

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA**

Natural Resources Defense Council, Inc.,)	Case No. 2 08 CV 0204
)	
Plaintiff,)	Judge Philip P. Simon
)	
v.)	
)	
BP Products North America, Inc.,)	<u>DEFENDANT BP PRODUCTS</u>
)	<u>NORTH AMERICA, INC.'S</u>
Defendant.)	<u>REPLY BRIEF IN SUPPORT OF ITS</u>
)	<u>MOTION TO DISMISS</u>
)	

In this case, NRDC asserts claims identical to those being asserted by NRDC's clients in a pending case before the Indiana Office of Environmental Appeals ("OEA"). NRDC argues at considerable length that these claims are federal issues that belong in federal court. That is simply not the case. True, the rules and procedures at issue here were adopted by Indiana to meet the mandates of the federal Clean Air Act. But the permit at issue is a state permit that was issued under state rules and that is governed by state law. The issue of whether the permit is valid is thus an issue of state, not federal law, and the OEA is the forum created by the State of Indiana for the express and exclusive purpose of making the often difficult and highly technical determinations required in reviewing IDEM decisions. As such, the issues raised by NRDC in this lawsuit belong before the OEA.

Every federal court that has been faced with a situation like that presented here has dismissed the federal lawsuit. Some of these courts have concluded that the federal courts

lack jurisdiction in cases such as this, where a permit has been issued but plaintiffs claim it is the wrong kind of permit. *See CleanCOALition v. TXU Generation Company, LP*, 536 F.3d 469 (5th Cir. July 21, 2008), *cf. Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D Penn. 1996). Others have held that even if jurisdiction does exist, the federal courts must abstain from hearing what is simply a collateral attack on state permitting processes and state review of its permitting decisions. *See Sugarloaf Citizens Assoc. v. Montgomery Co., Md.*, No. 93-2475, 1994 U.S. App. Lexis 21985, (4th Cir. Aug. 17, 1994); *Ellis v. Gallatin Steel Co.*, 390 F. 3d 461 (6th Cir. 2004); *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786 (D. W.V. 2007). The rationale differs but the result is invariably the same: the federal case is dismissed.

I. THIS COURT LACKS JURISDICTION OVER THE NRDC'S CLAIMS

NRDC asserts that §304(a)(3) of the Clean Air Act, 42 U.S.C. §7604(a)(3), gives this court jurisdiction over this case. In *CleanCOALition v. TXU Generation Company, LP*, 536 F.3d 469 (5th Cir. July 21, 2008), the Fifth Circuit rejected this claim holding that §304(a)(3) provides jurisdiction only when a source builds with no permit at all.¹

NRDC argues that *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D Penn. 1996) supports a contrary conclusion. This is ironic because the Fifth Circuit relied on *Ogden* to support its holding that §304(a)(3) provides jurisdiction only when a major source or modification is constructed with no permit at all. *See CleanCOALition, supra*, 536 F. 3rd at 479. True, the *Ogden* court did hold that it had jurisdiction, but it did so precisely

¹ NRDC seeks to distinguish *CleanCOALition* on the grounds that the defendant in that case was “still in the permitting process” whereas “[h]ere, the state permitting process has concluded, a minor source permit has been issued... and BP has begun construction.” (NRDC Opposition Brief, p.12). In fact, as the Fifth Circuit made clear, TXU had obtained a permit by the time of the appeal. *See CleanCOALition* at *28 (“not only has TXU applied for a permit, it has since successfully obtained one, though still subject to state judicial review”).

because the case was one in which no air pollution control permit had been issued at all.² *See Ogden, supra*, 911 F. Supp. at p. 867 (“[A] material distinction warrants treating challenges based on the terms and conditions of an actual permit differently than challenges based on the failure to require a permit at all”). Thus, *Ogden* provides no support for finding jurisdiction here, where an air permit has been issued, but NRDC is challenging that permit based on its belief that the permit does not contain the appropriate terms and conditions. *See, e.g.*, NRDC Opposition Brief at p. 7 (claiming the permit issued by IDEM is defective because it fails to “include BACT controls on any pollutant subject to regulation under the PSD program [Part C of the Act], as well as LAER limits and emission offsets for any pollutant subject to regulation under the NNSR program [Part D of the Act.]”).

In discussing both *CleanCOALition* and *Ogden*, NRDC appears to believe that the distinction between a “major” and “minor” source permit is material to the jurisdictional issue. The issue under §304(a)(3), though, is not whether the state has issued a major or minor permit but rather whether it has issued a permit “required under parts C . . . or part D” of the Act. Both parts C and D have provisions describing certain terms and conditions that must be met by “major” modifications. *See* CAA §§165 and 173, 42 U.S.C. §§7475 and 7503. But permits meeting those requirements are not the only types of permits “required under” parts C and D. Indeed, the permit IDEM issued to BP is very much a permit required by Part C and D. The point is made succinctly by NRDC itself:

Under both the PSD [Part C] and NNSR [Part D] programs, the modification of a source qualifies as a “major modification,” triggering major source permitting requirements, if it will result in an increase in the source’s potential to emit (“PTE”) regulated pollutants in excess of the “significance threshold” defined by regulation, unless either (i) the PTE for that pollutant is

² The only permit issued by the State was a solid waster permit, which did not at all address the requirements that would apply to the source under the Clean Air Act or analogous State laws.

limited to below the significance threshold by . . . practically enforceable physical or operational limits; or (ii) the increased emissions of that pollutant are offset by contemporaneous decreases in emissions of that pollutant, such that there is no “significant net emissions increase” in emissions, in a calculation known as “netting.” [Citations omitted]. A source that demonstrates *via PSD or NNSR netting analysis* that its net emissions increase from a major modification will be below the applicable significance threshold for all regulated pollutants may obtain a permit from the state permitting authority that does not meet the requirements of the PSD and NNSR programs (a “minor source permit.”)”

NRDC Opposition Brief at pp. 4-5
(emphasis supplied).

As NRDC recognizes, there are *two* ways to satisfy the permitting requirements of Parts C and D: one may either get a permit that requires compliance with the substantive requirements imposed on major modifications or one may get a permit that includes conditions that assure the modification will not result in a “significant net emissions increase.” If a permittee does not get the former, Parts C and D *require* it to get the latter, and *vice versa*.

In short, Parts C and D present two options to permittees: they may either get a permit that meets the requirements for major modifications or they may get a permit that prevents the modification from becoming major. The permit issued to BP by IDEM is of the second sort. It contains terms and conditions that IDEM has determined satisfy the requirements of the EPA-approved State rules implementing Parts C and D by assuring that the CXHO project will not result in any significant net emission increase for any resulted pollutants. While NRDC disagrees with that determination, it cannot argue that the permit IDEM issued was not a permit “required under” Parts C and D.

In fact, the only actual *holding*³ that provides any support for Plaintiff's jurisdictional argument is that of the Second Circuit in *Weiler v. Chatham Forest Prods., Inc.*, 392 F. 3d 532 (2nd Cir. 2004). *Weiler* is distinguishable from the case presented here, because, in *Weiler*, there was no parallel state appellate proceeding that was pending at the same time. In addition, the *Weiler* court expressly recognized that there were other potential bases for dismissal and invited the District Court to consider those bases on remand.⁴ Thus, *Weiler* supports BP's alternative argument that even if jurisdiction exists, federal courts must abstain from exercising that jurisdiction. But *Weiler*'s jurisdictional holding should not be followed here because, in addition to being inconsistent with the logic of *CleanCOALition* and *Ogden, supra*, it is inconsistent with a core principle of the Clean Air Act: that while Federal assistance and leadership is essential, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of State and local governments." CAA §101(a)(3); 42 U.S.C. 7401(a)(3).

Where a major new or modified source is being built without any permit at all, federal court intervention into state processes may well be appropriate. But where the State, acting pursuant to State rules approved by USEPA, has issued a permit that the State considers to

³ NRDC also cites three decisions of USEPA's Environmental Appeals Board ("EAB") in which the EAB dismissed permit appeals but suggested that appellants could pursue their claim in federal court under section 304(b)(3). None of these three cases include any holdings regarding §7604(a)(3) because none of the cases involved §7604(a)(3) claims. The statements cited by NRDC are simply off-handed remarks made without meaningful consideration, discussion, or citation of authority (other than the previous *dicta* in earlier cases) by an administrative tribunal that was in the process of dismissing claims over which it had no jurisdiction. Such statements about what other avenues might potentially be available to the plaintiffs are not "decisions" of the EAB. They are simply *dicta*. Further, even if these were decisions, this Court is not required to defer to the EAB on issues concerning the scope of its own jurisdiction.

⁴ On remand, the defendant moved to dismiss abstention and failure to exhaust administrative remedy grounds, and Plaintiffs voluntarily dismissed their federal court action on the day their opposition brief would have been due. The docket sheet and the relevant documents relating to the defendant's motion to dismiss in *Weiler* can be accessed through the online "PACER" system.

fully comport with all applicable requirements, challenges to those determinations belong in State, not Federal court.

II. ALTERNATIVELY, THE COMPLAINT MUST BE DISMISSED ON ABSTENTION GROUNDS

Even if jurisdiction existed, dismissal would still be appropriate based on the doctrine of judicial abstention. Every federal court to have considered the impact of *Burford* on a CAA citizen suit collaterally attacking a state-issued air permit has concluded that abstention is required. The NRDC has not, and cannot, dispute this fact. Rather it first tries to argue that other cases arising under other laws and involving very different factual situations require a contrary conclusion. Second, the NRDC tries to distinguish the cases relied on by BP. Neither effort is successful.

The NRDC relies primarily on the Seventh Circuit's decision in *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610 (7th Cir. 1998). *PMC* is not a Clean Air Act case. It involved different statutes, primarily the Resource Conservation and Recovery Act ("RCRA"), which governs solid waste. More important, however, is the fact that, in *PMC*, there was no pending state judicial or administrative proceeding addressing the same matters at issue in the federal suit. Indeed, Judge Posner gave every indication that if there were such a pending action, abstention *would have been appropriate*, stating "there may be room for applying the doctrines of abstention or primary jurisdiction... in cases in which a state has a formal administrative proceeding in progress that the citizens' suit would disrupt, as in *Coalition for Health Concerns v. LWD, Inc.*, 60 F.3d 1188 (6th Cir. 1995)... There is nothing like that here." *PMC*, 151 F.3d at 619.

The NRDC also seeks some support for its abstention argument from two district court decisions, *Oregon State Public Interest Research Group, Inc. v. Pacific Coast Seafoods*

Co., 341 F. Supp. 2d 1170 (D. Or. 2004) and *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306 (C.D. Ill. 1997). Both of these cases are inapposite for the same reasons as *PMC*. First, neither is a Clean Air Act case and, second, in neither case was there a pending state proceeding against the defendant. See *Oregon State*, 341 F. Supp. 2d at 1175; *White & Brewer*, 952 F. Supp. at 1313. Thus, as with *PMC*, these cases provide no support for the NRDC's arguments against application of the *Burford* abstention doctrine here, in a CAA case, where there is a pending state proceeding addressing issues identical to the issues raised here.

In a footnote, the NRDC cites eleven additional cases that it claims further support its argument that this Court should not abstain from hearing this suit. Ten of these eleven cases do not involve the Clean Air Act in any way, and none of these eleven cases address challenges to a state's permitting decisions. Instead, each of the cases relied on by the NRDC involve substantially different facts than the facts presented here.⁵ In fact, to the extent this Court is interested in looking at cases addressing other environmental statutes for guidance, as the NRDC suggests, those cases

⁵ See *Long Island Soundkeeper Fund v. N.Y. City Dep't of Env'tl. Protection*, 27 F. Supp. 2d, 380 (E.D.N.Y. 1998) (a Clean Water Act ("CWA") case that was not challenging a permitting decision and did not even analyze *Burford* abstention and for which there was no pending state action at the time the case was filed); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572 (N.D. Ga. 1995) (a CWA action that did not challenge a permitting decision); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476 (D. Minn. 1995) (an RCRA case that was not challenging a permitting decision and for which there was no pending state court action addressing the same issues); *Comm'y of Cambridge Env'tl. Health & Comm'y Dev'l. Group v. City of Cambridge*, 115 F. Supp.2d 550 (D. Md. 2000) (a CWA case that was not challenging a permitting decision and for which there was no pending state court action addressing the same issues); *L.E.A.D. v. Exide Corp.*, No. Civ. 96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999) (a case involving RCRA, CWA, and CAA that was not challenging a state permitting decision and for which there was no pending state court action addressing the same issues); *Cannata v. Forest Preserve Dist. Of DuPage County*, No. 06 C 2196, 2006 WL 2927604 (N.D.Ill. Oct. 11, 2006) (a case involving RCRA and CERCLA that was not challenging a state permitting decision and for which there was no pending state court action addressing the same issues); *Spillane v. Commonwealth Edison Co.*, 291 F. Supp.2d 728 (N.D. Ill. 2003) (a case involving RCRA and CERCLA that was not challenging a state permitting decision); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801 (N.D. Ill. 1988) (a CWA case that was not challenging a state permitting decision); *Student Public Interest Research Group of N.J., Inc. v. P.D. Oil & Chem. Storage*, 627 F. Supp. 1074 (D.N.J. 1986) (a Federal Water Pollution Control Act ("FWPCA") case that was not challenging a state permitting decision and for which there was no pending state court action addressing the same issues); *Brewer v. Bristol*, 577 F. Supp. 519 (E.D. Tenn. 1983) (a FWPCA case that was not challenging a state permitting decision); *College Park Holdings, LLC v. RaceTrac Petroleum*, 239 F. Supp. 2d 1322, (N.D. Ga. 2002) (an RCRA case that was not challenging a state permitting decision).

support abstention. When a challenge is made to a state permitting decision, as is the case here, federal courts have routinely abstained in favor of allowing any challenges to the permitting decision to proceed through the state's administrative review process.⁶

Turning to the cases cited by BP, NRDC argues that each is distinguishable because "each case involved a situation where a federal major source permit had been issued by the state agency, but plaintiffs claimed that the permit was somehow deficient or invalid." (Opposition Brief, p.18). NRDC misstates both the facts of these cases and the import of their holdings. None of these cases were dismissed because the court concluded that the claims were outside the purview of §7604(a)(3). To the contrary, the courts in these cases could not have addressed the issue of abstention as to the plaintiffs' CAA claims without first finding that jurisdiction under §7604(a)(3) existed – a court cannot abstain from a case over which it lacks jurisdiction.

Specifically, the NRDC claims that in *Ellis v. Gallatin Steel Co.*, 390 F. 3d 461 (6th Cir. 2004), the plaintiffs "argued that a second facility's emissions should have been rolled a [sic] federal major source permit obtained by another entity..." (Opposition Brief, p.18). This is true as far as it goes, but the plaintiffs in *Ellis* were also arguing that the permitting agency should have required the "second facility" (Harsco) to obtain its own major source permit. The confusion is that there were two defendants in *Ellis*. One, Gallatin, did obtain a major source

⁶ See, e.g., *Palumbo v. Waste Tech. Ind.*, 989 F.2d 156, 160 (4th Cir. 1993) (abstaining from challenges to modification of hazardous waste permits, finding that such challenges were more properly addressed through state's administrative review process); *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897, 905 (6th Cir. 1983) (abstaining from challenges claiming state permitting agency had wrongly concluded that defendant did not need an RCRA permit, finding that such challenges were best left to the state to decide); *Polyone Corp. v. Westlake Vinyls, Inc.*, No. 5:05CV-67-R, 2007 U.S. Dist. Lexis 24471 (W.D. Ky. March 30, 2007) (abstaining from challenges claim state permitting agency had wrongly concluded that defendant was not required to get a Part B permit under RCRA, finding that such challenges were best left to the pending state administrative review).

permit for its emissions. The claims against Gallatin, though, were not dismissed due to abstention, they were dismissed on res judicata grounds. *See Ellis*, 390 F.3d at 479.

The second company, Harsco, did not obtain a major source permit, and it was the claims against Harsco that the Court dismissed on *Burford* abstention grounds. *See Ellis*, 390 F.3d at 479-80. The plaintiff argued that both companies should have been required to obtain major source permits (*See Id.* at 466) and that the state permitting agency had incorrectly disagreed as regards Harsco. *See Id.* at 468. Thus, the plaintiff's claims against Harsco are nearly identical to the NRDC's claim here – in both cases the plaintiffs challenged a decision by the state permitting agency that a defendant was not required to obtain a major source permit. This Court should follow the *Ellis* decision, which held that *Burford* abstention was required as to the claims against Harsco.

As to *Sugarloaf Citizens Assoc. v. Montgomery County, Maryland*, No. 93-2475, 1994 U.S. App. LEXIS 21985 (4th Cir. Aug. 17, 1994), while it is true that the challenge was to the details of a major source permit issued to the defendant, the court did not express concern about what type of permit was issued as the NRDC implies. Rather, the court's basis for applying *Burford* abstention was its refusal to second-guess the permitting decisions of the state permitting agency, rather than allowing the state's administrative review process to resolve that issue. These same factors weigh in favor of abstention in this case.

And finally, as to *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786 (D. W.V. 2007), the plaintiff's claim was also quite similar to the NRDC's claim here. In both cases, the claim was that the defendant was beginning construction on a project without a major source permit. In *Jamison*, the defendant had previously obtained a major source permit but the allegations in the complaint (which were taken as true for the purposes of the motion to dismiss)

were that that permit had expired and that construction had begun without any permit at all. As in *Ellis* and *Sugarloaf*, the *Jamison* court paid special attention to the comprehensive state procedures for administrative review of the permitting process, and concluded that the plaintiff's claims were more properly pursued through that process. Accordingly, the *Jamison* court abstained under *Burford*.

The exact reasoning set forth in *Ellis*, *Sugarloaf*, and *Jamison* applies here. Every issue raised in this lawsuit is currently being addressed in the five separate proceedings that are before the OEA. The NRDC is thus inviting this Court to weigh in on issues of state law at the same time that there is a competent state tribunal engaged in considering precisely the same issues. This Court should refuse the NRDC's invitation and should instead abstain from hearing this suit.

III. CONCLUSION

The NRDC's brief does not and cannot dispute the one simple truth in this matter. Every federal court that has been faced with a lawsuit under the Clean Air Act that sought to challenge a state permitting decision in federal court, rather than through the state's administrative review process, has dismissed the federal lawsuit. The NRDC's attempt to preserve for itself a second bite at the apple, should the challenges before Indiana's OEA fail, is improper. In accordance with the case law discussed above, and for all of the foregoing reasons, NRDC's Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **Defendant BP Products North America, Inc.'s Reply Brief in Support of its Motion to Dismiss** was served via the Court's electronic filing system this 29th day of September, 2008 upon counsel of record as set forth as follows:

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