

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION**

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| Natural Resources Defense Council, Inc., |) | |
| |) | |
| Plaintiff, |) | Case No. 2 08 CV 0204 |
| |) | |
| v. |) | Judge Philip P. Simon |
| |) | |
| BP Products North America, Inc., |) | |
| |) | |
| Defendant. |) | |

**MEMORANDUM IN SUPPORT OF DEFENDANT
BP PRODUCTS NORTH AMERICA, INC.'S MOTION TO DISMISS**

BP Products North America, Inc. (“BP”) applied to the Indiana Department of Environmental Management (“IDEM”) for a permit under Indiana’s air pollution control laws allowing BP to construct and operate various modifications to its existing refinery in Whiting, Indiana (“the Refinery”). The purpose of these modifications is to enable the Refinery to process additional amounts of heavy Canadian crude oil. IDEM approved the application and issued a permit allowing BP to construct the modifications subject to the terms and conditions imposed by the permit. A number of environmental groups filed petitions for review of the permit with Indiana’s Office of Environmental Adjudication (“OEA”), the Indiana tribunal authorized to hear and decide initial appeals of IDEM-issued air permits. The Natural Resources Defense Counsel (“NRDC”), Plaintiff in this case, is counsel for one of the petitioners in the OEA appeals process, and NRDC’s complaint here raises issues and claims identical to the issues and claims asserted in the OEA petitions for review. As such, this suit is simply an attempt by NRDC to simultaneously litigate identical issues in two separate forums.

Such procedural maneuvering is not unprecedented, but it is invariably unsuccessful. Every federal district court that has faced such a collateral attack on state permitting determinations has dismissed the complaint, concluding either (a) that the federal courts lack

jurisdiction to review such claims (*see CleanCOALition v. TXU Power*, No. W-06-CA-355 (D. Tex. May 21, 2007), *aff'd*, No. 07-50685, 2008 U.S. App. Lexis 15392 (5th Cir., July 21, 2008))¹ or (b) that, even if jurisdiction exists, the federal courts must abstain from exercising jurisdiction under what is simply a collateral attack on state permitting processes. *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).

I. FACTS

As set forth in NRDC's complaint, BP owns and operates a refinery in Whiting, Indiana (the "Refinery"). See Complaint, ¶1. In July 2006, BP submitted an application to IDEM for a project that would involve significant modifications to the Refinery necessary to allow the Refinery to process increased amounts of heavy Canadian crude oil ("the Project"). See Complaint, ¶¶1, 40. In October of 2007, BP withdrew its application and on November 1, 2007, submitted a modified application to IDEM. See Complaint, ¶41.

On February 11, 2008, IDEM provided notice to the public of the draft permit that it intended to issue to BP, and gave the public access to the draft permit so as to allow public comments. On May 1, 2008, after making a number of changes to the permit terms and conditions in response to the public's comments, IDEM issued a final permit (the "Construction Permit") authorizing BP to commence construction on the Project. See Complaint, ¶42.

During the public comment period, NRDC submitted extensive written comments on behalf of itself and several other entities, raising concerns with the draft permit.² Specifically,

¹ Copies of the district court decision and court of appeals decision are attached hereto as Exhibits 1 and 2, respectively.

² A certified copy of the NRDC's comments is attached hereto as Exhibit 3.

the NRDC comments claimed that BP and IDEM had not accounted for all of the emissions that would result from the Project; that if those emissions had been properly accounted for the Project would have qualified as a “major modification” under the applicable Indiana rules; and that this would have triggered additional requirements beyond those imposed by the permit Indiana had determined was appropriate. See Exhibit 3 at p. 4. These are *exactly* the claims asserted here. See Complaint, ¶¶45-47. The comments were signed on behalf of all other entities joining in those comments by Ms. Ann Alexander, counsel for NRDC in this matter. See Exhibit 3 at p. 35.

After IDEM issued the final Construction Permit, three of the entities that had joined in the NRDC comments, jointly filed a petition for review³ with the Indiana Office of Environmental Adjudication (the “State Petition”).⁴ In addition to representing NRDC in this case, Ms. Alexander and Mr. Cmar, employees of the NRDC, are also representing one of the petitioners in the State Petition. Similarly, in addition to representing the NRDC in this case, Ms. Ferraro, an attorney with the Legal Environmental Aid Foundation, represents the Hoosier Environmental Counsel in the State Petition. Despite NRDC’s role in the public comment process and the fact that two of its employees are serving as counsel for entities participating in the state appeal, NRDC itself did not join in the petition for review.

On July 9, 2008, the NRDC filed the instant action. Every issue raised in this action was also raised in the State Petition and is currently being addressed by Indiana’s Office of

³ The original Petition for Review was filed on May 19, 2008. However, an amended petition was filed on July 15, 2008. A certified copy of the amended petition is attached as Exhibit 4. All but one of the organizations that had joined with NRDC in submitting comments also joined in the State Petition.

⁴ The OEA is authorized to review administrative actions of IDEM, including appeals of the issuance of air permits as in this case, and to conduct adjudicative hearings required to implement air pollution control and other environmental laws. IC 4-21.5-7 et seq.

Environmental Adjudication. In fact, significant portions of the complaint were copied verbatim from the State Petition.⁵

II. LAW AND ARGUMENT

A. This Court Lacks Jurisdiction Over The Claims Asserted By NRDC

NRDC claims that this action is authorized by section 304(a)(3) of the Clean Air Act (the “Act” or the “CAA”), 42 U.S.C. §7604(a)(3). See Complaint ¶¶2-3. That section allows any person to bring a civil action against “any person who proposes to construct or constructs a new or modified major emitting facility without a permit required under Part C of Subchapter I of this Chapter (relating to significant deterioration of air quality) or Part D of Subchapter I of this Chapter (relating to nonattainment). . . .”

NRDC admits that BP applied for and obtained a preconstruction permit from IDEM. See Complaint, ¶¶40-42. NRDC also admits that a permit meeting the requirements of Parts C and D is not required where the “net emissions increase from a . . . modification will be below the applicable significance threshold for all regulated pollutants.” Complaint, ¶28. NRDC’s claim is thus an attack on IDEM’s factual determination that “the net emissions increase from [BP’s project] will be below the applicable significance threshold for all regulated pollutants.”

Such an issue is properly raised in a direct appeal of the permit to the OEA. It is not a separate claim that is cognizable under §304(a)(3) of the CAA.

In *CleanCOALition*, No. W-06-CA-355 (D. Tex. May 21, 2007), the federal district court was presented with an attempt by plaintiffs to use the Clean Air Act’s citizen suit provisions,

⁵ Compare paragraphs 48-61 of the Complaint with paragraphs 21-42 of Exhibit 4; paragraphs 62-66 of the Complaint with paragraphs 43-49 of Exhibit 4; paragraphs 67-69 of the Complaint with paragraphs 50-53 of Exhibit 4; paragraphs 70-71 of the Complaint with paragraphs 54-58 of Exhibit 4; and paragraphs 72-79 of the Complaint with paragraphs 59-66 of Exhibit 4.

CAA §304(a)(1) and (3) and 42 U.S.C. §7604(a)(1) and (3), to challenge an air permit being processed by the State of Texas. The court held that neither of these sections provided a basis for federal court jurisdiction in such a case. With reference to §304(a)(3), the provision on which NRDC relies here, the court held that Congress had never intended to allow that section to be an avenue for collateral attacks on a state's permitting process. Rather, the court held that §304(a)(3) provided the federal courts with jurisdiction only when an entity proposed or started to build a major source or modification without any permit at all:

The Court finds that it lacks jurisdiction under section 304(a)(3). Section 304(a)(3) allows a citizen suit against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C. 42 U.S.C. § 7604(a)(3). Based on the plain language of the statute, the Court finds that Congress intended the violation in this provision to be proposing to construct or constructing a facility without a permit *at all* (or violating an existing permit). . . . Congress did not intend a federal CAA violation for proceeding through the permitting process, which would include determining the adequacy of information and analyses proposed in the permit application and setting the terms and conditions of the permit. The determination of whether an entity is a polluter for purposes of section 304 is to be made against the objective standards in the administrative proceedings, not in federal court. *See Citizens Ass'n*, 535 F.2d at 1322. Congress did intend this provision to allow a federal court in a citizen suit to force a party to get a permit if it is going to build a major emitting air facility (or to enforce the terms of an existing permit). Here, Oak Grove applied for a permit, TCEQ determined that a permit is required, and the TCEQ is now determining whether the permit should issue and any terms and conditions that may be necessary. Any review of the permit and its terms and conditions would only be proper in state court in Travis County.

Id. at pp. 19-20 (Exhibit 1) (emphasis in original),

The Fifth Circuit very recently affirmed this decision based on the same reasoning:

The district court held that §7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so. Instead, the district court interpreted that section as authorizing citizen suits when an entity proposes to construct or constructs a facility *without a permit whatsoever. We agree with the district court's interpretation.* Appellants interpret the phrase "without a permit" to mean "without a permit that complies with the CAA." However, we decline to rewrite the plain language of the statute. Here, not only has TXU applied for a permit, it has since successfully obtained one, though still subject to state judicial review. Thus, it can hardly be said -- as

Appellants must in order for §7604(a)(3) to apply – that TXU is proposing to construct or constructing a facility “without a permit.” . . . ***In short, we agree with the district court that § 7604(a)(3) does not authorize preconstruction citizen suits against facilities that have either obtained a permit or are in the process of doing so.***

CleanCOALition v. TXU Power, No. 07-50685, 2008 U.S. App. Lexis 15392, *28 (5th Cir. July 21, 2008) (citations and footnotes omitted; emphasis added) (Exhibit 2).

NRDC will doubtlessly point out that there is contrary authority on the jurisdictional issue in that the Second Circuit has held that §304(a)(3) does provide jurisdiction for citizen suit attacks on state permitting actions despite the availability of state appellate decisions.⁶ The Fifth Circuit’s holding should be followed in this case, as it is far more consistent with the structure of the Clean Air Act than is the Second Circuit’s.

The Clean Air Act, 42 U.S.C. §7401 et seq., is Congress’ effort to balance the perceived need for nationwide consistency in air pollution control efforts with the sometimes countervailing interests of the States in making policy judgments that affect their citizens. The statutory scheme developed for achieving these goals has changed over time, but has been governed from the outset by two core principles embodied in Section 101 of the Act. On the one hand, Congress recognized that “Federal financial assistance and leadership is essential for development of cooperative Federal, State, regional and local programs to prevent and control air pollution,” 42 U.S.C. §7401(a)(4). On the other, however, Congress also recognized that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of the States and local governments.” *Id.* §7401(a)(3). *See also Union Elec. Co. v. EPA*, 427 U.S. 246 (1976); *Train v. NRDC*, 421 U.S. 60 (1975). To implement this allocation of responsibility, §108

⁶ *Weiler v. Chatham Forest Prods., Inc.* 392 F.3d 532 (2nd Cir. 2004). The Second Circuit expressly did not address alternative grounds, such as abstention, for dismissing the suit and invited the district court on remand to consider such grounds. *See id.* at 539, notes 8 and 9.

of the Act, 42 U.S.C. §7408, assigns to USEPA responsibility for adopting health and welfare-based “National Ambient Air Quality Standards,” or NAAQS, while §110 of the Act, 42 USC §7410, assigns to the States the responsibility for developing the “State Implementation Plans,” or SIPs that contain the requirements that must to be met to assure that the NAAQS are attained and maintained.

The Act and EPA’s implementing regulations prescribe certain elements that SIPs must contain. *See generally* CAA §110, 42 U.S.C. §7410 and 40 C.F.R. Part 51. Of particular relevance here is §110(a)(2)(C) of the Act, which requires each SIP to “include a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D.” The “permit program[s] required by parts C and D” of the Act are known collectively as “major new source review,” since they apply only to “major stationary sources” and “major modifications” of “major stationary sources.”⁷ With respect to non-major sources and non-major modifications, the obligation to “regulat[e] . . . the modification and construction of any stationary source” is achieved both generally and in Indiana through what is known as a “minor new source review program.”

USEPA has promulgated federal rules implementing both Parts C and D of the Act.⁸ However, these federal rules apply only if the State permit programs required by §110(a)(2)(c) have not yet been approved by USEPA as a part of the SIP. *See, e.g.*, 42 C.F.R. 52.21(a). The

⁷ *See* CAA §160 *et seq.* 42 U.S.C. §7470 *et seq.* and 40 CFR 51.166 (areas that are attaining the NAAQS)(Part C of the Act) and CAA §171 *et seq.*, 42 U.S.C. §7501 *et seq.* and 40 C.F.R. §51.165 (areas that are not attaining the NAAQS)(Part D of the Act).

⁸ *See* 40 C.F.R. §52.21 (Part C) and 40 C.F.R. Part 51, Appendix S (Part D).

Indiana rules implementing Parts C and D of the Act have been approved by USEPA, most recently on June 18, 2007. 72 Fed. Reg. 33,395 (June 18, 2007). Indiana's minor new source review rules have also been approved by EPA. 62 Fed. Reg. 38,919 (July 21, 1997). Thus, the federally-approved *state* rules govern air pollution sources in Indiana and the *federal* new source review rules do not apply.

The Second Circuit's interpretation of §304(a)(3) undermines the balance between federal and state roles under the Act, while the Fifth Circuit's interpretation is consistent with the Act and its regulations. As a part of Indiana's obligations under the Clean Air Act, the State has adopted not just an EPA-approved set of permitting rules, but also a specialized process by which an aggrieved party may first seek administrative and then judicial review of IDEM's permitting decisions. See IC 4-21.5-5 *et seq.* and IC 13-15-6. The first step in the process – a step open to NRDC that it elected not to take -- is to file a petition for review with the OEA. See IC 13-15-6-1. The OEA is a specialized administrative review body whose sole function is to review decisions made by IDEM. See IC 4-21.5-7-3. Under Indiana law, the OEA is obligated to provide petitioners an entirely *de novo* hearing on appeals brought before it. See IC 4-21.5-3-27. See also, *Indiana Ky. Elec. Corp. v. Comm'r IDEM*, 820 N.E. 2d 771, 781 (Ind. Ct. App. 2005). The decisions of the OEA are, in turn, subject to review in accordance with Indiana Rules governing civil appeals. See IC 4-21.5-6-7.

In conformity with the CAA, Indiana has adopted a detailed and comprehensive process that meets all federal requirements not just for reviewing permit applications but also for securing public input into those decisions, and for providing any aggrieved party with an opportunity to challenge those decisions *de novo* in both administrative and judicial forums. It strains credulity to suppose that the same Congress that concluded that “air pollution prevention . . . and air pollution control at its source is the primary responsibility of the States,” CAA

§101(a)(4), 42 U.S.C. §7401(a)(4), would also authorize “any person” to circumvent and collaterally attack the process developed by the State for discharging those responsibilities by simply bringing a federal court suit raising the same issues that can be, and indeed in this case are being, litigated in the State proceedings.

As the Fifth Circuit concluded, §304(a)(3) provides citizens with a federal remedy where the entity in question constructs a major source or modification without getting any permit at all. In such a case, there is no state appellate remedy of which the aggrieved party could avail itself. But where, as here, the entity has applied for and obtained a valid state-issued permit, the objecting parties must avail themselves of the process for review that the state has adopted – as the NRDC had the opportunity to do and as they have done in choosing to represent parties to that state proceeding.

Thus, this Court lacks subject matter jurisdiction over the NRDC’s claims and this lawsuit should be dismissed.

B. Alternatively, The Complaint Must Be Dismissed On Abstention Grounds

While federal courts are generally required to exercise the jurisdiction they have been granted, the Supreme Court has recognized that federal courts must abstain from exercising federal jurisdiction in cases where, as here, federal review would be disruptive of comprehensive state administrative and regulatory programs. *See Burford v. Sun Oil Company*, 319 U.S. 315 (1943). In *Burford*, the plaintiff filed suit in Federal District Court attacking the validity of a Texas Railroad Commission order granting the defendants permission to drill several oil wells. The Court held that the federal case should have been dismissed in order to protect the rightful independence of state governments in carrying out their domestic policy. *Id.*, 319 U.S. at 318.

In considering the United States Supreme Court decisions explaining *Burford*, the Seventh Circuit has explained:

Where timely and adequate state-court review is available, a federal court sitting in equity *must decline to interfere with the proceedings* or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Nelson v. Murphy, 44 F. 3d 497, 500-01 (7th Cir. 1995) (quoting *New Orleans Public Service, Inc. v. New Orleans*, 491 U.S. 350, 361 (1989)(emphasis in original)). Thus, if either of the two *Burford* prongs is met, abstention is required and the NRDC Complaint should be dismissed. See *U.S. v. Riverside Laboratories, Inc.*, 678 F. Supp. 1352, 1360 (N.D. Ill. 1988).

1. 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

While the Seventh Circuit has never been presented with a situation in which a citizen group seeks to use section 304(a)(3) to collaterally attack a State-issued air permit, that exact issue has been presented in a number of other cases in other jurisdictions. In every one of those cases where abstention under *Burford* was considered, the court concluded that abstention is required.⁹

For example, in *Ellis v. Gallatin Steel Co.*, 390 F. 3d 461 (6th Cir. 2004), the Kentucky Division of Air Quality ("KDAQ") determined that the defendant company did not need a Prevention of Significant Determination ("PSD") permit for its operation of a steel manufacturing facility. Challenges to this decision by the KDAQ were filed with various state

⁹ In addition to the cases discussed below, see *League to Save Lake Tahoe, Inc. v. Trounaday*, 598 F.2d 1164 (9th Cir. 1979) (dismissing challenge under §304(a) of the CAA to permitting decision, finding the case should have been brought through the state administrative review procedures, rather than in federal court).

agencies and courts. *See id.*, 390 F.3d at 480 (explaining that, at the time of the district court decision, the “state agency and courts were reviewing the precise issue raised by the Ellises’ federal permit claims.”). Nevertheless, while those challenges were pending, the plaintiffs filed a federal court action under section 304(a)(3) challenging the KDAQ determination that a PSD permit was not required. The Sixth Circuit Court applied the *Burford* abstention doctrine, explaining that:

‘federal review at this juncture would be disruptive of Kentucky’s efforts to establish a coherent policy’ with respect to PSD permitting of emitting facilities, particularly as *the state agency and courts were reviewing the precise issue raised by the Ellises’ federal permit claims at the time of the district court’s opinion*. Federal review also would be disruptive here because it would require the district court to revisit earlier decisions made by the Kentucky Division of Air Quality that Harsco’s operations did not require a PSD permit and that Gallatin and Harsco are not a single “major stationary source”-- an issue committed by the Clean Air Act to state resolution. . .

The Ellises’ permit claims boil down to allegations that the Kentucky agency “failed to apply or misapplied [its] lawful authority under Kentucky law and under” the Clean Air Act by. . . determining that a PSD permit was unnecessary with respect to Harsco. . . [S]uch administrative claims offer a classic explanation for applying *Burford* abstention.

Id., 390 F.3d at 480-81 (citations omitted) (emphasis added). Based on these conclusions, the Sixth Circuit upheld the decision of the trial court to abstain from hearing the plaintiff’s claims challenging the State’s permitting decision.

Similarly, in *Sugarloaf Citizens Assoc. v. Montgomery County, Maryland*, No. 93-2475, 1994 U.S. App. LEXIS 21985 (4th Cir. Aug. 17, 1994), the Maryland Department of Energy (“MDE”) issued a permit to the County to construct a solid waste incinerator. The plaintiff challenged the issuance of the permit through the state administrative and judicial procedures. However, while plaintiff’s state court appeal was pending, the plaintiff also challenged the State

permit in federal court asserting jurisdiction under section 304 of the CAA. The trial court applied *Burford* and dismissed the complaint, finding that the plaintiff's claims were merely a collateral challenge to the permitting decisions of the MDE. The Fourth Circuit agreed and found that the relevant claim in Sugarloaf's complaint was essentially

“[an] expression[] of displeasure with the alleged inadequacies of [MDE] review.” Count I is actually an objection to a state agency's findings under state law, and “nothing more than a collateral attack on the prior permitting decisions of” MDE. As such, that claim is not actionable under CAA. Moreover, a federal court's consideration of Count I would necessarily entail a determination of Appellees' compliance with the offset requirement and their ensuing eligibility for the permits, issues central to state land use control which federal courts are ill-equipped to resolve. *Burford* abstention remains appropriate.

Sugarloaf, 1994 U.S. App. LEXIS 21986 at *19-20 (citations and quotations omitted).

Accordingly, relying on *Burford*, the Fourth Circuit upheld the dismissal of the federal court action, explaining that the “exercise of federal jurisdiction over MDE's permitting decisions would disrupt Maryland's complex statutory scheme and frustrate the State's efforts to establish a coherent environmental policy, thereby warranting *Burford* abstention . . .” *Id.* at *16.

Finally, in *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786 (D. W.V. 2007), the plaintiffs challenged a determination by the West Virginia Department of Air Quality (“DAQ”) that a previously-issued permit had expired. The defendants moved to dismiss, citing the *Burford* abstention doctrine. The court granted the motion, providing a summary of the considerations underlying the applicability of the *Burford* abstention doctrine to CAA citizen suits.

First, the court found that issues raised by the plaintiffs' federal lawsuit involved “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in' the instant action.” *Id.* at 790.

The DAQ's permitting decisions challenged by the plaintiffs in this case involve matters of substantial local concern, specifically air quality and land use in West Virginia. Similar to the environmental issues raised in *Sugarloaf* and *Palumbo*, the issue of air quality in West Virginia is an important state policy matter. Moreover, state agencies must balance the competing interests of protecting the environment and fostering economic growth in West Virginia. Significantly, Congress has also recognized that air pollution prevention and control is best regulated by the states, 42 U.S.C. § 7401(a)(3), and, therefore, under Section 7410 of the CAA, the EPA delegates the responsibility for administering the Act to state agencies.

Id.

The court next found that “the exercise of federal jurisdiction over the DAQ's permitting decisions would disrupt West Virginia's comprehensive scheme for issuing permits, and, therefore, would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.” *Id.* at 791.

Although the plaintiffs strive to characterize their claim as one arising under the citizen suit provision of the CAA, their claim is actually a collateral attack on a state agency decision made under state regulatory law, similar to the claims in *Palumbo* and *Sugarloaf*. . . . West Virginia cannot be expected to effectively control air pollution if it must contend with a federal district court, not as familiar in state regulatory law, second guessing its decisions under the state's regulatory scheme.

Id. at 790-91.

Based on this analysis, the court dismissed under *Burford*, finding that the “specific circumstances” that the “Supreme Court held require abstention are clearly present in this matter.” *Id.* at 792.

This exact reasoning applies here. Every issue raised in this lawsuit is currently being addressed by the state process that was specifically put in place to adjudicate challenges to IDEM's permitting decisions. 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.

2. Abstention In This Case Is Also Consistent With The Analogous Seventh Circuit Decisions Applying *Burford*

It does not appear that any courts within the Seventh Circuit have ever addressed the precise issue presented here. Nevertheless, there is a substantial body of Seventh Circuit case law addressing *Burford* abstention issues in other contexts. This law supports the conclusions of the Clean Air Act decisions cited above.

The Seventh Circuit Court of Appeals has articulated four factors that a district court should consider in determining whether to abstain pursuant to *Burford*: (1) whether the suit is based on a cause of action which is exclusively federal; (2) whether difficult or unusual state laws are at issue; (3) whether there is a need for a coherent state doctrine in the area; and (4) whether the stated procedures indicate a desire to create special state forums to adjudicate the issues presented. *See Hartford Cas. Ins. Co. v. Borg-Warner Ins. Services*, 913 F.2d 419, 425 (7th Cir. 1990). While consideration of these factors ordinarily involves a balancing test (*see, e.g., Rewerts v. Reliance Ins. Co.*, 170 F. Supp. 2d 847, 853 (C.D. Ill. 2001)), in this case, all four factors support abstention.

First, claims brought by the NRDC here are not exclusively federal in nature. Indeed, these claims are not even primarily federal. As discussed above, issues raised by NRDC here are exactly the ones raised in the pending state proceeding, a proceeding in which NRDC is actively participating in all but name. The relief sought is identical as well. In both this suit and the State Petition, the NRDC seeks a declaratory judgment that the Project is a “major modification” requiring a different type of permit from the one IDEM issued. Finally, the regulations at issue are not federal regulations. They are regulations adopted by the state. The many citations to

federal regulations contained in the NRDC complaint are inapposite. Because U.S. EPA has approved the Indiana permitting rules as a part of the Indiana SIP, the federal permitting rules do not apply.

Second, issues of state law involved in this case are complex. Indiana has established a detailed regulatory scheme for air permitting that has been approved by U.S. EPA as meeting all relevant requirements of the Clean Air Act. This air permitting scheme is similar to those in other states which have been deemed to be “complex” and “systematic processes” to evaluate facilities which have an impact on the environment and therefore warranting *Burford* abstention.¹⁰ Like these other state programs, Indiana’s state SIP constitutes a complex, detailed and thorough system of regulations. The Permit Review Rules alone span over two-hundred pages of the Indiana Administrative Code. *See* 326 IAC 2-1. The fact that difficult and complex state regulatory laws are at the core of the NRDC’s collateral attack in the Complaint further supports abstention by this Court.

Third, there is a need for a coherent state doctrine in the area of environmental regulation in Indiana. In fact, the stated purpose of Indiana’s extensive body of environmental law is “to provide for evolving policies for comprehensive environmental development and control on a statewide basis [and] to unify, coordinate, and implement programs to provide for the most beneficial use of the resources of Indiana.” IC 13-12-3. Indeed, the CAA itself expressly

¹⁰ *See* cases cited in Section II(B)(1) of the Memorandum. *See also* *Ada-Cascade Watch Co. v. Cascade Res. Recovery, Inc.*, 720 F.2d 897, 905 (6th Cir. 1983) (assessing Michigan’s hazardous waste regulatory scheme as a “complex and systematic process” and dismissing under *Burford*); *Sugarloaf Citizens Assoc. v. Montgomery County Maryland*, No. 93-2475, 1994 U.S. App. Lexis 21985, *13-15 (4th Cir. Aug. 17, 1994) (assessing Maryland’s regulatory scheme air and hazardous waste regulatory schemes as “comprehensive and complex” and affirming dismissal under *Burford*); *Palumbo v. Waste Tech. Ind.*, 989 F.2d 156, 160 (4th Cir. 1993) (assessing Ohio’s hazardous waste regulatory schemes as “complex” and reversing with instructions to dismiss under *Burford*).

recognizes that “air pollution prevention...and air pollution control at its source is the primary responsibility of States and local governments.” 42 U.S.C. §7401(a)(3). The appeals process, discussed *infra*, adopted by Indiana is an important component of the State’s efforts to fulfill this responsibility, and there is an obvious need for the state bodies involved in permitting and appeals to be able to independently develop a coherent and consistent interpretations of Indiana law as it relates to these processes.

Finally, Indiana has created a special state forum to adjudicate the exact issues presented by plaintiffs in this case. The OEA was created in 1995 as an independent forum specifically to review the decisions of IDEM. See IC 4-21.5-7-3. OEA appeals are adjudicatory procedures heard by environmental law judges who act as the ultimate authority and are charged with taking all measures necessary for the efficient, fair, and impartial resolution of issues arising from Indiana environmental laws. See 315 IAC 1-3-1 and IC 4-21.5-7-3. In adjudicating issues arising under Indiana law, Environmental Law Judges are authorized to rule on motions and requests, issue orders, administer oaths and affirmations, examine witnesses, make evaluation rulings, solicit testimony, issue subpoenas and decide questions of fact and law. See 315 IC 1-3-1. The Environmental Law Judge sits as a trial judge applying a de novo standard or review. See IC 4-21.5-3-27. *See also Indiana Ky. Elec. Corp. v. Comm’r IDEM*, 820 N.E. 2d 771, 701 (Ind. Ct. App. 2005). The administrative law judges at OEA are impartial and have the necessary expertise and experience with state environmental laws to review and adjudicate issues relating to air, water, and pollution control laws. See IC 4-21.5-7-3. By statute, an OEA Environmental Law Judge must be an attorney admitted to the Indiana Bar, have at least five years of administrative or environmental experience in Indiana, and be independent and impartial to the department of environmental management. See IC 4-21.5.7-6. Indiana law provides exclusive means for judicial review of agency actions under its Administrative Orders and

Procedures Act. See IC 4-21.5-5 *et seq.* A party who wishes to file an appeal with OEA may do so, by way of a written petition, if they object to a decision of IDEM and have been aggrieved or adversely affected by the decision. See IC 13-15-6 *et seq.* Judicial decisions on petitions for review are then appealable in accordance with the rules governing civil appeals from the courts. See IC 4-21.5-16.

In fact, Indiana's procedures for appealing permitting decisions of IDEM are nearly identical to the West Virginia procedures that the federal district court approved in *Jamison*. Both states have created a special adjudicatory office to hear permitting decisions, and both states allow litigants to appeal decisions from that office to the state court system. In *Jamison*, the court held that "Because West Virginia has clearly implemented the kind of timely and adequate system of review that *Burford* contemplated, the Court *must abstain* in this matter." *Jameson*, 493 F. Supp. 2d at 792 (emphasis added). Indiana already has a specialized state forum to adjudicate issues such as those NRDC bring here; therefore, this Court should abstain.

In sum, Indiana law and administrative procedures provide a comprehensive and specialized system for resolving disputes relating to air permits and air permitting decisions such as those brought by plaintiffs here. The creation of the OEA as a centralized body to adjudicate issues relating to Indiana's air permitting scheme in an unbiased fashion by an Environmental Law Judge with expertise in environmental matters clearly illustrates that Indiana has established a specialized forum to resolve matters such as those raised in the Complaint. Accordingly, this fourth factor also weighs in favor of abstention here.

Thus, in accordance with the Clean Air Act cases cited above, this Court should apply the *Burford* abstention doctrine and should dismiss the NRDC's Complaint.

III. CONCLUSION

For all of the foregoing reasons, NRDC's Complaint should be dismissed with prejudice.

Respectfully submitted,

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*(Pro Hac Vice Admission Applications to admit attorneys Patberg, Davis, O'Doherty, and Mercer have been submitted to the Clerk of Courts.)

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

Kim Ferraro
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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

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