



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETTITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

February 20, 2019

By First Class Mail

Ruth Leistensnider, Esq.
Nixon Peabody, LLP
677 Broadway, 10th Floor
Albany, New York 12207

Re: *CPV Valley, LLC v. New York State Department of Environmental
Conservation*
Albany County Supreme Court, Index No. 5146-18

Dear Ms. Leistensnider:

Enclosed for service upon you is the Decision, Order and Judgment signed by the Hon. Judith A. Hard, A.J.S.C., dated February 13, 2019, with Notice of Entry in the above-referenced matter.

Sincerely,

A handwritten signature in blue ink that reads "Itasha V. Hilton".

Itasha V. Hilton
Legal Assistant 2
(518) 776-2404

NEW YORK SUPREME COURT
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of
CPV VALLEY, LLC,

Petitioner,

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

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Respondent.

NOTICE OF ENTRY

Index No. 5146-18
RJI No. 01-18-ST9773

Hon. Judith A. Hard, A.J.S.C.

PLEASE TAKE NOTICE that a Decision, Order and Judgment, a true copy of which is attached, was signed on February 13, 2019 by the Honorable Judith A. Hard, A.J.S.C. and filed and entered in the office of the Clerk of Albany County on February 20, 2019.

Dated: February 20, 2019
Albany, New York

LETITIA JAMES
Attorney General of the State of New York
Attorney for Respondent

By: 

Lisa M. Burianek
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TO: Nixon Peabody, LLP
ATTN: Ruth Leistensnider, Esq.
677 Broadway, 10th Floor
Albany, New York 12207

PRESENT: HON. JUDITH A. HARD
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

CPV VALLEY, LLC,

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For a Judgment Pursuant to Article 78
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**DECISION, ORDER AND
JUDGMENT**

Index No.: 5146-18

RJI No.: 01-18-ST9773

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondent.

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: Ruth E. Leistensnider, Esq.
Daniel J. Hurteau, Esq.
Andrew C. Rose, Esq.
Nixon Peabody LLP
677 Broadway, 10th Floor
Albany, New York 12207
Attorneys for Petitioner

Hon. Letitia James
Attorney General
(Lisa M. Burianek, Esq., Assistant Attorney General)
The Capitol
Albany, New York 12224-0341
Attorney for Respondent

HON. JUDITH A. HARD, Acting Justice:

Petitioner CPV Valley, LLC ("CPV Valley") brings the instant hybrid action for a judgment: (1) annulling, nullifying, and/or vacating the August 1, 2018 determination of

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respondent, the New York State Department of Environmental Conservation (DEC) pursuant to CPLR 7806, which found that CPV Valley's Amended Final Air State Facility (ASF) Permit expired on July 31, 2018; (2) declaring that CPV Valley's Amended Final ASF Permit did not expire on July 31, 2018 pursuant to CPLR 3001, and is still in force and effect pending final resolution of CPV Valley's ASF Renewal Application; (3) declaring that CPV Valley may legally continue to operate CPV Valley Energy Center (hereinafter "the Facility") pending final resolution of CPV Valley's ASF Renewal Application pursuant to CPLR 3001; and (4) granting an immediate temporary restraining order pursuant to CPLR 6301 et seq., and a stay of enforcement pursuant to CPLR 7805 that prevents the DEC from: (i) enforcing its August 1, 2018 determination that CPV Valley's Amended Final ASF Permit expired on July 31, 2018; and (ii) imposing any fines, penalties, levies, assessments, criminal charges, or the like against CPV Valley for the operation of the Facility after July 31, 2018.

By Order dated August 15, 2018, the Honorable Roger D. McDonough, A.J.S.C., ordered that the DEC was enjoined, restrained and prohibited from (1) enforcing its August 1, 2018 determination that CPV Valley's Amended Final ASF Permit expired on July 31, 2018; and (2) imposing an fines, penalties, levies, assessments, criminal charges, or the like against CPV Valley for the operation of the Facility after July 31, 2018 until a determination of the instant petition.

FACTS

CPV Valley owns and constructed the Facility, a 630 megawatt natural gas-fired combined cycle generating station located in Wawayanda, New York. The Facility, which is interconnected to the bulk transmission system owned by the New York Independent System Operator (NYISO), will supply low-cost, clean electricity to customers in New York State's

lower Hudson Valley. It is located in the NYISO's new Lower Hudson Valley Capacity Zone, which was established to encourage construction of new power generation facilities in order to alleviate transmission congestion and address reliability concerns in the lower Hudson Valley region.

CPV Valley began development of the Facility in 2008 and physical construction in August 2015 after obtaining a \$630 million dollar construction loan to finance construction of the Facility. The loan terms required that the Facility achieve full commercial operation by September 14, 2018, or CPV Valley would be in default under the terms of the loan.

Construction of the Facility required numerous approvals from various agencies including the Town of Wawayanda, the United States Army Corps of Engineers, the United States Environmental Protection Agency (EPA), and the DEC. Prior to construction, CPV Valley was required to obtain an ASF permit from the DEC and a Prevention of Significant Deterioration (PSD) permit from the EPA. In December 2008, CPV Valley submitted an ASF application to the DEC and a PSD application to the EPA. On or about July 9, 2012, the DEC issued a Notice of Complete Application and a Draft ASF Permit to CPV Valley and commenced a public comment period on CPV Valley's ASF permit application. The regulations in effect on July 9, 2012 required an ASF permit applicant to submit a Title V Clean Air Act (Title V) permit within one year after a facility commences its operations (then 6 NYCRR § 201-6.3 [a] [2]). This requirement was stated within the Draft ASF Permit issued by the DEC to CPV Valley.

On or about August 1, 2012, the DEC initiated a rulemaking proceeding to amend its regulations applicable to Title V permitting. The proposed amended regulations required that a Title V application be submitted prior to the construction of new facilities (6 NYCRR § 201-6.2 [a] [1]) instead of within one year after commencement of the facility's operations (then 6

NYCRR § 201-6.3 [a] [2]). The new regulations became effective on February 22, 2013. Neither the notice of the regulations in the State Register nor the regulations themselves explained how the amendments to the regulations would be applied to existing permits or permits for which notices of complete applications had already been issued.

On or about May 15, 2013, the DEC issued a second Notice of Complete Application to CPV Valley for the Facility approving modifications to the Draft ASF Permit. On or about August 1, 2013, the DEC issued a final combined ASF/PSD permit (the Final ASF Permit) which contained the same language from the old regulations (then 6 NYCRR § 201-6.3 [a] [2]) which stated that a Title V application must be submitted within one year of the commencement of operations of the facility.¹ Under the PSD program, CPV Valley was to commence construction of the Facility no later than 18 months after the issuance of the Final ASF Permit on August 1, 2013 which would have been January 2015. Due to some delays, CPV Valley requested an extension of the construction deadline. In August 2014, the DEC granted the request for an extension of time to begin construction. Both the Final ASF Permit and the August 2014 letter referred to the outdated regulations, which stated that a Title V permit application must be submitted within one year of the commencement of operations of the facility. The Final ASF Permit was amended in November 2014 to reflect a ministerial correction of the permittee's name. Commencement of the construction of the Facility began in August 2015. CPV Valley maintains that the DEC was on its premises multiple times prior to construction and never informed petitioner that a Title V permit was necessary before construction.

¹ In 2013, the DEC became authorized to issue PSD permits. Accordingly, when the DEC issued the Final ASF Permit on August 1, 2013, it was a combined ASF/PSD permit.

Petitioner was required to file an application for the renewal of the Amended Final ASF Permit at least 180 days prior to the expiration of the permit on July 31, 2018. CPV Valley submitted the renewal application on January 23, 2018 and it was received by the DEC on January 24, 2018. Under the DEC's regulations, the DEC was required to notify petitioner if the application was incomplete or otherwise insufficient within 60 days of the receipt of the renewal application, which was March 26, 2018 (6 NYCRR §§ 621.6 [c], [d]). The DEC did not send CPV Valley any correspondence to indicate that the renewal application was incomplete or otherwise insufficient.

On Friday, July 27, 2018, CPV Valley met with the DEC's Region 3 Air Pollution Control Engineer to discuss technical issues. Allegedly, the engineer told CPV Valley that the renewal application was "fine" and requested that the Title V permit be submitted as soon as possible (Verified Petition ¶ 42). On August 1, 2018, CPV Valley was notified that the Amended Final ASF Permit would not be renewed because the renewal application failed to meet all the requirements of Title 6 of the NYCRR. Therefore, CPV Valley could not operate the Facility or else risk the imposition of monetary penalties. On August 2, 2018, CPV Valley requested an adjudicatory hearing pursuant to 6 NYCRR § 621.10 (a) (2) regarding the DEC's denial of the permit renewal application (Leistensnider Aff., Exh. A).

The DEC argues that its denial of the CPV's application to renew its Amended Final ASF Permit complied with applicable law and was a rational decision; and that the renewal application was legally insufficient because it did not comply with the Title V requirement, therefore it did not qualify for an extension of authorization to operate under State Administrative Procedure Act (SAPA) § 401 (2) and 6 NYCRR § 621.11. The DEC further maintains that petitioner mistakenly relied on the DEC's Uniform Permit Administration, which

provides that the application is deemed complete due to the agency's failure to respond to its completeness or incompleteness under the regulation. Finally, the DEC argues that CPV Valley has failed to exhaust its administrative remedies because the DEC's administrative hearing review process is pending.

In its reply brief, CPV Valley clarified that it is not seeking judicial review of the DEC's denial of its renewal application, rather CPV Valley seeks judicial review of the DEC's decision that the Amended Final ASF Permit expired on July 31, 2018. CPV Valley asserts that the DEC's determination, that SAPA § 401 (2) does not apply to extend the permit pending its administrative appeal of the DEC's denial of the renewal application, is irrational.

LAW AND DISCUSSION

This case presents novel issues regarding the DEC's denial of the renewal of a permit issued under superseded regulations, and whether the automatic permit extension pending a final administrative determination under SAPA § 401 (2) was triggered, when the DEC failed to advise CPV Valley that its failure to obtain a Title V permit before commencing the Facility's operations rendered the renewal application insufficient. According to the DEC, CPV Valley is the only major stationary source in the State with this issue. For the following reasons, the Court agrees with CPV Valley that the exhaustion of administrative remedies doctrine does not apply to the DEC's determination that the Amended Final ASF Permit expired on July 31, 2018.

CPV Valley argues that it is not required to exhaust administrative remedies because it is not asking the Court to decide the merits of the DEC's denial of the ASF renewal application. Rather, CPV Valley asks the Court to render a determination on whether SAPA § 401 (2) extends the terms of the Amended Final ASF Permit while CPV Valley pursues the denial of the ASF renewal application through administrative remedies. The Court agrees with CPV Valley

insofar as finding that the exhaustion of administrative remedies doctrine does not apply to the expiration of the permit on July 31, 2018.

“It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d 52, 57 [1978] [citation omitted]; see Town of Oyster Bay v Kirkland, 19 NY3d 1035, 1038 [2012], cert denied 568 US 1213 [2013]). “The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power, or when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury” (Watergate II Apts. v Buffalo Sewer Auth., 46 NY2d at 57 [citation omitted]). Here, CPV Valley is pursuing administrative remedies for the DEC’s denial of its renewal application, a matter wholly separate from the issue before the Court. The question of whether section 401 (2) of SAPA effectively extends the terms of the Amended Final ASF Permit is not before the Administrative Law Judge in the pending appeal taking place at the agency level. The parties’ arguments in the present matter concern only the application of SAPA to the terms of the Amended Final ASF Permit for the time period between the DEC’s initial denial of CPV Valley’s renewal application and the final administrative appeal determination that is yet to be rendered by the DEC. As CPV Valley has no recourse to obtain a determination on the applicability of SAPA § 401 (2) during this time period other than the instant action, the Court finds that it would be futile for CPV Valley to pursue administrative remedies.²

² Counsel for both parties confirmed, during a telephone conference with the Court on February 7, 2019, that the issue of the applicability of SAPA § 401 (2) is not presently before the DEC in CPV Valley’s pending administrative appeal at the agency level.

Turning to the merits of CPV Valley's petition, the Court finds that the DEC's decision finding that CPV Valley's Amended Final ASF permit expired on July 31, 2018 was irrational.

CPV Valley first applied for and obtained a preconstruction permit under then 6 NYCRR 201-6.1 (b), which explicitly stated that the permit "authorize[s] both construction and operation in accordance with all applicable State and Federal requirements." CPV Valley's Amended Final ASF Permit expired on July 31, 2018. Under the applicable regulations, CPV Valley was required to apply for an extension of the Amended Final ASF Permit at least 180 days prior to the expiration of the permit. CPV Valley complied with the 180-day requirement by submitting a renewal application on January 23, 2018. Under 6 NYCRR 621.11 (f), "[t]he department must notify the applicant by mail of its decision on renewals . . . of permit requests on or before 15 calendar days after receipt of the application . . ." The regulation at the crux of this matter states that "[t]he department's failure to find a timely renewal application insufficient within 15 calendar days of the department's receipt of the application for renewal or 60 days for delegated permits, will result in the application being deemed sufficient under the State Administrative Procedure Act, Chapter 82 of the NYS Consolidated Laws" (6 NYCRR 621.11 [f] [1]).

Here, it is undisputed that the DEC did not notify CPV Valley that its application was insufficient. CPV Valley argues that such failure to notify them triggered SAPA § 401 (2), thereby allowing CPV Valley to continue operating the Facility under the existing Amended Final ASF Permit. SAPA § 401 (2) states that "[w]hen 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 . . ." The determination of whether a renewal application is "sufficient" within the meaning of SAPA § 401 (2) falls "within the area of the DEC's expertise" (Matter of

Jamaica Recycling, Inc. v New York State Dept. of Env'tl. Conservation, 308 AD2d at 540; see also Matter of Benali, LLC v New York State Dept. of Env'tl. Conservation, 150 AD3d 986, 989 [2d Dept. 2017], lv denied 30 NY3d 911 [2018]). While the DEC could have deemed CPV Valley's renewal application insufficient, it failed to do so in this matter. Therefore, such failure to exercise its authority to do so within the required 60 days, rendered the renewal application "sufficient" for purposes of SAPA "by operation of law" (Matter of Jamaica Recycling, Inc. v New York State Dept. of Env'tl. Conservation, 308 AD2d at 539). Accordingly, SAPA § 401 (2) applies to the Amended Final ASF Permit and the Court finds that the permit thereby remains in effect until CPV Valley's renewal application is finally determined by the DEC pursuant to the administrative appeal process initiated by CPV Valley.

The Court must finally address CPV Valley's request for injunctive relief. "To establish entitlement to a preliminary injunction, [the petitioner is] required to demonstrate a likelihood of success on the merits, irreparable harm in the absence of an injunction and that the balance of the equities is in their favor" (Norton v Dubrey, 116 AD3d 1215, 1215 [3d Dept. 2014] [citations omitted]). The Court has already found that SAPA § 401 (2) applies to extend the terms of the Amended Final ASF Permit until the renewal application is finally determined. By fashioning the instant proceeding as one for a declaratory judgment pursuant to CPLR 3001 and for injunctive relief pursuant to CPLR Article 78, CPV Valley has in effect asked the Court to consider the merits of its argument regarding the application of SAPA § 401 (2), and to order injunctive relief while the Court considers the merits of its argument regarding the application of SAPA § 401 (2) (Petitioner's Reply Mem. of Law, pp. 13-14). Because the Court has granted the requested relief by annulling the DEC's determination regarding the applicability of SAPA § 401 (2), an injunction providing identical relief is unnecessary here. CPV Valley may seek review pursuant

to CPLR Article 78 in the event that the DEC takes action to cease operations at the Facility or impose penalties after the administrative appeals process is complete (see Town of East Hampton v Cuomo, 172 AD2d 657, 657 [2d Dept. 1991]). The Court expects that the DEC's review of its decision to deny CPV Valley's renewal application will be a fair review of applicable regulatory precedent. A full vetting of the DEC's position will be helpful to the parties, and to the Court should this matter proceed beyond the final agency determination.

NOW, THEREFORE, it is hereby

ORDERED AND ADJUDGED that the DEC's August 1, 2018 Permit Expiration Determination is hereby vacated; and it is further

ORDERED, ADJUDGED AND DECLARED that CPV Valley's Amended Final ASF Permit did not expire on July 31, 2018, and is still in force and effect pending final administrative resolution of CPV Valley's ASF Renewal Application; and it is further

ORDERED, ADJUDGED AND DECLARED that CPV Valley may legally continue to operate the Facility pending final administrative resolution of CPV Valley's ASF Renewal Application; and it is further

ORDERED AND ADJUDGED that CPV Valley's request for injunctive relief is **DENIED**.

The foregoing constitutes the Decision, Order, and Judgment of the Court. The original Decision, Order, and Judgment is being returned to counsel for respondent. A copy of the Decision, Order, and Judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this Decision, Order, and Judgment, and delivery of a copy thereof shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry, and notice of entry.

Dated: Albany, New York
February 13, 2019



Hon. Judith A. Hard, A.J.S.C.

Papers Considered:

1. Verified Petition/Complaint, verified by Ruth E. Leistensnider, Esq. on August 14, 2018, with Exhibits A through C annexed thereto; and Petitioner-Plaintiff's Memorandum of Law in Support of Order to Show Cause for a Temporary Restraining Order and Stay of Enforcement, dated August 14, 2018.
2. Affidavit of Ruth E. Leistensnider, Esq., sworn to on August 14, 2018, with Exhibits A through I annexed thereto.
3. Affidavit of Christopher J. Allgeier, sworn to on August 10, 2018, with Exhibits A and B annexed thereto.
4. Affidavit of Daniel R. Nugent, sworn to on August 11, 2018.
5. Affidavit of Sherman Knight, sworn to on August 10, 2018.
6. Affidavit of Jonathan Moore, sworn to on August 10, 2018, with Exhibits A through C annexed thereto.
7. Verified Answer and Certified Return, verified by Khai H. Gibbs, Esq. on September 12, 2018; and Memorandum of Law in Opposition to the Petition/Complaint, dated September 14, 2018.
8. Affirmation of Khai H. Gibbs, Esq, affirmed on September 13, 2018.
9. Reply Affidavit of Ruth E Leistensnider, Esq., sworn to on October 5, 2018, with Exhibits A through F annexed thereto; and Petitioner-Plaintiff's Reply Memorandum of Law in Further Support of Order to Show Cause for a Temporary Restraining Order and Stay of Enforcement, dated October 5, 2018.