UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE STATE OF NEW YORK AND
NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION,

Plaintiffs,

COMPLAINT

– against –

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendant.

Plaintiffs, the State of New York and the New York State Department of Environmental Conservation, allege:

PRELIMINARY STATEMENT

1. The State of New York (State) and the New York State Department of Environmental Conservation (DEC) bring this action for an order compelling the United States Environmental Protection Agency (EPA) to comply with the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Clean Air Act, 42 U.S.C. § 7414(c), and provide DEC documents submitted to EPA pursuant to what is known as the AIM Coatings Rule. EPA refused to provide the requested documents, conducted an insufficient search for responsive documents, improperly redacted certain responsive documents, and failed to reject the unsubstantiated claims by certain companies that documents are exempt from disclosure. To remedy these clear violations of law, plaintiffs seek an order compelling the prompt production

of all responsive documents.

2. The National Organic Compound Emission Standards for Architectural Coatings regulation (generally known as the Architectural and Industrial Maintenance (AIM) Coatings Rule), 40 C.F.R. Part 59, subpart D, requires companies seeking exemptions from the limits on the content of volatile organic compounds (VOCs) in architectural coatings to file with EPA annual reports and payments documenting their use of these exemptions. Plaintiffs seek these reports to assist their efforts to reduce air pollution in New York State.

PARTIES

3. Plaintiff State of New York, as a body politic and sovereign entity, brings this action on its own behalf, as *parens patriae* on behalf of its citizens and residents, and pursuant to its responsibility for protection of the public health and the State's environmental resources.

4. Plaintiff DEC is an executive department of the State of New York. DEC is empowered to administer and enforce various statutes to protect the environment.

5. Defendant EPA is an agency of the United States.

JURISDICTION

6. This court has jurisdiction over the action based on 5 U.S.C. § 552(a)(3), (a)(4)(B) and (a)(4)(E), 5 U.S.C. § 702 and 28 U.S.C. § 1331.

7. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(3).

LEGAL BACKGROUND

Freedom of Information Act

8. FOIA provides that agencies, "upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, *shall make the records promptly available to any person*." 5 U.S.C. § 552(a)(3)(A) (emphasis added).

9. Upon receiving a FOIA request, an agency "*shall* – (i) determine within twenty days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination." *Id.* § 552(a)(6)(A)(i) (emphasis added).

10. In order to comply with a request, an agency must "search" for responsive records. "Search" means "to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." *Id.* § 552(a)(3)(D). An agency must use good faith efforts to conduct a search using methods that can be reasonably expected to produce the information requested.

11. If an agency denies a claim or fails to act upon a request, any appeal to the head of an agency must be decided "within twenty days." *Id.* § 552(a)(6)(A)(ii).

12. An agency failure to comply with the statutory time limits for response to either an initial request or an administrative appeal constitutes exhaustion of administrative remedies. *Id.* § 552(a)(6)(C)(i).

13. Unless records fall into one of several narrowly construed statutory exemptions, an

agency must disclose them. Among the statutory exemptions is one for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

14. FOIA's exemptions are not absolute: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." *Id.* § 552(b).

15. An agency must independently assess a claim by a submitter that some or all of its submission is entitled to protection from disclosure.

16. A federal district court reviews the agency action *de novo* and "the burden is on the agency to sustain its action." *Id.* § 552(a)(4)(B).

17. A district court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." *Id.* § 552(a)(4)(E).

EPA's FOIA Regulations

18. FOIA directs agencies to promulgate regulations to carry out their FOIA obligations. *See id.* § 552(a)(4)(A)(i).

19. Title 40 C.F.R. Part 2 sets forth EPA's FOIA procedures. Subpart A governs general requests; subpart B sets forth EPA's rules for dealing with records requests seeking information submitted to the EPA as "Confidential Business Information (CBI)." *See* 40 C.F.R. § 2.100(a).

20. Title 40 C.F.R. § 2.201(e) defines "reasons of business confidentiality" as including

> the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure in order that the business may obtain or retain business advantages it derives from its right in the information.

21. An "affected business" is one that has asserted, or might if it were aware that disclosure to the public were proposed, a business confidentiality claim covering information it has submitted to EPA. *Id.* § 2.201(d).

22. When EPA has reason to believe that a FOIA request might seek records submitted to it by an affected business, it "shall examine the information and the office's records to determine which businesses, if any, are affected businesses . . . , and to determine which businesses, if any, have asserted business confidentiality claims which remain applicable to the information." *Id.* § 2.204(c). If such review discloses the existence of an affected business, "the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information." *Id.* § 2.204(c)(2)(i). Such inquiry is not mandatory if the allegedly affected business failed to identify the information as confidential at the time it was submitted. *Id.* § 2.203(c).

23. Upon the assertion of a claim by an affected business, "the EPA Office shall make a determination with respect to each such claim." *Id.* § 2.204(d).

24. If it determines that the information may be entitled to confidential treatment, "the [EPA] office shall," among other steps, refer the request to the appropriate EPA legal office. *Id.* § 2.204(d)(1); *see also id.* § 2.204(d)(1)(iii).

25. The legal office to which the referral was made "is responsible for making the final administrative determination of whether or not business information covered by a business

confidentiality claim is entitled to confidential treatment under this subpart." *Id.* § 2.205(a)(1). For purposes of a pending FOIA request, that determination "shall serve as the final determination on appeal from an initial denial of the request." *Id.* § 2.205(a)(2).

26. A denial made pursuant to 40 C.F.R. § 2.204(d)(1) is "of a procedural nature, to allow further inquiry into the merits of the matter, and a requestor is entitled to a decision on the merits." *Id.* § 2.205(a)(2)(ii).

27. The criteria for use in determining whether information should be protected as confidential business information are set forth in 40 C.F.R. § 2.208. Generally, information *must* be disclosed unless (a) a business has asserted a confidentiality claim that has not been withdrawn, (b) the business takes reasonable measures to protect the allegedly confidential information, (c) the information is not otherwise reasonably obtainable, (d) no statute requires that the information be disclosed, *and* (e) the business can demonstrate either (i) substantial harm to the business's competitive position would likely ensue from the disclosure or (ii) the information was voluntarily submitted and its disclosure would impair the ability of the government to obtain necessary information in the future.

The Administrative Procedure Act

28. The Administrative Procedure Act entitles a person aggrieved by agency action to judicial review of the action. *See* 5 U.S.C. § 702.

The Clean Air Act

29. The Clean Air Act, 42 U.S.C. §§ 7401-7671q, addresses the prevention and control of air pollution from a wide range of stationary sources, mobile sources and other activities. In particular, Congress directed EPA to regulate emissions of VOCs from consumer and

commercial products, including paints, coatings, and solvents. *See* 42 U.S.C. § 7511b.

30. Accordingly, in September 1998, EPA published the AIM Coatings Rule, codified at 40 C.F.R. Part 59, subpart D. *See* 63 Fed. Reg. 48848 (Sept. 11, 1998).

31. Clean Air Act § 7414(a) authorizes EPA to require "any person . . . who is subject to any requirement of [the Act]" to keep records, make reports and provide information.

32. The AIM Coatings Rule, which applies to the 22 manufacturers and importers identified in DEC's request, requires the submission of reports, records and information to EPA. These reports constitute "emission data" within the meaning of 40 C.F.R. § 2.301(a)(2)(i).

33. The federal Clean Air Act also requires that the public have access to "[a]ny records, reports or information" obtained by EPA pursuant to 42 U.S.C. § 7414(a), specifically including "emission data." 42 U.S.C. § 7414(c).

The AIM Coatings Rule

34. The federal AIM Coatings Rule establishes a VOC content limit for 61 categories of architectural and industrial maintenance coatings.

35. VOC emissions contribute to ground-level ozone, the major constituent of smog. According to the EPA, ozone causes severe consequences to human health, including lung irritation and permanent lung damage, reduced lung capacity, asthma, and increased susceptibility to respiratory ailments, including pneumonia and bronchitis. *See* AIM Final Rule Preamble, 63 Fed. Reg. at 48850. Even at low levels, ground level ozone contributes to a variety of health problems and can lead to death. Because it occurs principally in warm weather months, it takes a particular toll on those often outdoors, including children. Ground level zone also damages ecosystems, making plants and crops more susceptible to disease, insects, other

pollutants and harsh weather, and reducing crop and forest yields. As EPA has concluded, ground level ozone is harmful and must be reduced.

36. Architectural coatings include paints, industrial maintenance coatings, coatings for wood and roofs, primers and paint for application to pavements and curbs. EPA has determined that architectural coatings account for approximately 9% of VOC emissions from all commercial products. 63 Fed. Reg. at 48850. Accordingly, the federal AIM Coatings Rule purports to limit the VOC content of architectural coatings. *See* 40 C.F.R.§ 59.402(a) ("Each manufacturer and importer . . . shall ensure that the VOC content of the coating does not exceed the applicable limit in table 1 of this subpart").

37. In fact, however, the AIM Coatings Rule offers three alternatives to actual compliance with the VOC limits set forth in the AIM Coatings Rule:

a. *Exceedance Fee*: This provision permits a company to continue manufacturing architectural coatings with VOC contents higher than the limits included in the final rule through payment of a per gallon "exceedance fee." 40 CFR §§ 59.403(a) , 59.407(b). The exceedance fee is based on (1) the number of gallons of product that exceed the limit; and (2) the amount (as measured by weight) of VOC in the product that exceeds the VOC content limit. *Id.* § 59. 403(c).

b. *Tonnage Exemption*: This provision allows manufacturers and importers to sell or distribute up to 10 tons of non-compliant architectural coatings at no charge (in other words, before triggering an exceedance fee). *Id.* § 59.404(a).

c. *Recycled Coating*: Allows manufacturers to use a higher VOC content to account for the amount of post-consumer coating incorporated into their recycled paint products. *See id.* § 59.406(a)(3).

38. The AIM Coatings Rule requires manufacturers and importers to submit a one-time initial notification report. *Id.* § 59.408(b).

39. In addition, no later than March 1 of each calendar year, manufacturers and importers benefiting from any of the three compliance alternatives, "shall" submit an annual report demonstrating "compliance" – by whatever method – for the preceding calendar year. *Id.* § 59.408(c). Reports are submitted to the EPA Regional Office[1] in which the headquarters of the reporting company is located. *Id.* § 59.409(a).

40. Manufacturers and importers also must submit fees "to EPA by March 1 following the calendar year in which the coatings are manufactured or imported." *Id.* § 59.403(d). Fees are to be submitted to a post office box in Pittsburgh. *Id.* § 59.409(b).

41. For each coating for which the exceedance fee provision is used, the manufacturer or importer "shall report:" (1) its name and mailing address; (2) a list of all coatings and the associated coating categories for which the exceedance fee provision is being used; (3) the VOC content of each coating that exceeds the relevant limit; (4) the excess VOC content of each coating in grams of VOC per liter of coating; (5) the total volume of each coating manufactured or imported per calendar year, in liters, including the volume of any water and exempt compounds and excluding the volume of any colorant added to tint bases; (6) the annual fee for each coating; and (7) the total annual fee for all coatings. *Id.* § 59.408(d)(1)-(7).

42. Manufacturers and importers using the tonnage exemption must also submit a report no later than March 1 of the year following the calendar year for which the exemption was claimed. *Id.* § 59.408(e). As in the case of exceedance fees, manufacturers and importers must provide detailed technical information regarding the products for which they claim the tonnage

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[1]EPA is divided into 10 "Regions," each of which covers a particular geographic area of the United States. New York State is in Region 2.

exemption. *Id.*

43. Manufacturers and importers must also "maintain in written or electronic form records of the information specified [above] for a period of 3 years." *Id.* § 59.407(a).

44. The AIM Coatings Rule further requires that each container of coating bear a label indicating the date of manufacture (or a code containing that information), a statement of the manufacturer's recommendation regarding thinning, and either the VOC content of the coating or the VOC limit for the product that is specified in the AIM Coatings Rule. In addition, the label must provide information about how the product is to be used. Information about the VOC content of the coating thus appears on shelves at retail stores throughout the nation.

FACTUAL BACKGROUND

DEC's FOIA Request

45. In July 2004, DEC staff person Dan Brinsko conferred with EPA staff person David Salman, at Research Triangle Park, North Carolina. Mr. Brinsko indicated to Mr. Salman that DEC sought "variance reports" submitted to EPA pursuant to the AIM Coatings Rule, 40 C.F.R. Part 59, Subpart D, including exceedance fee reports and tonnage exemption reports.

46. DEC had a list of 22 companies, 17 of which DEC had identified from an exceedance list previously provided by EPA, and 5 of which DEC had reason to believe were also covered by the AIM Coatings Rule. DEC sought reports from these 22 manufacturers or importers for the years 2002, 2003 and 2004.

47. Mr. Salman promptly contacted "the AIM rule contacts" for EPA Regions 1, 2, 3, 5, 7 and 8.

48. During a telephone call on or about September 3, 2004, Mr. Salman advised Mr. Brinsko that he had most of the variance reports and he was just waiting for a few more to arrive from EPA Region 7. Although Mr. Salman indicated, informally, to Mr. Brinsko that he had collected most of the requested documents from the EPA Regions, Mr. Salman was never given permission to release the documents to DEC.

49. Accordingly, on or about October 28, 2004, DEC submitted a letter seeking, pursuant to the Freedom of Information Law, 5 U.S.C. § 552, to obtain the variance reports submitted to the United States Environmental Protection Agency from the following [22] paint manufacturers for the years 2002 to the present" (the Request). A copy of the October 28, 2004 letter from David J. Shaw, Director, Division of Air Resources, is attached as Exhibit 1 (the 22 manufacturers are identified in the letter).

EPA's Response

50. On or about October 29, 2004, EPA responded, assigning the Request the following number: HQ-RIN-00186-05.

51. By letter dated November 23, 2004, EPA advised DEC that it would respond no later than December 29, 2004.

52. By letter dated November 24, 2004, Sally Shaver (Mr. Salman's supervisor) advised DEC that EPA had been "made aware that the requested reports may contain sensitive confidential business information such as production data included by the individual companies." EPA therefore advised DEC that it was forwarding the Request to its Office of Enforcement, Compliance and Assurance (OECA).

53. OECA acknowledged receipt of the Request on or about December 2, 2004.

Despite Mr. Salman's earlier representation that responsive documents had been gathered at Research Triangle Park, OECA also said that the documents were stored in EPA's ten regional offices, to which the Request was being re-routed.

54. In early December, EPA Regions 2, 4, 5, 7, 9, and 10 acknowledged receiving the Request.

55. EPA Region 6 responded twice to the Request. First, on or about December 13, 2004, the Region's Emergency Planning and Community Right-to-Know Act (EPCRA) coordinator advised DEC by letter that, in his opinion, the Request had been mistakenly sent to his group. Later, by e-mail dated January 10, 2005, EPA Region 6 advised EPA Region 2 that it had "disinvested in this program about 4 or 5 years ago" and accordingly had no responsive documents.

56. Meanwhile, EPA Region 2 tried to dislodge the documents from other regions. On or about December 15, 2004, a staff person in EPA Region 2's Air Compliance Branch sent DEC staff person Rob Sliwinski an e-mail in which he advised that EPA had "been having some internal (EPA HQ and Regions) conversations with regard to providing you with the information you requested in your FOIA pertaining to VOC exceedance fees and tonnage exemption reports." He promised "to stay abreast of the status" of the Request after noting that it appears "the information might have to be sent to our HQ office for compiling."

57. EPA Region 4 and EPA Region 8 advised DEC, by letters dated December 22, 2004 and December 17, 2004, respectively, that they had no responsive documents. Within a few weeks, EPA Regions 9 and 10 had made the same determination, which EPA Region 9 communicated by letter dated January 21, 2005 and EPA Region 2 communicated, on behalf of

Region 10, by letter dated February 3, 2005.

58. On or about December 28, 2004, EPA Region 2 advised DEC by letter that a search of EPA Region 2's files revealed that 7 of the 22 companies covered by the Request had manufacturing facilities located within the Region but that the Region had no records for any of them for the relevant time period (2002-2004). The letter did not indicate that it was appealable.

59. On or about January 18, 2005, the FOIA coordinator for Region 7 advised EPA Region 2, which had offered to serve as a primary collection point, that Region 7 was doing a "substantiation letter to the sources" and would respond directly to DEC once it had done so.

60. EPA Region 3 withheld in full exceedance fee reports for 2001 and 2003 from PPG Architectural Finishes, Inc., "[p]ending [r]eview by [c]ounsel." By letter dated February 11, 2005, EPA Region 3 advised DEC that it was initially denying the Request pursuant to 40 C.F.R. § 2.204(d)(1), because certain responsive records "have been claimed confidential." The letter indicated that the Region would consult with the third party manufacturer or importer before the Office of Regional Counsel issued a final determination. Finally, the letter indicated that an appeal could be taken within 30 days from the initial denial.

61. EPA Region 5 provided some responsive documents in their entirety. EPA Region 5 also withheld entire documents. On or about February 3, 2005, EPA Region 2 sent DEC a letter stating, among other things, that EPA Region 5 was withholding certain records claimed to be confidential, including two letters from James R. Kantola, ICI Paints, to EPA Region 5 (one dated February 25, 2002 and the other dated February 25, 2003), and two letters from Madelyn K. Harding, Sherwin Williams, to EPA Region 5 (one dated February 22, 2002; the other dated February 25, 2003).

62. Upon information and belief, EPA Region 5 never communicated directly with DEC, nor did the February 3, 2005 EPA Region 2 letter indicate that it was an appealable initial denial.

63. On or about March 4, 2005, DEC filed a timely appeal from EPA Region 3's initial denial and the apparent denial by EPA Region 5, as to which no final determination has ever been made. DEC's appeal letter is attached as Exhibit 2.

64. On or about March 11, 2005, EPA's Headquarters FOIA staff acknowledged that DEC's appeal was received on March 8, 2005.

65. On or about April 14, 2005, EPA Region 7 advised DEC by letter that it had responsive documents, which it enclosed. The documents were heavily redacted "because the information has been determined to be exempt from mandatory disclosure by virtue of 5 U.S.C. [§] 552(b)(4)."

66. By letter dated May 6, 2005, DEC's Chief of Stationary Source Planning, Ronald W. Stannard, P.E., sent EPA a letter, enclosing a table detailing the status of each record sought by DEC's Request (that is, a description of whether the record had been sent, redacted or withheld).

67. Upon information and belief, EPA has taken no further action on DEC's appeal, or the Request.

68. Because EPA has not responded, the State seeks an order compelling the production of all responsive documents in their entirety.

FIRST CAUSE OF ACTION

FOIA

Failure to Provide Responsive Documents

69. DEC made a clear and adequate request for reports submitted to EPA pursuant to the AIM Coatings Rule. The Request was made in accordance with EPA's published FOIA rules.

70. Upon information and belief, each of the 22 companies identified in the Request was a manufacturer and/or importer subject to the AIM Coatings Rule during calendar years 2001, 2002, and 2003.

71. Upon information and belief, each of the 22 companies submitted requests, reports, submittals, and other communications covered by the Request to EPA.

72. Upon information and belief, each of the companies submitted an exceedance fee payment to EPA for calendar years 2001, 2002 and 2003.

73. None of the requested documents constitutes confidential or privileged business information.

74. EPA's failure to provide responsive documents for each of the 22 companies for each of the years identified in the Request constitutes a violation of FOIA, 5 U.S.C. § 552(a)(3)(A) as well as the corresponding EPA regulations.

SECOND CAUSE OF ACTION

FOIA

Inadequate Search

75. EPA conducted an inadequate search for responsive documents in violation of 5 U.S.C. § 552(a)(3)(A), (a)(3)(C) and corresponding regulations.

76. EPA indicated to DEC that several regions had no responsive documents, despite the near certainty that responsive documents exist.

77. EPA provided to DEC responsive documents from some of the 22 companies for certain years but not others, despite the near certainty that responsive documents exist.

78. Finally, EPA's failure to provide documents that, upon information and belief, were received at the Pittsburgh post office box identified in 40 C.F.R. § 59.409(b) as the address to which exceedance fee checks should be sent demonstrates that EPA conducted an inadequate search in violation of FOIA, 5 U.S.C. § 552(a)(3)(A) and (a)(3)(C).

THIRD CAUSE OF ACTION

FOIA

Improper Withholding of Non-Exempt Documents

79. EPA Regions 3, 5 and 7 improperly withheld responsive documents on the ground that they might or did contain confidential business information. The withheld documents are not protected by 5 U.S.C. § 552(b)(4) or 40 C.F.R. § 2.208. EPA's failure to promptly disclose them violated FOIA.

80. The improperly withheld responsive documents contain no confidential or

privileged business information. None of the manufacturers or importers claiming confidentiality can satisfy the criteria set forth in federal regulations for demonstrating confidentiality, including the requirement that a manufacturer or importer establish that substantial harm to the business's competitive position would likely ensue from the disclosure (nor can any manufacturer or importer establish that the information was voluntarily submitted or that its disclosure would impair the ability of the government to obtain necessary information in the future). *See* 40 C.F.R. § 2.208. Accordingly, EPA's failure to disclose the responsive documents promptly is improper and violates FOIA.

81. EPA failed to assess independently claims made by manufacturers or importers that their documents were exempt from disclosure on the basis that they contained or were confidential business information. EPA disclosed documents from some importers and manufacturers in their entirety while improperly withholding or redacting other responsive documents. Some of the information EPA withheld or redacted was publicly available and therefore was not entitled to protection. Accordingly, EPA cannot establish that it conducted an independent assessment of the importers' or manufacturers' claims of confidentiality.

FOURTH CAUSE OF ACTION

Clean Air Act

82. The Clean Air Act mandates public access to "[a]ny records, reports or information obtained under subsection (a)" of 42 U.S.C. § 7414.

83. The 22 manufacturers and importers identified in the Request submitted records, reports and information to EPA pursuant to subsection (a) of 42 U.S.C. § 7414.

84. The records, reports and information submitted to EPA by the 22 manufacturers and importers are emission data within the meaning of the Clean Air Act and cannot be treated as trade secret or otherwise confidential information.

85. EPA's failure to make their reports, records and information public pursuant to 42 U.S.C. § 7414(c) violates the Clean Air Act.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully ask the Court to enter judgment against EPA as follows:

(A) Compelling EPA to comply with DEC's October 28, 2004 request and produce all responsive documents, within 21 days of the entry of judgment;

(B) Enjoining EPA from improperly failing to produce documents already submitted to it pursuant to the AIM Coatings Rule, or submitted to it in the future, pursuant to the current AIM Coatings Rule, by maintaining that the documents are exempt from disclosure as confidential business information or trade secret data;

(C) Awarding costs and attorneys' fees pursuant to 5 U.S.C. § 552(a)(4)(E); and

(D) Such other and further relief as the Court deems just and proper.

Dated: February 14, 2006

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