**BEFORE THE ADMINISTRATOR**
**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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| In the Matter of the Proposed Title V Permit<br><br>Issued by the<br><br>New York State Department of Environmental Conservation<br><br>To<br><br>International Paper to operate the Ticonderoga Mill Facility | ) | Permit No. 5-1548-00008/00081 |

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF THE PROPOSED TITLE V PERMIT MODIFICATIONS FOR THE INTERNATIONAL PAPER TICONDEROGA MILL FACILITY**

**AND**

**REQUEST THAT EPA DIRECT NYSDEC TO REFRAIN FROM ISSUING A TITLE V PERMIT OR TO SUSPEND THE EFFECTIVENESS OF ANY TITLE V PERMIT ISSUED PENDING RESOLUTION OF VERMONT'S PETITION OR, ALTERNATIVELY, THAT EPA TAKE ANY AND ALL APPROPRIATE ACTION TO SUSPEND THE EFFECTIVENESS OF ANY SUCH PERMIT UNTIL IT HAS ISSUED A DETERMINATION ON VERMONT'S PETITION**

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**PETITION REQUESTING THAT THE ADMINISTRATOR OBJECT TO THE ISSUANCE OF THE PROPOSED TITLE V PERMIT MODIFICATIONS FOR THE INTERNATIONAL PAPER TICONDEROGA MILL FACILITY**

Pursuant to 42 U.S.C. § 7661d(b)(2) and 40 C.F.R. § 70.8(d), the State of Vermont[1] hereby petitions the Administrator of the United States Environmental Protection Agency (EPA) to object to the proposed modifications to the Title V permit for International Paper's (IP's) Ticonderoga Mill facility.[2]

## BACKGROUND

On July 27, 2006, NYSDEC provided notice to EPA Region II of proposed modifications to the Title V permit for IP's Ticonderoga Mill facility. As explained in more detail below, the proposed modifications would unlawfully authorize the burning of TDF in the Mill's power boiler.[3] The vast majority of the air pollutants emitted from the Mill are blown by prevailing westerly winds into Vermont, adversely affecting the pristine quality of the air Vermonters breathe. If allowed, burning TDF in the Mill's power boiler is expected to result in increases in emissions of particulates, sulfur dioxide, hazardous air pollutants and metals, which have the potential to significantly worsen Vermont's air quality and result in serious public health impacts.

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[1] Under New York air pollution regulations, Vermont is an affected state; Vermont is contiguous to New York and lies within 50 miles of the Mill. See 6 NYCRR § 201-6.4(b) (defining "Affected states" as "All states and tribal lands: (i) whose air quality may be affected and that are contiguous to the state where the major stationary source is located for which a title V facility permit, permit modification or permit renewal is being proposed; or (ii) that are within 50 miles of such major stationary source."). Vermont is also an affected state under 40 C.F.R. § 70.2.

[2] In accordance with 42 U.S.C. §7661d(b)(2) and 40 C.F.R. § 70.8(d), this petition is being submitted within 60-days after EPA's 45-day review period; a copy of this petition is also being provided to NYSDEC and IP; and this petition is based only on objections that were either raised with reasonable specificity during the public comment period or objections that were impracticable to raise during the public comment period and/or arose after such period. Copies of the State of Vermont's comments and an engineering report submitted to NYSDEC during the public comment period are attached and incorporated by reference herein.

[3] The proposed TDF test burn as set forth in IP's application is referred to in this petition as the "Proposed Project."

NYSDEC is authorized to issue permits required under Title V of the federal Clean Air Act ("CAA"), 42 U.S.C. §§ 7410-7671q; 67 Fed. Reg. 5216 (Feb. 5, 2002). The CAA Title V requirements are implemented in New York through Article 19 of the New York Environmental Conservation Law, and the NYSDEC implementing regulations, 6 NYCRR Part 201.

Title V permits must include such conditions as necessary to assure compliance with all applicable requirements. 40 CFR § 70.6(a)(1), 6 NYCRR § 201-6.5(a)(1). "Applicable requirements" include all standards, emissions limitations and requirements of New York and federal regulations under the Clean Air Act including federal Prevention of Significant Deterioration (PSD) pre-construction review under 42 U.S.C. §§ 7470-7479; Non-Attainment New Source Review (NSR), pursuant to 6 NYCRR Part 231; the New Source Performance Standards (NSPS), 42 U.S.C. § 7411; and pursuant to the National Emissions Standards for Hazardous Air Pollutants (NESHAP) and Maximum Achievable Control Technology (MACT) standards. NYCRR § 201-2.1(b)(5). All specific standards, emission limitations and other requirements imposed under these programs must be included as federally enforceable terms in a Title V operating permit issued under 6 NYCRR §201-6. Any preconstruction permit requirements, including limits on potential to emit, are applicable requirements under Title V and must be set forth in a source's Title V operating permit.

In New York, the procedures for issuing pre-construction permits were in place prior to the approval of New York's Title V program and have been combined with the state's Title V program. 6 NYCRR § 201-6.1(b). While combining the two programs offers simultaneous review of NSR requirements and Title V sources, it does not alter the

substantive requirements of the two programs. A source seeking approval to construct or modify through a Title V permit, must comply with the substantive and process requirements for both NSR and Title V. In the Matter of Orange Recycling and Ethanol Production Facility, Pencor Masada Oxynol, LLC, Order Responding to Petitioner's Request that the Administrator Object to Issuance of A State Operating Permit, at 3 (May 2, 2001). A source may not avoid the requirement to undergo NSR review by obtaining a Title V permit where the Title V Permit review does not satisfy NSR requirements. See, e.g., Notice of Deficiency for Clean Air Operating Permits Program, Maricopa County, AZ, 70 FR 105, 32245 (June 2, 2005).

## GROUNDS FOR OBJECTION

### I. EPA MUST OBJECT TO THE PROPOSED PERMIT MODIFICATIONS BECAUSE THE UNDERLYING PERMIT HAS EXPIRED AND CANNOT BE LAWFULLY MODIFIED UNTIL IT IS RENEWED.

The Title V permit that IP seeks to modify expired on June 19, 2006. Although IP is permitted by law to continue operations under its expired Title V permit, there is no legal basis for NYSDEC to modify IP's existing permit until the renewal process is completed. Therefore, EPA must object to the proposed permit modifications.

IP's Title V permit remains in effect only by operation of law pursuant to section 401(2) of New York's State Administrative Procedure Act (SAPA). In relevant part, section 401(2) states:

> When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency . . . .

(emphasis added).[4]

[4] The term "license" is defined broadly to include "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law." SAPA § 102(4).

The plain language of SAPA § 401(2) only allows operations to continue under the terms and conditions of "the existing license" until the renewal application "has been finally determined by the agency." The term "existing license" refers to the license that existed at the time the licensee submits a "timely and sufficient" renewal application. The purpose of SAPA § 401(2), therefore, is to allow a permittee to continue to operate under the terms and conditions of its existing permit while its renewal application is pending.[5] Similarly, NYSDEC's regulation on permit renewal and modification for Title V facilities provides: "All the terms and conditions of a permit shall be automatically continued pending final determination by the department on a request for renewal application for a permit provided a permittee has made a timely and complete application and paid the required fees." 6 NYCRR § 201-6.7(a)(5).

In sum, neither provision authorizes NYSDEC to modify the terms and conditions of expired permits during the renewal process. Because any modifications to IP's expired Title V permit prior to renewal are unlawful, EPA must object to the proposed modifications and prohibit NYSDEC from issuing a final permit to IP.[6]

## II. EPA MUST OBJECT TO THE PROPOSED PERMIT MODIFICATIONS BECAUSE IP'S PERMIT APPLICATION DOES NOT INCLUDE ALL REQUIRED INFORMATION.

The application submitted by IP omits vital information that was necessary for NYSDEC to properly review the application. Because the application fails to satisfy the

[5] In fact, the first page of IP's draft permit lists June 20, 2006 as the "SAPA Extended Begin Date."

[6] Because IP's Title V permit had not yet expired during the public comment period, this objection arose after the public comment period and was impracticable to raise at that time. See 42 U.S.C. § 7661d(b)(2) (authorizing petitioners to raise objections not raised during the public comment period provided that the petitioner demonstrates that "it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period").

requirements of 40 CFR Part 70 and 6 NYCRR Chapter 201 for complete applications, EPA must object.

The IP application seeks a "Significant Modification" to a now-expired Title V Facility Permit. The application only addresses IP's proposal to conduct a trial burn of tire-derived fuel. Application Appendix A, Page 1. Under the applicable rules, however, an application for a significant permit modification is subject to the same requirements for new applications for a Title V facility permit. 6 NYCRR § 201-6.7(d); see also 40 CFR § 70.7(e)(4)(ii) ("significant permit modifications shall meet all requirements of this part, including those for applications, . . . , as they apply to permit issuance and permit renewal."). Therefore, the information required to be submitted in IP's application must be adequate to determine the applicability of any requirement applicable to the facility, not just the units affected by the proposed modification. 6 NYCRR § 201-6.3(d).[7] As stated in the NYSDEC Permit Review Report for the Draft Permit:

> [6 NYCRR Part 201-6] specifies the need to identify and describe all emissions units, processes and products in the permit application as well as providing the Department to include this and any other information that it deems necessary to determine the compliance status of the facility.

NYSDEC Permit Review Report, 10/12/2005, Page 20 of 28 (emphases added). The IP application did not provide adequate information to determine the compliance status of the facility nor does it identify all emissions units, processes, and products for EPA to ensure that the permit modification is consistent with the Clean Air Act. Accordingly,

[7] IP's attempt to permit a modification through a Title V permit revision cannot in any way limit the scope of review required for a significant Title V permit modification under Part 70. The federal rules do not reduce the scope of an application for a "significant modification" and, in fact, require a full permitting process as if it were for a new permit covering the entire facility. See 40 CFR § 70.7(e)(4)(ii). IP may not circumvent the requirements for complete applications under 40 CFR Part 70 in order to apply for approval of its Proposed Project through Title V permitting. Title V permits are facility-wide permits, and applications for significant permit modifications are not limited in scope.

EPA should object to the proposed permit modifications because IP failed to submit all the necessary information.

Even with respect to the units affected by the proposed modification, the IP application still fails. The application did not provide adequate information to determine whether the modification subjects IP to applicable requirements such as NSR. Consequently, NYSDEC erred when it failed to find that NSR requirements are applicable to the Proposed Project.[8]

Moreover, the application does not satisfy the requirements of CAA § 114(a)(3)(B), 40 CFR § 70.5(c)(9)(ii), and 6 NYCRR § 201-6.3(d)(10)(ii), which require a statement of the methods for determining compliance with each applicable requirement upon which IP's compliance certification is based. The application merely contains a blanket compliance certification without any discussion of how compliance was determined. This is particularly problematic in light of the unlawfully limited and narrow scope of the application. The application must contain a certification of the facility's compliance status for all applicable requirements facility-wide and must indicate the methods used by the source to determine compliance. 40 CFR § 70.5(c)(9); 57 FR 32250, 32274 (July 21, 1992). A permit for a proposed modification that does not entail review of IP's compliance status cannot assure compliance with all applicable requirements in accordance with 40 CFR § 70.1(b) and § 70.6(a). The EPA should object on this basis, as well.

In addition, IP's application does not describe all applicable requirements that apply to the facility nor does it provide a description of or reference to applicable test

[8] As set forth herein, the State of Vermont maintains that the proposed trial burn is a "modification" under Title I of the Act.

methods for determining compliance with each applicable requirement. 40 CFR § 70.5(c)(4) and 6 NYCRR § 201-6.3(d)(4). In this instance, the failure to include this information obscures the potential applicability of pre-construction NSR permitting requirements. Because of IP's deficient application, it is nearly impossible to determine with precision which new applicable requirements are triggered by the Proposed Project. The lack of information also makes it difficult to evaluate whether the proposed monitoring is adequate.

For example, the application references "worst case power boiler operating scenarios" (Page 1-1) but fails to provide any estimate of potential emissions resulting from the modification. Nor does it provide adequate emissions data to assess the applicability of NSPS regulations codified in 40 CFR Part 60, or NESHAP regulations codified in 40 CFR Part 61 and Part 63. As set forth in the attached Engineering Report, the Proposed Project will result in an emissions rate increase for PM and other regulated air contaminants. As a result of the Proposed Project, the IP boiler, emissions unit P-OwerH is subject to NSPS Subpart Db as a modified steam generating unit. 40 CFR § 60.40b. In addition, the unit is subject to 40 CFR Part 63 Subpart DDDDD. No information regarding compliance with these requirements is provided in the application.

In sum, due to the many deficiencies in IP's application, EPA should object to NYSDEC's issuance of the permit modification.

## III. EPA MUST OBJECT TO THE PROPOSED PERMIT MODIFICATIONS BECAUSE THE PROPOSED PERMIT IS DEFECTIVE AND FAILS TO ASSURE COMPLIANCE WITH ALL APPLICABLE REQUIREMENTS.

As a result of the inadequate permit application, the proposed permit does not comply with the requirements of 40 CFR Part 70.6 and 6 NYCRR § 201-6.5. These

provisions require permit conditions for all applicable emissions limitations and standards, "including those operational requirements and limitations that assure compliance with all applicable requirements at the time of permit issuance." 6 NYCRR § 201-6.5(a)(1). Without having provided adequate information to NYSDEC or the public as to its compliance status, IP's defective application has resulted in a defective proposed permit, which cannot be issued.[9] EPA should therefore object and direct NYSDEC to ensure that the permit complies with the applicable regulations stated above.

For instance, the application clearly does not list all applicable requirements or, as set forth above, satisfy the requirements for setting forth the compliance status, and methods by which compliance status was determined for each applicable requirement. These defects alone preclude a determination that the proposed permit assures compliance with all applicable requirements. In fact, the application fails to provide any information necessary to determine whether the facility is being operated in compliance or whether compliance schedules should be included in the permit.

It is not possible to ascertain and identify the full extent of applicable requirements at the facility on the basis of IP's unlawfully narrow application. It is apparent that a number of applicable requirements are not addressed in the draft permit. Such requirements include, without limitation, NSR requirements, those set forth in 40 CFR Part 60 (NSPS) Subpart Db, and those set forth in 40 CFR Part 63 (NESHAP) Subpart DDDDD.

[9] The Draft Permit was published by NYSDEC independently of and severed from the current permit, which includes conditions that will remain in the Title V Facility Permit. This format, in-and-of-itself, does not comply with 40 C.F.R. Part 70 or 6 NYCRR Subpart 201-6 and illuminates the failure of the application to address the entire facility.

As a threshold matter, the Proposed Project constitutes a Title I modification, namely a physical change or change in the method of operations that will increase emissions.[10] IP was required to calculate the size of the modification for all regulated pollutants. Neither the proposed permit nor the permit review report provide sufficient analysis as to the emissions increase(s) or impacts projected to result from the modification and the applicable requirements that result therefrom. When reviewed as required to include IP's intent to permanently undertake the change in fuels, the Proposed Project results in a significant increase in PM triggering BACT and other required elements of NSR review.

### A. The Proposed Permit Fails To Adequately Assure Compliance With NSR Requirements.

As acknowledged by IP's application, IP's Proposed Project constitutes a physical change and an operational change that is expected to result in increased emissions and the emissions of regulated pollutants not previously emitted at the facility.[11] However, the application does not adequately address the extent of emissions increases that will result from the Proposed Project.

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[10] In its Responsiveness Summary, NYSDEC incorrectly paraphrases the term "modification" to mean only "a physical change or change in the method of operation at a facility which is of a permanent nature." Summary, p. 5. There is no support in the law that a change must be "permanent" in order to qualify as a modification. In addition, NYSDEC was also incorrect when it alleged that "the proposed modified permit does not allow IP to physically modify its facility to burn TDF." Summary, p. 6. It is impossible to imagine that IP will be able to switch to TDF without making a "physical change" – as that term is interpreted under the existing caselaw. On these bases alone, EPA should object to the proposed permit.

[11] The Proposed Project does not qualify for the PSD alternative fuel exemption at 40 CFR § 52.21(b)(2)(ii)(e), since without limitation, the boiler was not designed to combust TDF. See USEPA Region 4 Objection to Proposed Operating Permit for Florida Power Corporation Crystal River Plant, at 3-6 (Nov. 1, 1999). In addition, NYSDEC erred when it stated in its Responsiveness Summary that "No change in operations is authorized by this modification." Summary, p. 22. NYSDEC rested its determination on the allegation that IP would used the "same pneumatic conveyor system that currently feeds wood to the boilier." Id. This reasoning, however, does not support their conclusion on this issue. As demonstrated, by the above regulation, the mere change to TDF—an alternate fuel— must be considered a "change in the method of operation" unless it meets one of the regulatory exemptions.

In particular, the application acknowledges that TDF contains more ash than residual oil, a clear indicator that an increase in PM emissions will result from the project. This lack of clarity is inconsistent with available data and appears to be an attempt to justify the need for the test burn. This justification for the Proposed Project is inapposite to the controlling law under the Act.

As a matter of law, IP may not avoid the requirements of NSR applicable to the Proposed Project in order to measure the emissions increase(s) resulting from the Proposed Project. Such requirements include, without limitations, the requirement to quantify the projected emissions using available data. Applicability of NSR provisions and requirements must be determined in advance of a modification for each pollutant. "In cases involving existing sources, this requires a pollutant-by-pollutant projection of the emissions increases, if any, that will result from the physical or operational change." 57 FR 32,314, 32,316 n.8 (1992). The statute and applicable regulations require the applicant to determine whether an NSR permit is required prior to the change.

IP may not undertake a modification, such as the change in fuels to TDF as part of the test burn, for the ostensible purpose of determining what applicable requirements apply to a change in fuels to TDF, and avoid the requisite NSR review prior to the test burn. As EPA has stated,

> Any other construction of the statute would turn the preconstruction permitting program on its head and would allow sources to construct (modify) without a permit while they wait to see if it would be proven that emissions would increase. Clearly Congress did not intend such an outcome, which would eviscerate the preconstruction dimension of the program.

In re: Tennessee Valley Authority, Final Order on Reconsideration, at 438. (2000) (emphasis added).[12] See also U.S. v. Louisiana Pacific Corp., 682 F. Supp. 1141, 1166 (D. Colo. 1988) (the PSD framework requires a source to determine based on available data what its emissions will be prior to a modification). Because the analysis is required to be conducted before the Proposed Project is performed, the post-activity emissions require a projection. See e.g., United States v. Ohio, 276 F. Supp. 2d at 880 ("the law . . . require[s] such pre-construction estimates and predictions"). IP has not posited in its application any projection of post change emissions.

Neither the application, the proposed permit, nor the permit review report provide the necessary emissions projections and adequate information to determine the emissions increase that will result. Further, neither the application, the proposed permit, nor the permit review report cites any regulatory authority that allows IP to engage in the change without quantifying the projected emissions that will result.

There is adequate emissions data pertaining to use of TDF in similar circumstances to sufficiently and reasonably project emissions from the project. See Application at Page 1 ("based on over 15 years of experience with more than 80 individual facilities, EPA recognizes that the use of tire-derived fuels is a viable alternative to the use of fossil fuels"). It is clear from the existing emissions data that emissions increases and emissions of regulated pollutants not previously emitted by the facility will result from the proposed change. See Attached Engineering Report.

[12] In TVA, the EPA EAB held that the actual post change emissions data could be used to confirm or refute the reasonableness of a particular prediction methodology. TVA at P. 439. IP may undertake its test-burn after completing pre-construction permitting for its fuel switch. This is consistent with the required process for permitting a modification. The source is required to make reasonable projections of post change emissions to support its preconstruction permitting. After receiving its permit and undergoing shakedown for the change, it undergoes supervised emissions testing to assure that it meets the emissions limits required in its pre-construction permit. See, e.g., 40 CFR 60.8, Performance tests.

Accordingly, the Proposed Project is a "modification" under Title I of the Act and preconstruction NSR is an applicable requirement. Proper consideration of both the project and the resulting emissions would demonstrate that the modification is a major modification for, without limitation, particulate matter and PM10. See Attached Engineering Report. Because of IP's failure to project emissions that will result from the change, neither the permitting authority, the public, nor the affected states can properly determine what applicable requirements relating to pre-construction NSR review need to be included in the permit, and thus the proposed permit is deficient.

**B. The Proposed Permit Fails To Include Applicable Requirements For The Entire Project, i.e., IP's Intent To Combust TDF As A "Permanent" Alternative Fuel.**

IP's test burn and its intent to utilize TDF as a permanent alternative fuel in the boiler are part of the same project and may not be segmented. To review the test burn as distinct and separate from IP's fuel conversion project is impermissible segmentation under applicable law and EPA policy. Additionally, implementation of the test burn requires the same or similar physical and operational changes to the boiler and facility that would otherwise be necessitated by the permanent change in fuels to TDF. *See* Attached Engineering Report. In effect, segmenting the project allows IP to implement the modification prior to receiving the requisite permit. Accordingly, the change in fuels is required to be permitted in conjunction with the test burn.

To its credit, IP states clearly and unequivocally that the test burn is the first step in its plan to permanently burn TDF. Application at P. 1. A permit with conditions that do not accurately reflect the source's planned mode of operation is "void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review"

for its planned mode of operation. USEPA Memorandum, Limiting Potential to Emit in New Source Permitting, Page 12 (June 13, 1989). EPA requires work that is part of an overall project to be aggregated when quantifying the emissions that result from the project. See Letter from Don Clay to John Boston, 2/15/89 (facility cannot carve out and seek separate treatment of integrated project). The record of the matter clearly states that the purpose of the proposed test burn is to "establish the permitting requirements for use of TDF as a permanent fuel." Application, Page 1. Nonetheless, neither the proposed permit nor the application addresses applicable requirements for the complete project.[13]

### C. The Proposed Permit Fails To Include Applicable Requirements From 40 CFR Part 60 (NSPS).

The boiler will be subject to standards under 40 CFR Part 60 because the project will result in an increase in the emission rate of a regulated pollutant or the emission of any regulated pollutant not previously emitted. Any increase in the emission rate for particulates constitutes a "modification," and will subject the unit to Subpart Db, Standards of Performance for Industrial-Commercial-Institutional Steam Generating Units. 40 CFR Part 60.2, 40 CFR 60.40b(a).

An increase in the PM emission rate would trigger Subpart Db. The proposed permit provides for periodic instantaneous PM testing. Item 5-13.2. The Proposed Project is a change in the method of operation. A measured increase in emissions rate resulting from the change will constitute a modification. If the unit is modified after

[13] Should the proposed permit be issued, IP proceeds at its own risk. Experience with the fuel and IP's application suggest that the need for a test burn is not predicated on operational uncertainty. IP's application and the attached Engineering Report indicate that there is sufficient experience and emissions data with TDF to consider the entire project now. As set forth in section III.C., below, any increase in emissions rate that results from the test burn will subject IP to the applicable NSPS and other standards as if the project is a permanent change. See USEPA Memorandum, Limiting Potential to Emit in New Source Permitting, at 12-14, (June 13, 1989) (discussing sham permitting). See also USEPA, New Source Review Workshop Manual (draft), Draft (10/90), Pages A.36-A.37.

June 19, 1984, the requirements of Subpart Db apply. 40 CFR 60.40b(a). The provision of the proposed permit requiring that the TDF fuel rate be reduced in the event that such an emission rate increase is monitored does not negate the "modification." Accordingly, the proposed permit does not include all applicable requirements under 40 CFR Part 60.

### D. The Proposed Permit Fails To Include Applicable Requirements From 40 CFR Part 63 (NESHAP).

The boiler is subject to standards under 40 CFR Part 63. Without limitation, this includes 40 CFR Part 63 Subpart DDDDD, National Emissions Standards for Hazardous Air Pollutants (NESHAP), Industrial, Commercial, and Institutional Boilers and Process Heaters.[14] Neither the application, the proposed permit, nor the permit review report addresses applicable requirements from Subpart DDDDD.

Subpart DDDDD required IP to provide an initial notification that the boiler is subject to the standard by March 12, 2005 and to be in compliance with all requirements of the NESHAP by September 13, 2005 including more restrictive particulate standards. 40 CFR 63.7545 and 63.7505(a). In addition, numerous general provisions of Part 63 apply to the unit. 40 CFR 63.7565. Because of IP's failure to submit a complete application, it is not clear whether IP complied with the notification requirements.[15] Likewise the proposed permit does not adequately include conditions to assure compliance with applicable requirements under Subpart DDDDD.

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[14] Although the boiler is a "control device" used to reduce HAP emissions from affected sources under 40 CFR 63.443, the boiler is not an affected source under the Pulp and paper NESHAP, Subpart S. Accordingly, the boiler is an affected source under Subpart DDDDD.

[15] The absence of applicable requirements from Subpart DDDDD illuminates IP's defective application and the impermissibly narrow scope of the proposed permit. These are clearly applicable requirements and they are not addressed in the current IP Title V permit. The permit was reopened by virtue of IP's application for a significant permit modification. As set forth in section II above, a significant modification mandates that the application and procedures applicable to permit issuance and renewal apply. IP did not file such an application. As a consequence, applicable requirements are not addressed in the application or included in the proposed permit.

For all of the reasons set forth above, this petition should be granted, and EPA should object to NYSDEC proposed permit, and take all appropriate action.

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**REQUEST THAT EPA DIRECT NYSDEC TO REFRAIN FROM ISSUING A TITLE V PERMIT OR TO SUSPEND THE EFFECTIVENESS OF ANY TITLE V PERMIT ISSUED PENDING RESOLUTION OF VERMONT'S PETITION OR, ALTERNATIVELY, THAT EPA TAKE ANY AND ALL APPROPRIATE ACTION TO SUSPEND THE EFFECTIVENESS OF ANY SUCH PERMIT UNTIL IT HAS ISSUED A DETERMINATION ON VERMONT'S PETITION**

As set forth above, the State of Vermont has petitioned the EPA to object to the proposed modifications to the Title V permit for IP's Ticonderoga Mill facility. The State of Vermont further requests that EPA immediately direct NYSDEC to refrain from issuing a Title V permit or to suspend the effectiveness of any Title V permit issued pending resolution of Vermont's petition or, alternatively, that EPA take any and all appropriate action to suspend the effectiveness of any such permit until it has issued a determination on Vermont's petition.

Because the challenged modification involves a two-week "test burn" of tire derived fuel and the draft permit submitted by NYSDEC does not require IP to wait any prescribed period of time before conducting the test burn, such action by EPA is necessary to ensure that IP does not complete the test burn before EPA performs its statutorily required review of Vermont's petition.

**A. <u>The State Of Vermont Has A Right Under The Clean Air Act To Have EPA Determine The Validity Of NYSDEC's Proposed Permit And To Judicial Review If EPA Denies The Petition.</u>**

The Clean Air Act provides a detailed mechanism for the review of Title V permits and permit modifications. Section 7661d(a)(1) of title 42 requires the permitting authority, in this case, NYSDEC, to transmit a copy of the permit application so that EPA

can "effectively review the application and otherwise [] carry out [its] responsibilities" under the Act. 42 U.S.C. §7661d(a)(1). In addition, recognizing the importance of neighboring states, section 7611 also requires that the permitting agency notify "all States ... whose air quality may be affected and that are contiguous to the State in which the emission originates, or ... that are within 50 miles of the source." Id. at (a)(2); see also 40 C.F.R. §70.8. EPA is permitted an initial 45-day review period to object to the permit. 42 U.S.C. § 7661d(b)(1).

If EPA does not object within 45 days, "any person may petition the Administrator" to object to the issuance of the permit. 42 U.S.C. §7661d(b)(2). The Clean Air Act commands EPA to grant or deny the petition within 60 days and further provides that EPA "shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan." Id. If EPA denies the petition, the section provides that "[a]ny denial of such petition shall be subject to judicial review under section 7607 of this title." Id. Because Vermont has petitioned EPA, it has a right to a determination by EPA and to pursue judicial review of an adverse determination.

### B. EPA Should Take Appropriate Action to Ensure That EPA Is Able To Fulfill Its Statutory Duty To Review Vermont's Petition And Provide Meaningful Relief If It Grants The Petition.

In this case, a decision by EPA on Vermont's petition (and judicial review thereafter) could be rendered moot if IP is allowed to conduct the test burn before EPA makes a determination on the petition. Such an outcome would be patently unjust, effectively depriving Vermont of its right to a final decision by EPA and judicial review

of any denial of Vermont's petition. Thus, under the circumstances presented, the statutorily mandated EPA review cannot be conducted without EPA taking appropriate action to ensure that its review is not effectively mooted.

As a general matter, if a permit has already been issued by the permitting agency, the filing of a petition to object with EPA, by itself, does "not postpone the effectiveness of the permit." 42 U.S.C. §7661d(b)(2). However, nothing in section 7661d or elsewhere in the Clean Air Act precludes EPA from postponing the effectiveness of a permit, based on the particular circumstances presented, when a petition to object has been filed. EPA has broad powers to effectuate its mission and obligations under the Clean Air Act that encompasses the relief being sought by Vermont. See generally 42 U.S.C. §§ 7413, 7477, 7603, 7604, 7651m. In addition, such authority to grant the relief requested is necessarily implied in the general power of agencies to ensure that they are able to complete their statutory duties. See also 5 U.S.C. §705 ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.").

Here, the Clean Air Act creates a complex relationship between EPA and state permitting agencies that provides for EPA review of state permitting decisions and the authority to change or nullify those decisions:

> Upon receipt of an objection by the Administrator under this subsection, the permitting authority may not issue the permit unless it is revised and issued in accordance with subsection (c) of this section. If the permitting authority has issued a permit prior to receipt of an objection by the Administrator under paragraph (2) of this subsection, the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with subsection (c) of this section.

42 U.S.C. § 7661d(b)(3).

Necessarily implied in EPA's authority to change – and even nullify – a state permitting decision under the Clean Air Act is the authority to preserve the status quo while it acts on a petition requesting that EPA object. That is particularly applicable here, where the proposed modification consists of a two-week test burn that, under the terms of the draft permit, might occur during EPA's consideration of Vermont's petition.

### C. A Balancing Of Factors Demonstrates That EPA Should Grant The State's Requested Relief.

Utilizing the analysis that is applied to requests for stays and injunctions, the temporary relief sought by Vermont is appropriate. Four factors are typically applied. See, e.g., Mohammed v. Reno, 309 F.3d 95, 100 (2d. 2002) ("[f]our criteria are relevant in considering whether to issue a stay of an order of a district court or an administrative agency pending appeal: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest"); see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

In applying these factors, it is important to note that "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors" and that the "probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply stated, more of one excuses less of the other." Mohammed v. Reno, 309 F.3d at 101 (internal cites omitted).

Here, the irreparable harm that will result if IP is allowed to proceed with the test burn without waiting for EPA's final decision on this petition should be dispositive on whether relief should be granted. If IP is able to engage in the test burn before EPA reaches a decision, it would undermine the statutory procedure enacted by Congress.

Upon the filing of this petition, the State of Vermont's petition must be reviewed and EPA must be able to provide meaningful relief if it determines that the petition should be granted. The only way to guarantee this is to restrict the ability of IP to proceed with this project, which by the terms of the draft permit is of a limited duration.

Under similar circumstances, the Second Circuit recognized the need for meaningful review in a Clean Air Act case. In Connecticut v. EPA, 656 F.2d 902, 905 (2d. Cir. 1981), the court found that preventing timely review would be "grossly inappropriate" where authorization had been issued for a "test burn" and two states had petitions pending with EPA that requested relief from the test burn. The court noted that "the petitioning states are immediately concerned with the deleterious effects which the 'test burn' may have" and that deferring review "would thus effectively moot this entire dispute." Id. The same principles hold true in this case. Unless EPA issues relief as requested above, IP's proposed project could effectively evade review by EPA. Such a result would run counter to the statutory requirement that EPA determine the validity of the proposed project under section 7661d of the Act and Vermont's right to obtain relief through the petition process.

As to the likelihood of success on the merits, the objections set forth in this petition and in the comments to NYSDEC present significant questions of federal law that EPA is now statutorily required to address. Even though EPA did not use its initial right to object on its own, EPA must now review Vermont's petition and issue an explicit determination. 42 U.S.C. § 7661d(b)(2) ("The Administrator shall grant or deny such petition within 60 days after the petition is filed"). As set forth below, the State has identified numerous deficiencies in NYSDEC's proposed permit – any of which will

require EPA to object. Especially in light of the irreparable harm presented above, Vermont has presented sufficient likelihood of success on the merits.

Another major factor that militates in favor of granting the relief requested by Vermont is the potential harm to the "public interest" if IP is allowed to proceed with the project before a decision is rendered on Vermont's petition. As NYSDEC has recognized, there is a "significant degree of public interest in the IP facility." NYSDEC Responsiveness Summary, International Paper Ticonderoga Mill Proposed Tire Derived Fuel Test, DEC #5-1548-00008/00081 (July 2006), p. 3. During the comment period for this proposed action, for example, NYSDEC received more than 1280 comments on the proposed burn, including extensive comments from the State of Vermont, People for Less Pollution, and the Natural Defense Resources Defense Council. Id. The State of Vermont (and many commenters) have raised serious questions regarding safety of the test-burn. Moreover, the public interest is generally served by a meaningful petition process; conversely, it would not be served by allowing an applicant to complete the project before an EPA determination regarding the lawfulness of the proposed permit.

By contrast, IP will not suffer any significant harm from the relief requested. Suspending the issuance of a permit or the effectiveness of any issued permit for the limited period of time needed to obtain a determination by EPA on Vermont's petition – a period of 60 days – does not amount to substantial injury.

For all the reasons set forth above, EPA should grant the requested relief.

Respectfully Submitted,

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