SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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Remedial Bureau C
Division of Environmental Remediation

In the Matter of the Application of

E.I. DUPONT DE NEMOURS & COMPANY,

Petitioner,

For a Judgment Under CPLR Article 78 and § 3001

Index No.: 9156-06

-against-

THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and THE NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF DUPONT'S VERIFIED PETITION

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PRELIMINARY STATEMENT

This action involves the improper selection of a remedial program by the New York State Department of Environmental Conservation (the "DEC" or "Agency"), after consultation with the New York State Department of Health (the "DOH"), for the DuPont-Stauffer Landfill Site (the "Site") located in the Town of Newburgh, Orange County, New York. The remedy selected by DEC combines a number of components or actions to be performed at the Site. Although DuPont does not necessarily agree with all of the components of the remedy, it challenges only one component of the overall remedy selected by DEC: with respect to one of seven different waste types found at the Site, DEC decided the waste could not be treated on-site to reduce its toxicity and that, even if it was rendered non-hazardous through treatment, it nevertheless must be disposed at a significantly more costly hazardous waste disposal facility (as opposed to a solid waste disposal facility). Because the remedial program, however, is a composite of all of its components, and because the remedy selection process employed by DEC (at least as it relates to the challenged component) violated the mandatory regulatory procedure that governs that process, the Record of Decision (or "ROD") in which DEC selected the remedial program must be vacated, and DEC must repeat the process in full compliance with the applicable regulations.

Following extensive investigations of environmental conditions at the Site, DuPont (a past owner of the landfill) and Stauffer Chemical Company ("Stauffer") (the current owner of the landfill) prepared a Draft Focused Feasibility Study (or "Draft FFS") that evaluated alternative remedial actions and proposed one remedy in particular that they determined was the most effective alternative when balancing all of the mandated regulatory evaluation criteria. The remedy proposed by Petitioner contemplated, among its various components, the on-site treatment of certain wastes (that exhibited hazardous waste characteristics) in order to reduce their toxicity, and the subsequent on-site containment or off-site disposal of the treated waste as

non-hazardous (or "solid") waste. DEC, during the negotiations of a Consent Order pursuant to which the two companies would design, implement, and maintain the remedy, expressed the Agency's conceptual agreement with the proposed remedy, and specifically with the on-site treatment of certain wastes to reduce their toxicity. DEC provided comments to the Draft FFS, including an express request that DuPont and Stauffer (collectively, the "Companies") treat certain wastes on-site, and instructed the Companies to revise and issue a final feasibility report.

Before the Companies could issue a Final Focused Feasibility Study (or "Final FFS") (but after they had signed the Consent Order), the Agency's program manager assigned to the Site was replaced. The new program manager inexplicably, and without notice to the Companies, issued for public review and comment a proposed remedy for the Site that was dramatically different from the remedy the parties (including DEC) had conceptually agreed to more than 1 year earlier. The Proposed Remedial Action Plan (or "PRAP"), in an effort to comply with law, stated that it was based on the Final FFS when, in fact, the Final FFS had not even been released yet, let alone approved by DEC. The evaluation of remedial alternatives in the PRAP did not even identify (let alone consider) the remedy the Companies had proposed and DEC had previously agreed to. Most importantly, the remedy proposed by DEC did not include any on-site treatment of waste, and required that all hazardous wastes be removed from the Site and disposed of at a hazardous waste disposal facility, regardless of whether the waste was capable of being treated and transformed into a non-hazardous waste suitable for disposal, at considerably less cost, in a solid waste disposal facility.

Following public review and comment, DEC's proposed remedy was selected in a ROD that did not contain any analysis or other consideration of the feasibility of on-site waste treatment or off-site waste disposal at a solid waste disposal facility. Again, DEC referred to a

remedial alternative evaluation in an FFS, apparently in an effort to comply with its own regulations, when in fact the FFS had never been completed or approved. Again, the Companies' proposed remedy was never even identified, let alone evaluated. DEC's ROD also failed to comply with state regulations that required DEC to give "due consideration" to the "reduction of toxicity, mobility and volume [of wastes] through treatment" when selecting a remedy.

DEC's proposal of a remedy before the Final FFS was completed, its rejection of waste treatment as a component of the remedy, its refusal to consider the feasibility of waste treatment, and its failure to provide any justification for its insistence that all waste be removed and disposed at a hazardous waste facility (regardless of its potential to be treated and transformed into a non-hazardous solid waste), constitute arbitrary and capricious actions and violations of lawful procedure. DuPont thus brings this proceeding to challenge DEC's decisions (1) to reject the on-site treatment of one discrete type of waste (out of seven types found at the Site) (the "South Landfill Fill Material"), and (2) to require that such waste be disposed in a hazardous waste disposal facility without regard for whether it can be treated and rendered non-hazardous and disposed in a solid waste disposal facility at considerably less cost. For the foregoing reasons and those that follow, DEC's remedy selection as reflected in the ROD should be vacated.

STATEMENT OF FACTS

All material and relevant facts set forth in the attorney's affidavit of David P. Flynn, sworn to on December 27, 2006, with exhibits attached thereto, are incorporated by reference herein as if they were set forth in their entirety.

LEGAL DISCUSSION

I. APPLICABLE LEGAL STANDARDS.

In a proceeding brought under CPLR Article 78 to challenge an agency action, judicial review is limited to ascertaining whether the agency's action was made in violation of lawful procedure or affected by an error of law, or whether it was arbitrary and capricious or constituted an abuse of discretion. See, e.g., CPLR 7083(3); Solomon v. Administrative Review Board for Professional Medical Conduct, 303 A.D.2d 788, 788-89 (3d Dept' 2003).

Administrative acts are subject to annulment if they contravene explicitly mandated procedures, such as regulations promulgated by an agency to accomplish those responsibilities delegated to it by law. See, Board of Education of Monticello Central School District v. Commissioner of Education, 91 N.Y.2d 133, 139 (1997); Bingham v. Town of Burlington, 116 A.d.2d 900 (3d Dep't 1986); Sinclair v. Smith, 97 A.D.2d 953 (4th Dep't 1983) Nesbitt v. Goord, 12 Misc.3d 702, 705-06 (Sup. Ct. Albany County 2006). An error of law occurs when an agency misinterprets or misapplies applicable law or acts inconsistently with a requirement imposed upon it by statute or regulation. See, e.g., Kurcis v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980); Bingham v. Town Bd. of Burlington, 116 A.D.2d 900, 900-01 (3d Dep't 1986).

An agency decision is "arbitrary and capricious or an abuse of discretion," if the action taken was without a sound basis (or "rational basis") or taken without regard to the facts (or was not "factually supported"). See, e.g., Pell v. Bd. of Edu. of Union Free School District No. 1, 34 N.Y.2d 222, 230-32 (1974); Remmers v. DeBuono, 241 A.D.2d 587, 588 (3d Dep't 1997); Solomon, 303 A.D.2d at 788-89. "A determination will be deemed rational if it has some objective factual basis, as opposed to resting entirely on subjective considerations such as general community opposition." Halperin v. City of New Rochelle, 24 A.D.3d 768, 772 (2d Dep't 2005).

II. DEC SHOULD BE REQUIRED TO SUPPLEMENT THE ADMINISTRATIVE RECORD TO THE RECORD OF DECISION TO REFLECT ALL PROCEEDINGS THAT OCCURRED BEFORE THE REMEDY WAS SELECTED.

In connection with an Article 78 petition, a court is limited to reviewing the record before the agency at the time of the agency's decision. Featherstone v. Franco, 95 N.Y.2d 550, 554 (2000). On the one hand, a court cannot consider "evidentiary submissions as to circumstances after the [agency] made its determination" because "judicial review of an administrative determinations is confined to the 'facts and record adduced before the agency.'" Id., at 554. On the other hand, it also is improper to review a matter based on an incomplete administrative record. Captain Kid's Inc. v. New York State Liquor Authority, 248 A.D.2d 791, 792 (3d Dep't 1998). Thus, when an agency omits documents from the administrative record, and that omission might cause prejudice to substantial rights of a party, the court should order the agency to correct the administrative record so that the entire record adduced before the agency's action is available to the court for its review. Id.; see also, Cliff v. Kingsley, 293 A.D.2d 954, 955 (3d Dep't 2002).

CPLR § 7804(e) requires an agency to file, with its answer to an Article 78 Petition, "a certified transcript of the record of the proceedings under consideration." In contravention of the regulatory requirement that "the process of selecting a remedy shall be documented in a record of decision, which includes . . . a list of the documents the department used in its decision making,"[1] DEC listed only six items, in non-chronological order, in the administrative record to the ROD. See Exhibit A to Flynn Affidavit, at Appendix B. DEC omitted a number of documents that had been submitted to or received from DEC, all relating to the consideration of

[1] See 6 NYCRR § 375-2.8(e)(8) (formerly 6 NYCRR § 375-1.10(d)(8)) (revised December 14, 2006).

potential remedial alternatives that were ignored in the PRAP and ROD.[2] DEC's omission of various documents from the administrative record to the ROD is prejudicial to DuPont because those documents help to establish both that DEC committed an error of law and violated lawful procedure when it selected its remedy and that DEC's remedy selection was arbitrary and capricious. If DEC files a certified transcript of the administrative record that, like the ROD, does not include the entire proceedings, DuPont will move as permitted under CPLR § 7804(e) for an order requiring DEC to supplement the record as required by law to reflect the entire record of the proceedings culminating in its remedy selection.

III. DEC'S REMEDY SELECTION IN THE ROD SHOULD BE ANNULLED BECAUSE DEC VIOLATED LAWFUL PROCEDURE AND COMMITTTED ERRORS OF LAW.

During the remedy selection process leading up to and culminating in the issuance of the ROD for the Site, DEC violated a number of the remedy selection procedures mandated in New York State regulations. First, DEC ignored, without justification, state and federal regulatory mandates to consider reducing the toxicity of waste through treatment. DEC's remedy selection regulations require that, "a remedy shall be selected upon consideration of" *inter alia*, "reduction in toxicity, mobility or volume of contamination through treatment: a program or project that permanently and significantly reduces the toxicity, mobility or volume of contamination is to be preferred over a program or project that does not do so. The following is the hierarchy of technologies ranked from the most preferable to the least preferable: (i) destruction, on-site or off-site; (ii) separation or treatment on-site or off-site; (iii) solidification or chemical fixation, on-

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[2] The omitted documents include DEC's comments to the draft FFS and the Companies' responses to those comments, the Companies' comments to the PRAP, the draft and final PDI work plan and DEC's comments thereto. DEC listed only six items, in non-chronological order, in the administrative record to the ROD. DEC also omitted many reports describing investigations of environmental conditions at the Site that had been performed by DEC, the United State Environmental Protection Agency, and DuPont and Stauffer.

site or off-site; and (iv) control and isolation, on-site or off-site." 6 NYCRR § 375-1.8(f)(4). With respect to the hierarchy of source removal and control measures, DEC's regulations list "removal and/or treatment" as the most preferred measure. 6 NYCRR § 375-1.8(c)(1).

DEC's regulations also require that "the remedy selected shall eliminate or mitigate all significant threats to the public health and to the environment . . . in a manner not being inconsistent with the national oil and hazardous substances pollution contingency plan" (the "NCP"). 6 NYCRR § 375-2.8(e). Under the NCP (40 CFR § 300.430(a)(1)(i)), "the national goal of the remedy selection process is to select remedies that are protective of human health and the environment, that maintain protection over time, and that minimize untreated waste" (emphasis added). The NCP specifically identifies treatability studies among the list of those tasks generally included in a feasibility study. 40 CFR § 300.430(a)(2).

Second, DEC ignored those state regulations that require that a feasibility study "shall be conducted" to develop and evaluate alternatives for all contaminated media identified at the site. 6 NYCRR § 375-2.8(d)(1). DEC is required to select the remedy for a site from among the feasible alternatives developed and evaluated in the feasibility study or additionally by the Agency. 6 NYCRR § 375-2.8(c)(4). In turn, DEC is required, when publishing a proposed remedy for public review and comment, to summarize its "reasons for preferring [the proposed remedy] over other remedial alternatives considered." 6 NYCRR § 375-2.10(c)(1). DEC then is required to document the process it uses to select a remedy in a ROD that includes "a description and evaluation of the remedial alternatives considered." 6 NYCRR § 375-2.8(e)(6).

Initially, DEC not only considered but also conceptually agreed to the on-site treatment of the South Landfill Fill Material, followed by its on-site containment under a cover as a solid waste. See Exhibit C, at 1. Its willingness to embrace such a remedial alternative was consistent

with RODs issued by the Agency for at least 16 landfills located elsewhere in the state that involved comparable waste material. See Exhibit F, at Table 1. Following a change in DEC program management for the DuPont and Stauffer landfill site, however, DEC paid no further consideration to the on-site treatment of the South Landfill Fill Material, its on-site containment or its disposal as a solid waste. For reasons never explained to DuPont and Stauffer nor disclosed publicly in either the PRAP or the ROD, DEC reversed course by 180 degrees and proposed and selected a remedy that (1) refused to allow any on-site treatment of South Landfill Fill Material and (2) required that the waste be disposed of at a hazardous waste disposal facility regardless of whether, after treatment, it had been rendered a solid waste. See Exhibit A and I. DEC ignored all the prior discussions the Agency had engaged in with the Companies. It provided no rationale for the remedy selection it made in the ROD in this respect. The Agency referenced a Final FFS that it requested but did not wait for and never received, and never even included in the PRAP's evaluation of remedial alternatives any reference to the remedy that the Companies had proposed and DEC had conceptually agreed to. See Exhibits A (at 4) and I (at 2, 5, 12 and 14). The Agency even excluded from its administrative record all of the documents that had previously considered the on-site treatment of waste and any containment or disposal of treated waste as a solid waste. See Exhibit A, at Appendix B.

The remedy selection process used by DEC, therefore, violated the regulatory mandate to give "due consideration" to the "reduction of toxicity, mobility and volume [of waste] through treatment." 6 NYCRR § 375-1.8, 2.8. Reducing the toxicity and mobility of waste through treatment poses obvious public benefits. In this case, it also would save DuPont and Stauffer an estimated $3,000,000 in disposal costs by converting a waste that is considered hazardous to a solid waste capable of disposal in a solid waste disposal facility.

DEC's remedy selection process also violated the remedy selection regulations because (1) a feasibility study was never completed, (2) a remedy was proposed in the PRAP without evaluating the alternative proposed in the feasibility study, (3) all remedial alternatives that were considered were not described in the ROD, and (4) the PRAP did not summarize DEC's reasons for preferring its proposed remedy over the remedial alternative proposed in the FFS. Proceeding with a remedy selection in the absence of a Final FFS, ignoring altogether the remedy proposed in the Draft FFS, and refusing to consider the on-site treatment of wastes and their subsequent disposal at a solid waste disposal facility, apparently for no other reason than to cause the Companies to incur significantly greater costs, violated the remedy selection procedures mandated in New York regulations and the NCP. The Court is not confronted here with a determination by the Agency that should be afforded considerable deference, such as occurs when a party challenges regulations promulgated by an Agency, or factual determinations made by an Agency that fall within its technical expertise. Instead, the Court is confronted with actions by an Agency that clearly and simply run counter to the procedures mandated by the Agency's own regulations. For all the foregoing reasons, DEC's violations of its remedy selection procedures require that the ROD for the Site be vacated and the process for selecting the remedy be performed in compliance with law.

IV. DEC'S REMEDY SELECTION IN THE ROD ALSO WAS ARBITRARY AND CAPRICIOUS.

DEC's decisions to reject the on-site treatment of the South Landfill Fill Material and to require that such waste be disposed of at a hazardous waste disposal facility, regardless of whether it can be treated and rendered a non-hazardous solid waste, were arbitrary and capricious because no evidence is found in the ROD that reflects either DEC's consideration of those remedial alternatives or that provides a supporting rationale for the Agency's decisions.

The Record is devoid of any consideration of on-site treatment of waste and off-site disposal of treated waste for two reasons. First, the DEC program manager inexplicably excluded from the administrative record any documents (authored by DEC or the Companies) that considered on-site treatment of waste or the disposal of treated waste at a solid waste disposal facility. These records probably were excluded because they all related to a proposed remedy that DEC had "conceptually agreed to" but then decided, after a program management change, to reject.

Second, the PRAP and ROD both ignore the earlier consideration by the Companies (and agreement by DEC) of on-site treatment of waste and off-site disposal of treated waste. The ROD recognizes that the Companies entered into an Order on Consent in August 2005 that required them to complete a FFS, and claims that a FFS in fact had been completed that evaluated alternatives for remediating site contamination. See ROD at Section 4 and Preamble to Section 5. After summarizing the remedial investigation, however, the ROD never identifies the remedial alternative proposed by the Companies in the Draft FFS. The ROD never acknowledges that DEC had conceptually agreed to a different remedy than was being selected in the ROD. In its ROD, DEC never evaluated the remedy proposed by the Companies, and never provided any rationale for instead choosing the selected remedy.

The PRAP issued by DEC is similarly flawed. Referring to the PRAP, DEC stated that "this document is a summary of the information that can be found in greater detail in the July 2004 "Supplemental Remedial Investigation" (SRI) Report, the Final 2006 "Focus Feasibility Study" (FFS) and other relevant project documents." The Final FFS, however, had not yet been

issued and never was completed.[3] In the "summary of the evaluation of alternatives" section of the PRAP (section 7), DEC states that "the FFS is being developed and focused on alternatives consisting of appropriate components of a 6 NYCRR Part 360 engineered cap system and the No Action alternative." DEC, however, completely ignored the waste treatment remedial alternatives proposed by the Companies and conceptually agreed to by DEC. Like the ROD, DEC in its PRAP never acknowledged its prior consideration of (or agreement with) on-site waste treatment or off-site disposal of treated waste and solid waste at disposal facilities.

Even if the administrative record was corrected to include those documents in which DEC and the Companies considered the on-site treatment of waste and the off-site disposal of treated waste, DEC's decisions (rejecting on-site waste treatment and requiring off-site disposal of treated waste at hazardous waste disposal facilities) remain arbitrary and capricious because the decisions are without a sound basis and were made without regard to the facts in the record. The only proof in the record shows that the on-site treatment of South Landfill Fill Material was feasible, especially given the successful implementation of identical treatment technologies on comparable waste at 16 other landfills in New York State. See Exhibit F. The record shows that the treatment of that waste would render it a solid waste, thus reducing the toxicity of the waste significantly. Id. By rendering the waste a solid waste, it would then be capable of disposal at solid waste disposal facilities, thus reducing the resulting cost of the remedy significantly (by an estimated $3,000,000) and by saving much-needed hazardous waste disposal facility capacity for the disposal of truly toxic hazardous wastes. Id. The record even shows that the on-site treatment of the South Landfill Fill Material and its off-site disposal at a solid waste facility was

[3] Once DEC issued the PRAP, the Companies stopped work on the Final FFS in order to avoid unnecessarily incurring costs on a report that had been rendered obsolete and which DEC apparently no longer wanted.

equally protective, if not more protective, of human health in the environment than the remedies selected by DEC. Id.

On the other hand, the record does not contain any evidence to the contrary except for general public comments seeking the removal of all wastes from the landfill. The public comments, however, do not criticize the on-site treatment of wastes before the off-site disposal of those treated wastes. The public comments also provide no rationale for insisting on the disposal of treated wastes at a hazardous waste disposal facility, even if those wastes are capable of being disposed of at solid waste disposal facility. Moreover, public opposition alone (especially when it is only one of nine mandatory factors to consider) is not a sufficient objective basis upon which to rely when making an Agency determination. See Halperin, 24 A.D. 3d at 772.

The two Agency decisions that DuPont challenges in DEC's remedy selection fail the usual test that is applied in deciding whether a determination is arbitrary and capricious – that is, whether the determination is rational and supported by adequate basis in fact. See, e.g., Flacke v. Onondaga Landfill System, 69 N.Y.2d 355, 362 (1987). Moreover, the record is devoid of any factual evaluation that would allow DEC to argue that the Court should defer to the Agency's expertise; thus, DEC's judgment in this instance is not entitled to the weight and judicial deference it might otherwise be entitled. Flacke, 69 N.Y.2d at 387; Regional Action Group for Environment, Inc. v. Zagata, 245 A.D.2d 798, 800 (1997).

It appears that DEC recognized that its remedy selection would not be defensible if the record included the extensive consideration paid by the Companies and DEC to the on-site treatment of waste and the subsequent disposal of treated waste at solid waste disposal facilities. This apparently explains DEC's decision to exclude these important documents and other

communications from the administrative record. In so doing, however, DEC subjected its determination to an equally strong criticism: there exists no rationale to support these contested decisions, thus rendering them arbitrary and capricious. As a result, the Court is confronted with two alternative scenarios: either the decisions regarding the South Landfill Fill Material are not supported because the record is devoid of any consideration concerning its treatment and manner of disposal, or the supplemented record not only does not support DEC's decisions but also contradicts them.

Especially with respect to DEC's decision to insist that all hazardous waste that is removed from the Site must be disposed at a hazardous waste disposal facility, regardless of whether it is capable of being treated and rendered a solid waste, the record offers one logical explanation for DEC's actions. Following the PRAP and prior to the ROD, the Companies had complained to DEC that the new project manager assigned to the site had, on more than one occasion, threatened to impose a more costly remedy, even one that was not more protective of human health and the environment. In the end, despite the Companies' complaints to DEC management, that is precisely what the project manager proceeded to do.

It is indeed rare that a remedy selected by DEC includes remedial alternatives that lack any supporting evidence in the record or justifying rationale.[4] Rarely does DEC entirely fail to consider an important (and required) factor in a remedy selection process, or selects a remedial component that is so implausible that it cannot be explained by either a difference in competing views of the facts or a product of the agency's expertise. When, however, the court is confronted with such an arbitrary and capricious decision by DEC in selecting a remedy, the law provides a

[4] See, e.g., Matter of Bell Petroleum Services, Inc. v. United States, 3 F.3d 889, 904-06 (5th Cir. 1993) (the administrative record was devoid of any evidence that an alternative drinking water supply system was necessary in an area where the ground water was contaminated but no one in the area actually drank the water).

procedural mechanism for an aggrieved party to challenge that decision and assure that the remedy selection process is completed in compliance with law. For all of the foregoing reasons, this Court can and should vacate the ROD and require DEC (1) to comply with the remedy selection regulations, and (2) select a remedy that is supported by evidence in the record and based on a rational analysis of that proof.

CONCLUSION

For all the reasons set forth above and in the attorney's affidavit, with exhibits attached of David P. Flynn, sworn to December 27, 2006, DuPont respectfully requests that this Court in a judgment pursuant to CPLR 78 and §3001, granting the relief prayed for in the Verified Petition, including:

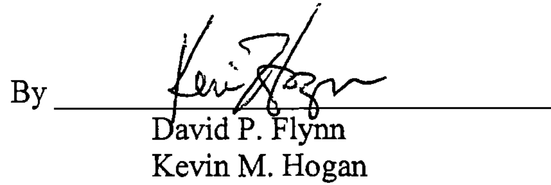
(1) declaring the action of Respondents in selecting the remedy in the ROD null and void and vacating the ROD on grounds that (a) Respondents' action in issuing the ROD was based on an error of law because DEC violated the mandatory procedure for selecting a remedy as set forth in the regulations promulgated under the ECL; and (b) Respondents' decision in the ROD was arbitrary and capricious because (i) no evidence exists in the Administrative Record to support Respondents' decision, and (ii) no rational justification exists to support the decision;

(2) requiring Respondents to supplement the Administrative Record to the ROD to reflect, as required by the regulations promulgated under the ECL, all of the documents that DEC considered (or should have considered) in making its remedy selection; and

(3) granting Petitioner its reasonable attorneys' fees and costs incurred in connection with this action, and such other and further relief as this Court may deem proper and just.

Dated: Buffalo, New York
December 27, 2006

PHILLIPS LYTLE LLP

By 
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