mandamus is brought pursuant to CPLR 7803(1). *See* David A. Siegel, *New York Practice*, § 558 (1999). The First Cause of Action specifically alleges that “NYSDEC’s determination that IP’s proposed TDF test burn is a Type II action exempt from SEQRA review was in violation of lawful procedure, affected by an error of law, arbitrary and capricious, and an abuse of discretion.” Petition ¶ 46 (emphasis added). This recital precisely tracks the language of CPLR 7803(3), not CPLR 7803(1). Thus, NYSDEC’s argument on this point is based on a flawed reading of the Petition.

C. NYSDEC Mischaracterizes the Petition’s Allegations Relating to Wastewater Discharges

As is evident from the face of the Petition, Vermont’s allegations concerning the “new or increased discharges of [water] pollutants” associated with the burning of TDF are made in the context of arguing that the test burn is not properly classified as a Type II action. Petition ¶¶ 7-8, 29-30, 52-54. Nowhere in the Petition is there an allegation or cause of action challenging the

Mill's SPDES permit. Nevertheless, NYSDEC repeatedly characterizes Vermont's claims as seeking to "revise" the Mill's SPDES permit. NYSDEC Mem. at 31-34. Relying on its fabricated version of Vermont's claims, NYSDEC then proceeds to raise a statute of limitations defense to the non-existent SPDES permit claims. *Id.* Because the Petition contains no cause of action concerning the Mill's SPDES permit, NYSDEC's statute of limitations arguments have no bearing on this action.

D. This Court Has Personal Jurisdiction Over IP

Near the end of its brief, IP makes the throw-away argument in a footnote that "Vermont [sic] lacks personal jurisdiction over IP because the State failed to serve IP with its Verified Petition and supporting papers as required by the Court's Order to Show Cause." IP Mem. at 22, n. 24. In fact, IP was personally served with the Order to Show Cause and supporting papers, as well as the Verified Petition and Petitioner's Memorandum of Law, before close of business on February 7, 2006 as required by the Order to Show Cause.²⁴ *See* Affidavit of Service, Exhibit B to Amato Reply Aff. Contrary to IP's claim that service on the New York Secretary of State "complies with neither the letter nor the spirit" of the Court's order, New York law expressly provides that personal service upon a foreign corporation licensed to do business in New York is effected upon delivery to the Secretary of State. *See* CPLR § 311(a)(1); Business Corporation Law § 306. Consequently, IP's claim is baseless.

²⁴ IP also makes the erroneous claim that Vermont's application for a temporary restraining order was "denied" by Justice McNamara at the time the Order to Show Cause was signed. IP Mem. at 3, n.1. In fact, the application for a TRO was voluntarily withdrawn by Vermont based on NYSDEC's representation on the record that no final decision would be made on IP's permit application for the test burn until after the return date. The procedural status and review requirements underlying that representation are repeated in NYSDEC's opposing papers. *See* NYSDEC Mem. at 35-36.

CONCLUSION

For all of the foregoing reasons, the relief sought in the Petition should be granted in all respects.

Dated: Albany, New York
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DREYER BOYAJIAN LLP
Attorneys for Petitioner the State of Vermont
75 Columbia Street
Albany, NY 12210
(518) 463-7784

S// Christopher A. Amato
Christopher A. Amato
Of Counsel

STATE OF VERMONT
WILLIAM H. SORRELL
ATTORNEY GENERAL

S// Erick Titrud
Erick Titrud
Kevin O. Leske
Assistant Attorneys General
Vermont Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-5518
Request for Admission Pro Hac Vice
Pending