Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET#: **PLCV2009-00752-A**

RE: Earthsource Inc et al v Burt, Commissioner et al

TO: Thaddeus A. Heuer, Esquire
Foley Hoag LLP
Seaport World Trade Center West
155 Seaport Bvld
Boston, MA 02210-2600

NOTICE OF DOCKET ENTRY

You are hereby notified that on **08/18/2010** the following entry was made on the above referenced docket:

MEMORANDUM OF DECISION AND ORDER on Defts'. Motions To Dismiss - it is hereby ORDERED that the defts'. motions to dismiss the plaintiffs' first supplemental complaint are ALLOWED in part and DENIED in part. Specifically, this Court orders the following: (1) The Covanta Defts'. Motion to Dismiss is ALLOWED as to Counts I,II,III,IV,VII, and VIII and is DENIED as to Counts V,VI and IX. (2) The deft. Massachusetts Department of Environmental Protection's Partial Motion to Dismiss is ALLOWED (Jeffrey A. Locke, Justice). Copies mailed
Dated at Plymouth, Massachusetts this 24th day of August, 2010.

Robert S. Creedon, Jr.,
Clerk of the Courts

BY: David M. Biggs
Assistant Clerk

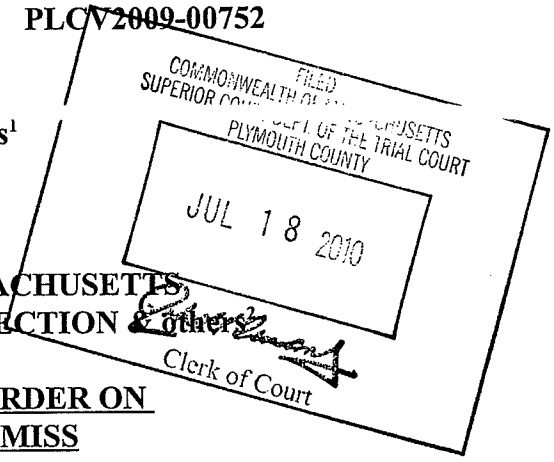
Telephone: (508) 583-8250 ext. 305

(32)

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
PLCV2009-00752



EARTHSOURCE, INC. & others[1]

vs.

LAURIE BURT, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION & others[2]

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTIONS TO DISMISS

On June 19, 2009, the plaintiffs, EarthSource, Inc. and fifteen citizens of Massachusetts (collectively, the "plaintiffs"), filed suit against the defendants, Laurie Burt, Commissioner of the Massachusetts Department of Environmental Protection (DEP), Covanta Operations of SEMASS, LLC and eight other Covanta entities (collectively, "Covanta"). Covanta owns and operates four municipal solid waste incinerators which are located in Massachusetts. EarthSource and Covanta are competitors in the waste industry.

On April 2, 2010, the plaintiffs filed a thirty-seven page First Supplemental Complaint (the "Complaint"), which substituted for the Plaintiffs' First Amended Complaint. The plaintiffs seek declaratory and injunctive relief to prevent alleged significant harm to the environment resulting from Covanta's present and proposed incineration of wastes. They contend that

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[1] George L. Carney, Jr.; Laetitia Carney; Robert Kelly; Kelly C. Kelly; Marie Buckley; Jill Mead; Timothy Mead; Louis Columbo; Gary Temple; Maura Carney; Timothy Carney; Thomas Carney; Morgan Carney; Dennis Carney; and Guy Campinha.

[2] Covanta Operations of SEMASS, LLC; Covanta SEMASS, LLC; SEMASS Partnership; Covanta Company of SEMASS, LP; Covanta SEMASS, LP; Covanta Haverhill, Inc.; Covanta Haverhill Properties, Inc.; Covanta Springfield, LLC; and Covanta Pittsfield, LLC.

August 24, 2010
cc: All Counsel

jurisdiction is conferred by G.L. c. 214, § 7A.

On April 29, 2010, the Covanta defendants filed a motion to dismiss the plaintiffs' Complaint pursuant to Mass. R. Civ. P. 12(b)(1), (12)(b)(6), and 12(h)(3). Additionally, DEP filed a partial motion to dismiss the plaintiffs' Complaint pursuant to Mass. R. Civ. P. 12(b)(1) and (12)(b)(6). DEP moves to dismiss all but one of the claims against it. More specifically, DEP does not seek dismissal of the claim for judicial review under G.L. c. 30A, § 14 of DEP's May 20, 2009 Determination of Need for Covanta's planned SEMASS Fat, Oils and Grease [FOG] Project, which is discussed below and contained in Count V of the Complaint.

On July 20, 2010, this Court held a hearing on the instant motions. For the following reasons, the defendants' motions to dismiss are allowed in part and denied in part.

BACKGROUND

The following alleged facts are drawn from the plaintiffs' Complaint. EarthSource is a Massachusetts corporation with a principal place of business in Brockton, Massachusetts. The fifteen named citizens are residents of Massachusetts. Covanta owns and operates four municipal solid waste incinerators located in Massachusetts. The incinerators are located in Rochester, Massachusetts (SEMASS Incinerator); Haverhill, Massachusetts (Haverhill Incinerator); Pittsfield, Massachusetts (Pittsfield Incinerator); and Agawam, Massachusetts (Agawam Incinerator).

Covanta's four incinerators each require several permits related to their construction and operation. For instance, each Covanta incinerator must receive a site assignment from the local community's board of health and an authorization to operate permit from DEP. These permits establish the types and quantities of solid wastes that may be received and burned. Also, the

Covanta incinerators must receive a final air quality operating permit from DEP, which limits the types and quantities of solid wastes that may be received and burned and the acceptable levels of air pollution emissions. According to the plaintiffs, the four Covanta incinerators may not be expanded or modified or their use of operation may not be expanded or modified without first receiving further permits.

DEP regulates the four Covanta incinerators as "municipal waste combustors" as defined in 310 Code Mass. Regs. § 7.08. The plaintiffs contend that under 310 Code Mass. Regs. § 7.00, Covanta's incinerators may only burn "municipal solid waste." Accordingly, the Covanta incinerators may not burn construction and demolition waste, used oil, industrial process or manufacturing waste, and sewage sludge because these types of wastes are not municipal solid waste as defined in 310 Code Mass. Regs. § 7.08.

Also, DEP regulates sludge, which is the accumulated solid and/or semi-solid residue from the processing or treatment of gases, water, or other fluids. Sewage sludge is sludge that results from the treating or processing of wastewater at wastewater treatment plants and includes the waste that has been removed from grease traps at restaurants. Commercial sewage waste also includes wastewater that is removed from the grease traps of restaurants or other commercial food establishments.

In their Complaint, the plaintiffs assert that the actual or intended use or operation of any Covanta incinerator that is in violation of the authorization to operate permit, the final air quality operating permit, any other permit issued by DEP, the Massachusetts Environmental Policy Act, G.L. c. 30, §§ 61-62H (MEPA), or any other similar regulation "constitutes significant damage to the environment which is occurring or is about to occur within the meaning of G.L. c. 214, §

7A." The plaintiffs seek declaratory and equitable relief to prevent this damage to the environment. They allege that significant damage to the environment has occurred and is about to occur "due to the bad-faith actions of MassDEP which . . . [provided] preferential treatment to Covanta and . . . were not related to the regulatory purposes upon which such actions should have been based." Based on information and belief, the plaintiffs assert that senior agency officials at DEP improperly directed subordinate DEP officials to sign certain governmental permits and to take or not take other actions. The plaintiffs believe that the "bad-faith and invalid actions" by DEP have caused significant harm to the environment and have "unjustly threatened EarthSource's competitive position in the highly regulated waste industry."

Count I

Count I is entitled, "Agency Actions for the SEMASS Incinerator Violate MEPA." The plaintiffs argue that if MEPA applies to a project at the SEMASS Incinerator located in Rochester, then DEP may not issue a permit or permit modification or take any other agency action until after Covanta has fully complied with MEPA. In the past, DEP issued a modified final air quality operating permit for the SEMASS Incinerator dated February 12, 2004 (2004 Final Air Quality Operating Permit). The 2004 Final Air Quality Operating Permit contained a modification that allowed the SEMASS Incinerator to burn construction and demolition waste, used oil, and industrial process or manufacturing waste. These solid wastes are not municipal solid waste. The plaintiffs contend that Covanta failed to comply with MEPA before seeking and receiving the 2004 Final Air Quality Operating Permit and thus, the permit is "invalid ab initio."

The 2004 Final Air Quality Operating Permit expired on February 12, 2009. The plaintiffs assert that DEP cannot lawfully reissue a new permit that allows the SEMASS

Incinerator to burn non-municipal solid waste substances. Covanta has applied to DEP for various permits and permit modifications that relate to a second project (FOG Sewage Project) that would allow the SEMASS Incinerator to receive, store, treat, and process commercial sewage waste, burn the resulting sewage sludge, and reuse the liquid portion of the remaining sewage waste in its air pollution control systems. The plaintiffs believe that Covanta has misnamed this commercial sewage waste as "FOG wastewater" and the resulting sewage sludge as "FOG sludge." The plaintiffs assert that DEP knowingly and improperly adopted Covanta's creation of the "misnamed" FOG wastewater and FOG sludge in order to avoid the proper application of DEP regulations to the FOG Sewage Project.

Eventually, DEP issued a Determination of Need dated May 20, 2009 authorizing the FOG Sewage Project. The plaintiffs contend that Covanta failed to comply with MEPA before seeking and receiving the Determination of Need and thus, the Determination of Need is invalid ab initio.[3] The plaintiffs believe that the 2004 Final Air Quality Operating Permit and the Determination of Need were in violation of applicable law and regulations, the major purpose of which are to prevent and minimize damage to the environment and that as a result, of the violation, significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A. The plaintiffs seek declaratory and equitable relief to prevent such

[3] The plaintiffs attach to their Complaint a memorandum from David Johnston, then acting regional director of the southeast regional office of DEP to Maeve Bartlett, assistant secretary of the Executive Office of Energy and the Environment dated November 10, 2009. Johnston concluded that the FOG Sewage Project, "as it is currently proposed may trigger a MEPA Review Threshold for air emissions" and concluded that SEMASS needs to advise DEP and MEPA [Office] of "its intentions regarding the establishment of new future potential emission limits and possibly changes in procedures for managing outages and off-specification biofuel so that a final determination of MEPA applicability for the project can be made."

damage.

Count II

In Count II, the plaintiffs allege that DEP's actions relating to the Pittsfield Incinerator violate MEPA. DEP has previously modified permits to allow the Pittsfield Incinerator to burn sewage sludge. The plaintiffs believe that Covanta failed to comply with MEPA before seeking and receiving the modified permits. They contend that these permits were issued in violation of MEPA and are invalid ab initio.

On or around May 4, 2009, defendant Covanta Pittsfield submitted a non-major comprehensive plan application to DEP seeking to modify its air operating permit in order to construct and operate a sludge injection system that would co-combust industrial and municipal sludges with municipal solid waste at the Pittsfield Incinerator (Pittsfield Project). On August 6, 2009, DEP issued a special waste determination related to the Pittsfield Project. On December 18, 2009, DEP issued a final approval of the comprehensive plan application for the Pittsfield Project. On December 29, 2009, DEP issued a major demonstration project permit pursuant to 310 Code Mass. Regs. § 19.037 to permit Covanta to burn industrial sludge from waste lagoons located at the Crane Paper Company site adjacent to the Pittsfield Incinerator. The plaintiffs assert that these permits were not issued in compliance with MEPA. Moreover, the plaintiffs believe that DEP improperly calculated the total amount of solid waste to be processed under the Pittsfield Project, which allowed the Pittsfield Incinerator to violate its air operating permit and other permits.

The plaintiffs conclude that the modified permits, which include the final comprehensive plan application approval, the special waste determination, and the demonstration project permit,

were in violation of applicable law and regulations, which are intended to prevent or minimize damage to the environment. As a result of these alleged violations, significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A and the plaintiffs seek declaratory and equitable relief to prevent this damage.

Count III

Count III is entitled, "Agency Actions for Agawam Incinerator Violate MEPA."[4] DEP previously modified permits to allow the Agawam Incinerator to burn sewage sludge and sewage, and these solid wastes are not municipal solid waste. Covanta's burning of sewage sludge and sewage at the Agawam Incinerator exceeded one or more of the MEPA review thresholds for air, solid waste, and wastewater. According to the plaintiffs, Covanta did not comply with MEPA before seeking and receiving modified permits, which were issued in violation of MEPA and are "invalid ab initio." The plaintiffs believe that these modified permits were in violation of applicable law and regulations, the major purpose of which are to minimize damage to the environment and as a result, significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A. The plaintiffs seek declaratory and equitable relief to prevent such damage.

Count IV

In Count IV, the plaintiffs allege that the Covanta incinerators are in violation of air pollution laws and are causing harm to the environment. Under 310 Code Mass. Regs. § 7.00 at Appendix A(3) (e) - (g), any physical change or change in method of operation undertaken by a

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[4] In Count III, the plaintiffs do not describe any dates or specific descriptions of permits that were issued related to the Agawam Incinerator that they believe DEP issued in violation of MEPA.

major stationary source of volatile organic compounds and/or nitrogen oxide (NOx) emissions that occurs within a geographical area designated by the U.S. Environmental Protection Agency as nonattainment for ozone, and results in any increase in volatile organic compounds or NOx emissions that is not a de minimis increase, triggers the obligation to meet the requirements of 310 Code Mass. Regs. § 7.00.

The plaintiffs assert that the four Covanta incinerators are all major stationary sources of NOx emissions, are located within a geographical area designated by the U.S. Environmental Protection Agency as nonattainment for ozone, and that the permit modifications and Covanta's burning of wastes have resulted in an increased in NOx emissions beyond the de minimis threshold and have triggered the obligation to meet the requirements of 310 Code Mass. Regs. § 7.00, Appendix A.

The plaintiffs state in Count IV that all of the DEP permits and permit modifications that allow the Covanta incinerators to burn non-municipal solid waste or allow the Covanta incinerators to make physical changes or changes in methods of operation without first requiring compliance with 310 Code Mass. Regs. § 7.00, Appendix A, are invalid, ab initio. The plaintiffs believe that the permits that DEP issued to Covanta were in violation of applicable law and regulations and that significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A. Thus, the plaintiffs seek declaratory and equitable relief to prevent this damage.

Count V

In Count V, the plaintiffs aver that the Determination of Need for the SEMASS Incinerator is invalid and make a series of varied allegations against Covanta. They state that,

"The DON was a contrived mechanism knowingly employed by MassDEP and Covanta to unlawfully allow the FOG Sewage Project to occur, and to occur without Covanta meeting its air pollution obligations and its obligations to pay the Town of Rochester the correct solid waste tax mandated by G.L. c. 15, § 24A." According to the plaintiffs, the Determination of Need allows Covanta's FOG sewage to be directly injected into the SEMASS Incinerator. By contrast, EarthSource recycles all of its FOG sewage sludge that Covanta would burn pursuant to the FOG Sewage Project. The plaintiffs then explain why they believe the Determination of Need is invalid and in violation of MEPA, air pollution regulations, and other regulations and that significant damage to the environment is occurring or is about to occur as a result.

Additionally, the plaintiffs contend that they are aggrieved by DEP's issuance of the Determination of Need for the SEMASS Incinerator and that it was issued in excess of the authority and jurisdiction of DEP, is based upon errors of law, was made upon an unlawful procedure, is unsupported by substantial evidence, is unwarranted by facts as those facts should be found by the court, is arbitrary and capricious, an abuse of discretion, and is not otherwise in accordance with law.

Count VI

In Count VI, the plaintiffs allege that the SEMASS Incinerator is in violation of its Water Management Act permit. On or about September 11, 1992, the SEMASS Incinerator received a water withdrawal permit pursuant to G.L. c. 21G (Water Withdrawal Permit). The Water Withdrawal Permit requires Covanta to conserve water by utilizing storm water and landfill leachate as process water to the maximum extent possible and to explore any additional opportunities for water conservation. The plaintiffs assert that Covanta is violating its water

conservation requirements because it has not utilized landfill leachate to the maximum possible extent because it will not accept the maximum quantity of landfill leachate that is available unless the shipper of landfill leachate pays Covanta a fee. Furthermore, the plaintiffs believe that Covanta is in violation of water conservation requirements because it has not explored the opportunity to utilize wastewater from the Wareham municipal wastewater treatment plant and from other wastewater treatment plants. According to the plaintiffs, these violations of Covanta's Water Withdrawal Permit are causing significant damage to the environment within the meaning of G.L. c. 214, § 7A, and they seek declaratory and equitable relief to prevent such damage.

Count VII

The plaintiffs assert in Count VII that DEP issued Covanta an authorization to operate permit for the SEMASS Incinerator dated September 22, 2008. The plaintiffs believe that the authorization to operate permit is inconsistent with and in violation of the DEP regulation at 310 Code Mass. Regs. § 19.051 because "Covanta was not required to provide a financial assurance mechanism for bad-faith and invalid reasons that were not related to the regulatory purposes upon which such a decision should have been based." The plaintiffs contend that any decision not to require Covanta to provide a financial assurance mechanism was arbitrary, capricious, and contrary to law. According to the plaintiffs, the violation of the financial assurance mechanism requirement is a violation of law and regulations, the major purpose of which are to prevent or minimize damage to the environment and as a result, significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A. Thus, EarthSource and the fifteen citizens seek declaratory and equitable relief.

Count VIII

In Count VIII, the plaintiffs assert that Covanta has not complied with certain reporting and tax payment requirements. DEP regulations at 310 Code Mass. Regs. § 19.050 require Covanta to report the full weight of all solid wastes that are processed at each of its four incinerators and to pay each host community a tax on every ton of solid waste that is processed at each of its four facilities pursuant to G.L. c. 16, § 24A. The plaintiffs assert that Covanta is not reporting the full weight of all sewage, sewage sludge, and landfill leachate that it has received and processed at each of the four Covanta incinerators and is therefore, not paying the full required taxes on the waste it is processing. Specifically, Covanta is avoiding its full tax obligations by "improperly deducting the weight of the liquid fraction of all sewage, sewage sludge, and landfill leachate."

The plaintiffs maintain that any violation of the reporting and tax requirements is a violation of law and regulations, the major purpose of which are to prevent or minimize damage to the environment. As a result, the plaintiffs believe that significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A, and they request declaratory and equitable relief.

Count IX

In Count IX, the plaintiffs state that an actual controversy exists as to whether the actions and inactions of Covanta and DEP are violations of law. The plaintiffs believe that pursuant to G.L. c. 231A, the court should declare the rights of the parties with respect to each violation of law or regulation discussed in its Complaint.

Requested Relief

The plaintiffs are seeking a declaratory judgment that the actions and inactions of the defendants violate various statutes and regulations referenced in their Complaint and that significant damage to the environment is occurring or about to occur as a result of the defendants' violations. Also, the plaintiffs request a judgment setting aside the Determination of Need related to the SEMASS Incinerator, or in the alternative, a judgment modifying the Determination of Need, or a judgment remanding various issues to DEP for further consideration on the grounds that the Determination of Need is in excess of the authority and jurisdiction of DEP, based upon errors of law, was made upon an unlawful procedure, is unsupported by substantial evidence, and is unwarranted by the facts as those facts should be found by the court, is arbitrary and capricious, an abuse of discretion, and is otherwise not in accordance with the law.

DISCUSSION

When evaluating the legal sufficiency of a complaint under Mass. R. Civ. P. 12(b)(6), this Court accepts as true all of the factual allegations of the complaint and draws all reasonable inferences from the complaint in favor of the plaintiff. Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008); Berish v. Bornstein, 437 Mass. 252, 267 (2002). To survive a motion to dismiss, a complaint must contain factual allegations which, if true, raise a right to relief above the speculative level. Iannacchino v. Ford Motor Co., 451 Mass. at 636. Dismissal under Mass. R. Civ. P. 12(b)(6) is proper where a reading of the complaint establishes beyond doubt that the facts alleged do not add up to a cause of action which the law recognizes, such that the plaintiff's claim is legally insufficient. Nguyen v. William Joiner Center for the Study of War and Social

Consequences, 450 Mass. 291, 294 (2007).

Time-Barred Claims (Counts I-IV and VII)

General Laws c. 214, § 7A provides in pertinent part as follows:

> The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.
>
> . . .
>
> Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause of action herein authorized shall be in addition to any such right or remedy.

The plaintiffs rely on G.L. c. 214, § 7A as the primary procedural vehicle for asserting their claims against the defendants throughout their Complaint. Nonetheless, both Covanta and DEP argue that the plaintiffs' allegations of improperly issued permits contained in Counts I, II, III, IV, and VII are time-barred by G.L. c. 30A, § 14, which states that challenges to final agency decisions "shall, except as otherwise provided by law, be commenced in the court within thirty days after receipt of notice of the final decision of the agency." See G.L. c. 30A, § 14.

The plaintiffs, however, contend that their claims are timely and actionable and that G.L. c. 214, § 7A confers broad jurisdiction to stop environmental harm, unlimited by other statutes. The plaintiffs rely on Enos v. Secretary of Envtl. Affairs, 432 Mass. 132, 143 n.9 (2000), in which the Supreme Judicial Court noted that: "We see no sound reason why these concerns would not be properly addressed in a § 7A suit against the town, which can be brought at any

time on a sufficient showing of environmental damage." From this language, the plaintiffs argue that G.L. c. 214, § 7A permits challenge to otherwise permitted activity that is more or less timeless in scope. Yet, to accept this argument would be to abolish the legislatively created statute of limitations for every environmental approval. Any environmental permit approval likely, if not certainly, inherently results in activity that may be environmentally detrimental. Exempting a G.L. c. 214, § 7A challenge from the statute of limitations, as sought here on a continuing nuisance theory, would render the statute of limitations a nullity. Additionally, as DEP correctly notes in its written opposition, timeliness of filing suit was not at issue in Enos and the Enos court had no statutory limitations period before it then.

Moreover, the Supreme Judicial Court has limited the scope of G.L. c. 214, § 7A, particularly in the context of administrative agency review. See, e.g., Cummings v. Secretary of Executive Office of Environmental Affairs, 402 Mass. 611, 616-617 (1988) (holding that G.L. c. 214, § 7A does not authorize suit against secretary for failing to require an environmental impact report under MEPA and noting that secretary could not be said to be one causing or about to cause environmental harm); Wellfleet v. Glaze, 403 Mass. 79, 82-84 (1988) (recognizing that an act regulating activities in shellfish beds was not a statute with the major purpose of preventing or minimizing damage to the environment and thus Superior Court's authority to issue injunction was not conferred by G.L. c. 214, § 7A); Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 118 (1984) (refusing to interpret G.L. c. 214, § 7A as creating jurisdiction to review actions by site safety council).

In their written opposition to the instant motions to dismiss, the plaintiffs state that they do not seek untimely judicial review of permits issued years ago, rather, they seek timely

declaratory and injunctive relief to prevent significant harm to the environment resulting from Covanta's present and proposed incinerations of wastes.[5] The plaintiffs do, however, seek judicial review of the Determination of Need described in Count V of the Complaint, which is not at issue because DEP concedes that judicial review of that Determination of Need is warranted.

In Canton v. Commissioner of the Mass. Highway Dep't, 455 Mass. 783, 784-795 (2010), the Supreme Judicial Court recognized that G.L. c. 214, § 7A should be construed with a limitations period in a separate statute that is applicable to the particular government action being challenged. Id. In Canton, the plaintiff town invoked G.L. c. 214, § 7A to argue that a private developer could not proceed with a proposed mixed-use development project because the developer's environmental impact report did not comply with MEPA even though the Secretary of Environmental Affairs issued a certificate pursuant to G.L. c. 30, § 62C that stated that the environmental impact report indeed complied with MEPA and the related regulations. Id. at 786-787. The Supreme Judicial Court noted that G.L. c. 214, § 7A could be used to make a claim that an environmental impact report violated MEPA, but the court also held that a lawsuit

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[5] The plaintiffs cite Worcester v. Gencarelli, 34 Mass. App. Ct. 907, 908 (1993), in support of their argument that their G.L. c. 214, § 7A claims are not barred by a limitations period. Yet, Worcester v. Gencarelli is inapposite as in that case, the city sought injunctive relief under G.L. c. 214, § 7A after the defendant placed fill on a wetland that he owned without filing a notice of intent with the Worcester conservation commission. Worcester v. Gencarelli, 34 Mass. App. Ct. at 907. The trial judge determined that the presence of the fill was a continuing violation of G.L. c. 131, § 40, warranting injunctive relief under G.L. c. 214, § 7A. Worcester v. Gencarelli, 34 Mass. App. Ct. at 908. The Appeals Court noted that, "[t]his case is analogous to a proceeding against a continuing nuisance which is not barred by the statute of limitations because of the recurring nature of the harm." Here, the plaintiffs seek injunctive relief to challenge permits that they believe DEP improperly issued to Covanta. As discussed above, the Complaint does not allege that Covanta is acting unlawfully in violating the terms of its permits.

commenced pursuant to G.L. c. 214, § 7A was time-barred by the substantive statutory appeal provision governing the underlying approval at issue, which in Canton was G.L. c. 30, § 62H (thirty-day period to appeal the certification of environmental impact report). Id. at 785-795.

Here, the plaintiffs' claims under G.L. c. 214, § 7A as set forth in their Complaint in Counts I through IV and Count VII are similarly subject to the substantive statutory appeal provision governing the underlying approval at issue, which in this case is G.L. c. 30A, § 14. Cf. Canton v. Commissioner of the Mass. Highway Dep't, 455 Mass. at 784-795. As discussed above, in the Complaint the plaintiffs contend that various permits were improperly issued by DEP without first being subject to review under MEPA or other referenced statutes or regulations. See supra (describing plaintiffs' allegations as set forth in their Complaint). For instance, in Counts I through IV, the plaintiffs allege that the various permits issued to Covanta are all "invalid ab initio." Generally, the plaintiffs assert that significant damage to the environment has occurred and is about to occur "due to the bad-faith actions of MassDEP which . . . [provided] preferential treatment to Covanta and . . . were not related to the regulatory purposes upon which such actions should have been based." Therefore, but for DEP issuing the various permits to Covanta, there would be no environmental damage that "is occurring or is about to occur" to the environment. The plaintiffs believe that the permits were not issued in compliance with MEPA or other environmental regulations and it is this harm upon which their claims are based under G.L. c. 214, § 7A.

In this case, the plaintiffs originally filed suit on June 19, 2009, and they filed the instant First Supplemental Complaint on April 2, 2010. Except for the May 20, 2009 Determination of Need, the remaining permits referenced throughout the Complaint were beyond the thirty day

appeal period under G.L. c. 30A, § 14. While the plaintiffs maintain in their written opposition that they do not seek judicial review of these older permits, this Court is satisfied that the only ongoing environmental harm that is alleged throughout the Complaint in Counts I through IV and Count VII relates to DEP actually issuing the permits to Covanta. Again, in Counts I through IV plaintiffs specifically assert that the permits were invalid from the beginning. As such, the plaintiffs claims in Counts I[6], II, III[7], IV[8], and VII under G.L. c. 214, § 7A are time-barred and must be dismissed.[9]

Count V

In Count V, the plaintiffs make a series of claims against Covanta pursuant to G.L. c. 214, § 7A and also seek judicial review under G.L. c. 30A, § 14 of the May 20, 2009 Determination of

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[6] To the extent that Count I challenges whether DEP can lawfully reissue a permit to replace the 2004 Final Air Quality Operating Permit, that claim is dismissed because it is not ripe for review. See Lakeside Builders, Inc. v. Planning Bd. of Franklin, 56 Mass. App. Ct. 842, 849 (2002) (recognizing that a claim is not ripe because there has not been a final authoritative determination made). The plaintiffs do not allege that DEP has renewed this permit, and the defendants maintain that DEP has not.

[7] Count III, which contains no dates relating to any specific permits, is also dismissed because it does not raise a right to relief above the speculative level. See Iannacchino v. Ford Motor Co., 451 Mass. at 636. In any event, Covanta states that the most recent permit related to the Agawam Incinerator was issued on August 24, 2007.

[8] As explained on pages six and seven of Covanta's written opposition, the plaintiffs' claims in Count IV, which does not identify specific air permits or dates, are time-barred.

[9] DEP correctly notes that a contrary rule would be disruptive to the permitting agencies and that G.L. c. 214, § 7A should not become a means to disturb otherwise settled permits whenever a group of plaintiffs chooses to file suit sometime in the future. See New England Milk Dealers Association v. Department of Food & Agriculture, 22 Mass. App. Ct. 705, 709 (1986) (noting "in the absence of special circumstances, usually ones involving a question of broad and acute public interest, declaratory relief should not be used to circumvent a period prescribed by statute for obtaining judicial review").

Need.[10] To the extent that the plaintiffs allege that Covanta is not meeting its tax obligations under G.L. c. 16, § 24A, for generally the same reasons as discussed below regarding Count VIII, any of the plaintiffs' tax violation claims relating to the Determination of Need contained in Count V are dismissed.

Count VI

In Count VI, the plaintiffs allege that the SEMASS Incinerator is in violation of its Water Management Act permit. As discussed above, on or about September 11, 1992, the SEMASS Incinerator received a water withdrawal permit pursuant to G.L. c. 21G (Water Withdrawal Permit). The Water Withdrawal Permit requires Covanta to conserve water by utilizing storm water and landfill leachate as process water to the maximum extent possible and to explore any additional opportunities for water conservation. The plaintiffs assert that Covanta is violating its water conservation requirements because it has not utilized landfill leachate to the maximum possible extent because it will not accept the maximum quantity of landfill leachate that is available unless the shipper of landfill leachate pays Covanta a fee. Also, the plaintiffs assert that Covanta is in violation of water conservation requirements because it has not explored the opportunity to utilize wastewater from the Wareham municipal wastewater treatment plant and from other wastewater treatment plants. According to the plaintiffs, these violations of Covanta's Water Withdrawal Permit are causing significant damage to the environment within the meaning of G.L. c. 214, § 7A, and they seek declaratory and equitable relief to prevent such

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[10] This Court recognizes that Count I also refers to the May 20, 2009 Determination of Need. Yet, Count V appears to generally cover similar allegations regarding the Determination of Need. As noted above, DEP is not moving to dismiss the plaintiffs' claim of judicial review under G.L. c. 30A, § 14 of the May 20, 2009 Determination of Need.

damage.

Count VI is only directed at Covanta. At the motion hearing on July 20, 2010, Covanta correctly recognized that this claim is different from the plaintiffs' other claims. In Count VI, the plaintiffs allege that Covanta is violating its Water Management Act permit and is causing damage to the environment. They do not challenge the actual issuance of Covanta's Water Management Act permit or that the permit was invalid when it was issued. Thus, this Court is satisfied that Count VI need not be dismissed as it sufficiently states a claim upon which relief can be granted.

Count VIII

In Count VIII, the plaintiffs contend that Covanta has not complied with certain reporting and tax payment requirements. 310 Code Mass. Regs. § 19.050 requires Covanta to report the full weight of all solid wastes that are processed at each of its four incinerators and to pay each host community a tax on every ton of solid waste that is processed at each of its four facilities pursuant to G.L. c. 16, § 24A. The plaintiffs assert that Covanta is not reporting the full weight of all sewage, sewage sludge, and landfill leachate that it has received and processed at each of the four Covanta incinerators and is therefore, not paying the full required taxes on the waste it is processing. The plaintiffs state that any violation of the reporting and tax requirements is a violation of law and regulations, the major purpose of which are to prevent or minimize damage to the environment. As a result, the plaintiffs believe that significant damage to the environment is occurring or is about to occur within the meaning of G.L. c. 214, § 7A, and they request declaratory and equitable relief.

Count VIII must be dismissed because here, even if Covanta failed to meet its tax

reporting and payment requirements under 310 Code Mass. Regs. § 19.050 and G.L. c. 16, § 24A, a failure to pay taxes neither causes "damage to the environment" nor "constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." See G.L. c. 214, § 7A (emphasis added). See also Wellfleet v. Glaze, 403 Mass. at 82-84 (recognizing that act regulating activities in shellfish beds was not a statute with the major purpose of preventing or minimizing damage to the environment). General Laws c. 16, § 24A states that: "The operator of a privately owned or operated resource recovery facility or landfill shall pay to the city or town in which the facility or landfill is located a tax of one dollar per ton of solid waste processed at the facility . . . Such tax shall be in lieu of all taxes, fees, charges or assessments imposed by the city or town in which the facility or landfill is located, except for real estate taxes imposed solely upon the land on which the said facility or landfill is located." Moreover, 310 Code Mass. Regs. § 19.050 notes that the "tax [collected] shall be in lieu of all taxes, fees, charges or assessments imposed by the municipality in which the facility is located, except for real estate taxes imposed solely upon the land on which the facility is located." Hence, the statute and regulation at issue suggest that the major purpose of both is to provide a consolidated mechanism for collecting taxes and fees rather than to "prevent or minimize damage to the environment." See G.L. c. 214, § 7A. Consequently, the plaintiffs have no standing to bring their Count VIII claim under G.L. c. 214, § 7A, and it must be dismissed.[11]

[11] As noted above, the similar tax violation claim in Count V is also dismissed.

Count IX

To the extent that there are remaining substantive claims in the plaintiffs' Complaint that have not been dismissed, the Court may declare the rights of the parties as to those claims.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the defendants' Motions to Dismiss the Plaintiffs' First Supplemental Complaint are **ALLOWED** in part and **DENIED** in part. Specifically, this Court orders the following:

(1) The Covanta Defendants' Motion to Dismiss is **ALLOWED** as to Counts I, II, III, IV, VII, and VIII and is **DENIED** as to Counts V, VI, and IX.

(2) The Defendant Massachusetts Department of Environmental Protection's Partial Motion to Dismiss is **ALLOWED**.

Jeffrey A. Locke
Justice of the Superior Court

Dated: August 18, 2010