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Court Administrator

STATE OF MINNESOTA
COUNTY OF RAMSEY

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By  Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Civil

In re Government Shutdown

Court File N. 62-CV-11-5203

In re Temporary Funding of Core Functions of
the Executive Branch of the State of Minnesota

PETITION OF GEORGIA-PACIFIC WOOD PRODUCTS LLC FOR AN ORDER LIFTING
THE SUSPENSION OF WATER APPROPRIATION PERMIT NUMBER 1987-2047 ISSUED
BY THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

To: Special Master Kathleen Blatz and Chief Judge Kathleen Gearin:

Pursuant to the Order dated June 29, 2011 by Chief Judge Kathleen Gearin in the above captioned matter, Georgia-Pacific Wood Products LLC (“Georgia-Pacific”) petitions the Court for an Order lifting the purported suspension of Water Appropriation Permit Number 1987-2047 (“Permit”) issued by the Minnesota Department of Natural Resources (“DNR”).

FACTS

Georgia-Pacific is a leading manufacturer and supplier of building products to lumber and building materials dealers and large do-it-yourself warehouse retailers. Affidavit of Robert J. Hendrickson dated July 11, 2011 (Aff. of R. Hendrickson) at ¶ 2. The company operates a manufacturing facility located at 1220 West Railroad Street in Duluth, Minnesota (“Facility”) where it employs approximately 150 persons. *Id.* at ¶ 3.

Georgia-Pacific received the Permit from the DNR on December 15, 2008. *Id.* at ¶ 4. The Permit allows Georgia-Pacific to appropriate up to 2,500 gallons of water per minute from

Superior Bay on Lake Superior and use it in non-contact cooling in the manufacture of composite wood fiber panels (wet-process hardboard). *Id.* at ¶ 5 and Ex. 2. The same water is then discharged back into Superior Bay via Duluth Harbor Basin as authorized under NPDES/SDS Permit No. MN 0046043 such that the difference between water removed and the water returned to the Bay is negligible. *Id.* at ¶ 6.

In a letter dated June 30 (“Notification Letter”) and received by Georgia-Pacific on or about July 6, the DNR notified Georgia-Pacific that “in the event of a state government office shutdown, *and pending any other direction from the Court*” all permits authorizing the withdrawal of surface water, including the Permit issued to Georgia-Pacific, would be temporarily suspended from July 1, 2011 until State offices re-open for business. *Id.* at ¶ 7 and Ex. 2 (emphasis added). According to the Notification Letter, the suspension is authorized because no DNR staff are available “to monitor stream gages or determine whether water use must be suspended to protect natural resources and high priority water users.” *Id.* at Ex. 2.

ARGUMENT

Georgia-Pacific petitions the Court to invalidate the purported suspension of its Permit because (i) the suspension is not consistent with Minnesota Statutes or Rules; (ii) the purported suspension violates the terms and conditions established by the Commissioner of the DNR (“Commissioner”) through the permit process; (iii) continued operation under the terms of the Permit requires no State funds or any State activity; (iv) suspension of the Permit by the DNR is arbitrary and inconsistent with actions taken by itself and other State Agencies; and (v) continued suspension of the Permit will have a permanent and negative financial impact on a business of this State, its employees and the citizens of the State.

Venue is proper before this Court in accordance with the July 5, 2011 decision of the Minnesota Supreme Court, assigning all cases relating to the government shutdown to a single judge, regardless of whether the dispute involved appropriation of State funds. As noted in the Court's July 5 order, "an action to enforce contractual rights against the Commissioner [of the Department of Natural Resources] is properly venued in Ramsey County District Court under Minn. Stat. § 542.03, subd. 1 (2010), and *Ebenezer Society v. Minnesota State Bd. of Health*, 301 Minn. 188, 197, 229 N.W. 2d 385, 390 (1974)." See *In Re Government Shutdown*, Order A-11-1170, July 5, 2011.

I. Suspension of the Permit Due to State Government Shutdown is not Allowed by Statute or Rule.

Administrative agencies are creatures of statute and they have only those powers given to them by the legislature. *Great N. Ry. Co. v. Pub. Serv. Comm'n*, 284 Minn. 217, 220, 169 N.W.2d 732, 735 (1969); see also *In re Qwest's Wholesale Serv. Quality Standards*, 702 N.W.2d 246, 259 (Minn. 2005) (noting that "[n]either an agency nor the courts may 'enlarge the agency's powers beyond that which was contemplated by the legislative body.'" (quoting *Peoples Natural Gas Co. v. Minn. Pub. Utils. Comm'n*, 369 N.W.2d 530, 534 (Minn. 1985))). Whether an administrative agency has acted within its statutory authority is a question of law that the Court reviews de novo. *Qwest*, 702 N.W.2d at 259. In the present case, no provision of statute or rule authorizes the DNR to suspend the Permit in the event of a state government shutdown and therefore, the agency lacks the authority to suspend the Permit as purported in the Notification Letter.

The Minnesota Legislature authorizes the Commissioner to issue water appropriation permits. See generally Minn. Stat. Ch. 103G. The Commissioner also has statutory authority to promulgate rules related to the permitting process. *Id.* Minnesota Rules allow the Commissioner,

in certain circumstances, to amend and cancel but not suspend permits that have been issued pursuant to Chapter 103G. Importantly, the Commissioner's authority to modify or cancel permits arises when modification or cancellation is necessary to protect the safety and welfare of the people of the State of Minnesota. *See* Minn. R. 6115.0750, subp. 5 (allowing for amendments to permits based on certain criteria) and Minn. R. 6115.0750, subp. 7 (allowing for cancellation of permits when reasonably necessary to protect the welfare of the people of the State) (emphasis added). Importantly, in instances where the Commissioner is authorized to modify or cancel an issued permit, procedural safeguards are in place to protect the permit holder. These safeguards include notice to the permit holder, an opportunity for response, and, in many cases, a public hearing. *See* Minn. R. 6115.0750, subp. 5 (requiring the Commissioner to provide notice to the permit holder with 30-days for a response and noting that no amendments shall be made without a public hearing); *see also* Minn. R. 6115.0750 subp. 7.

In this case, the DNR has not proposed to amend or cancel the Permit as allowed by statute. Instead, the Notification Letter indicates that the Permit is being "temporarily suspended," an action that is not authorized by statute or rule. Further, any attempt by the Commissioner to cancel the Permit pursuant to the applicable statutes and rules would require the DNR to find that continued operation under the Permit conditions was potentially harmful to the public safety or welfare of the residents of Minnesota. *See* Minn. R. 6115.0750, subp. 7. Finally, any attempt to modify or cancel the Permit would require the DNR to provide Georgia-Pacific with notice, an opportunity to respond and, in all likelihood, a public hearing. None of these procedural safeguards have been satisfied and therefore, the agency has exceeded its authority by attempting to suspend the Permit during the government shutdown.

By purporting to “suspend” rather than amend or cancel the Permit, the DNR is attempting to avoid the procedural safeguards guaranteed by statute. In reality, the purported suspension of the Permit is, in effect, a cancellation of the Permit as the “suspension” has no foreseeable end date.

II. The Purported Suspension Violates the Terms of the Permit.

Under the terms of the Permit, the Commissioner may “restrict, suspend, amend or cancel” the Permit “in accordance with applicable laws and rules for any cause for the protection of the public interests, or for the violation of the provisions of [the Permit].” *See* Aff. of R. Hendrickson, Ex. 2. The Notification fails to meet the requirements of the Permit because (i) it was not issued by the Commissioner; (ii) it was not issued in accordance with the applicable laws and rules; (iii) there is no risk to the public interest if Georgia-Pacific continues to operate under the conditions of the Permit; and (iv) there has been no allegation that Georgia-Pacific has violated the terms of the Permit. Because the Notification Letter does not comply with the requirements of the Permit itself, this Court should find that the Notification Letter and the purported suspension are invalid.

Importantly, the Notification Letter was signed by Steve Horsch, Director, Division of Ecological and Water Resources of the DNR. According to the Permit (Paragraph 4(c)), the Commissioner is the DNR employee vested with authority to suspend the Permit. *See* Aff. of R. Hendrickson, Exh. 2. No evidence has been provided that the suspension was ordered or authorized by the Commissioner and by the Permit’s own terms, only the Commissioner may suspend the Permit.

In addition, the Permit indicates that the Commissioner may suspend the Permit “in accordance with applicable laws and rules...for the protection of public interests, or for violation

of the provisions of the [Permit].” As outlined above, no statute or rule allows for the suspension of the Permit due to a government shutdown. Even if the Court were to find that lack of monitoring by DNR employees justified the modification of the Permit, applicable statutes and rules would require the DNR to follow certain procedures to protect the due process rights of permit holders such as Georgia-Pacific.

Significantly, the Notification Letter did not provide any evidence that continued operation under the terms of the Permit would be detrimental to the public welfare. Instead, the DNR alleges that the inability of staff to “monitor stream gages” necessitates a blanket suspension of lower priority water appropriation permits. In the case of Georgia-Pacific, no stream gage monitoring is conducted as all water is appropriated from Lake Superior. Further, the water appropriated from Lake Superior under the Permit after use for cooling is discharged directly back in the Lake pursuant to an NPDES permit such that the difference between the volume of water removed and returned is negligible. Finally, Georgia-Pacific has complied with all of the terms and conditions of the Permit.

Because the Notification Letter does not comply with the requirements of the Permit as established by the DNR, this Court should find that the Notification Letter is invalid and that Georgia-Pacific’s continued operation under the Permit is allowed.

III. Operation Under the Permit Does Not Require Any State Funds or Any State Action.

Allowing Georgia-Pacific to operate pursuant to the Permit does not require any State monies, resources or actions. As noted above, no stream gage monitoring by DNR employees is required. No DNR employee has ever monitored the Facility’s water appropriation on-site. *See* Aff. of R. Hendrickson at *Id.* ¶ 10. No report to the DNR is due until February 15, 2012. Georgia-Pacific only requires direction from the Court to allow it to continue operating under the

validly issued Permit. There is no action required by the DNR until the Facility's next annual report will be filed on February 15, 2012.

IV. Suspension of the Permit by the DNR is Arbitrary and Inconsistent with Actions Taken by Other State Agencies.

The DNR has not suspended all water appropriation permits but only some such permits. Water appropriation permits for domestic water supply and utility power production are not impacted by the permit suspension order. In addition, we believe some lower priority water users in the same classification as Georgia-Pacific did not receive the suspension letter. The DNR has provided no rational basis for allowing some, but not all, DNR permits to continue in effect. Other permits issued by the DNR were not suspended. For example, DNR permits to mine; DNR groundwater use permits, including permits for mine dewatering; and DNR general permits not requiring agency notification, were not suspended.

In contrast to the positions taken by the DNR in regard to water appropriation permits, the Minnesota Pollution Control Agency ("MPCA") has continued all valid permits in full force and effect. As stated on the MPCA website:

Licenses that are not expired will still be valid through any potential disruption in service from the State.

See <http://www.pca.state.mn.us/> (last visited July 12, 2011). There is no rational basis for allowing MPCA permits and licenses to remain valid during the State shutdown but to not allow certain DNR permits to remain valid. Nor is there any rational basis for allowing some DNR permits to remain in effect but not all.

V. Suspension of the Permit will have a severe and permanent financial impact on Georgia-Pacific

Using water from Lake Superior is an integral part of maintaining safe and appropriate temperatures in the manufacturing process. Aff. of R. Hendrickson at ¶ 8. Because of the

suspension of the Permit by the DNR, the Facility has been forced to cease operations as of Noon on July 13, 2011. *Id.* at ¶ 12. As a result, Georgia-Pacific and its one hundred and fifty or so employees in Duluth are suffering severe and permanent negative financial damages. *Id.* at ¶ 15.

Most at risk are the sales of Superwood® hardboard supplied by Georgia-Pacific to the rebounding, but still fragile automotive industry. These account for roughly 40% of the Facility's sales. *Id.* at ¶ 13. Plastics and other non-wood based manufacturers are continually looking for openings to substitute their products for Superwood. A supply disruption providing that opening places the Facility at significant risk in losing the business, and without such revenues, the ability to maintain jobs in the community. *Id.* at ¶ 15.

In the Court's Order of June 29, 2011, the Court identified as a priority, its desire to protect and preserve activities which, if suspended, will have a "severe and permanent financial impact to business or vulnerable populations or groups of individuals throughout Minnesota." *See* Findings of Fact 28, referencing Exhibit A ("Recommended Statewide Objectives, 2001 [sic] Potential Minnesota Government Shutdown and Recommended Priority 1 and Priority 2 Critical Services"). The Facility's group of employees is precisely the type of vulnerable population for whom relief is contemplated.

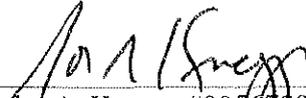
CONCLUSION

Georgia-Pacific respectfully requests that the Court to invalidate the purported suspension of its Permit and allow Georgia-Pacific to operate under the terms and conditions of its Permit because (i) the suspension is not consistent with Minnesota Statutes or Rules; (ii) the purported suspension violates the terms and conditions of the Permit itself; (iii) continued operation under the terms of the Permit requires no State or activity funds; (iv) suspension of the Permit by the DNR is arbitrary and inconsistent with actions taken by other State Agencies; and

(v) continued suspension of the Permit will have a permanent and negative financial impact on a business of this State.

Dated: July 14, 2011

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