

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

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

**DEFENDANT BP PRODUCTS NORTH AMERICA, INC.’S
MEMORANDUM IN SUPPORT OF ITS MOTION TO
DISMISS AMENDED COMPLAINT OR FOR A STAY OF PROCEEDINGS**

I. BACKGROUND AND PROCEDURAL HISTORY.

Pursuant to state rules implementing the Clean Air Act, and after review and approval by USEPA, the Indiana Department of Environmental Management (“IDEM”) issued construction and operating permits allowing BP Products North America, Inc. (“BP”) to modify its existing refinery in Whiting, Indiana so that it could process larger volumes of heavy crude oils derived from Canadian oil sands. The Natural Resources Defense Counsel (“NRDC”), acting as counsel for various other environmental groups, filed petitions for review of the permits with Indiana’s Office of Environmental Adjudication; (“OEA”). The Indiana tribunal authorized to hear initial appeals of IDEM-issued air permits. Then, acting in its own behalf, and asserting jurisdiction under the “citizen suit” provision of the Clean Air Act, CAA §304(a)(3), 42 USC §7604(a)(3), NRDC filed suit in this court, asking the court to declare the IDEM construction permit invalid

and enjoin construction of the Canadian crude project (“hereinafter “the Project”). The grounds for its suit were two claims identical to claims that were also being asserted before OEA.

BP moved to dismiss the complaint, arguing, first, that the Clean Air Act’s citizen suit provision did not provide the court with jurisdiction to entertain collateral attacks on state-issued permits, and second, that even if jurisdiction did exist, the court would be required to abstain from interfering with the state’s environmental permitting and review processes. See BP’s Motion to Dismiss, filed August 6, 2008 (Doc. # 9,10).

After briefing on the motion to dismiss was complete, NRDC moved for leave to amend its complaint to assert a new claim based on a “notice of violation” (“NOV”) issued to BP by USEPA on October 1, 2008. NRDC simultaneously moved OEA for leave to amend its petition for review to include an identical claim in that proceeding.¹ This court granted NRDC leave to amend. See Opinion and Order dated November 26, 2008 (Doc. # 36). Based on that decision, the court then ruled that BP’s motion to dismiss the original complaint was moot, and noted that BP was free to move to dismiss the amended complaint if it saw fit. See Order dated November 26, 2008 (Doc. # 37).

BP now moves the court to dismiss the Amended Complaint on substantially the same grounds that underlay its motion to dismiss the original complaint. IDEM has authorized BP to construct and operate its Project. NRDC’s Amended Complaint, no less than the original, is simply an effort to use the powers of this Court to invalidate the permit and stop the Project. The additional claim asserted by NRDC – which appears as Count II in the Amended Complaint – is simply another argument as to why the permit IDEM issued is invalid. This claim does not change the fact that the Court cannot grant NRDC the relief it seeks in Count II without

¹ A copy of the Second Amended Petition for Review is attached as Exhibit A. The petitioner’s motion for leave to file this petition has not yet been granted by OEA, but it is unopposed and BP expects that OEA will issue an order granting it very soon.

invalidating the state-issued permits and thereby preempting the state permitting and appellate processes. Thus, the Amended Complaint, no less than its predecessor, is a collateral attack on IDEM's permitting decisions and an end-run around Indiana's environmental appellate review process.

This court does not have jurisdiction over such actions. *CleanCOALition v. TXU Power*, 536 F.3d 439 (5th Cir. 2008), *Cert. Denied* 2008 U.S. LEXIS 8771, 77 U.S.L.W. 3324 (December 1, 2008). Even if it did, it would be required to abstain from exercising jurisdiction in this case in order to avoid interfering in Indiana's permitting and appellate review processes. *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). For both of these reasons, the Amended Complaint should be dismissed. Failing that, however, the court must, at a minimum, stay all proceedings in this case until such time as the state appellate proceedings have been completed. *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976). Under no circumstances should BP be required to defend the same claims at the same time against the same adversaries in two separate forums.

II. FACTS.

A. The OCC Project.

The OCC project is a multi-billion dollar investment in Northwest Indiana. The state has indicated that the project involves the largest capital investment in Indiana history.² BP commenced construction on the project in early May 2008, and close to a thousand construction workers are already working on the project at construction sites in and around Whiting, Indiana. As construction progresses, the project will employ thousands of additional workers in

² See statement of Governor Daniels quoted in BP Press Release, September 20, 2006, attached as Exhibit B.

Northwest Indiana, and in factories, fabrication facilities, and module yards located in Texas, Louisiana, South Carolina, and the Philippines. When the project is complete, 80 full-time jobs will have been added to the Refinery's workforce, gasoline supplies in the Midwest and greater Chicago area will have been increased by nearly 800 million gallons per year, and energy security and independence will have been enhanced by enabling the Midwest's largest refinery to process additional amounts of crude oil from Canada, a stable country with national interests that are aligned with those of the United States.

The project will do all of this while *reducing* air emissions by approximately 8% from baseline levels, and improving the safety, efficiency and availability of the Refinery. NRDC alleges that, as a result of the project, "the Refinery will emit massive excess quantities of sulfur dioxide, nitrogen oxides, volatile organic compounds, and particulate matter," and that, "all of these pollutants, alone and in combination, will cause severe public health and environmental problems in the vicinity of and downwind of the Refinery." While BP recognizes the court's obligation to assume that the allegations in the complaint are true when addressing a motion to dismiss, it is important that the Court understand that such allegations badly mischaracterize the project. Both IDEM and USEPA spent nearly two years reviewing the permit application and both agencies concluded that the project will *reduce* Refinery emissions relative to baseline levels. Alarmist allegations that the project will adversely affect human health and welfare are simply not true.

B. NRDC's Claims.

NRDC challenges the determinations of IDEM and USEPA on three basis. Claims I and III of the Amended Complaint are essentially identical to Claims I and II of the original complaint. They allege that, in various ways, IDEM and USEPA failed to account for all of the

emissions associated with the project, and that, if a proper accounting of the emissions had been made, different permitting requirements would have been triggered. See Amended Complaint ¶¶ 1,50-80, 88-96. As such, these claims are direct attacks on the IDEM's permitting decisions.

Count II of the Amended Complaint is the new claim that NRDC added by amending its complaint. In this count, relying entirely on an unsupported allegation in a “notice of violation” issued by USEPA,³ NRDC alleges (a) that certain changes made to FCU 500 in 2005 were actually a part of the OCC project; (b) that those 2005 changes considered alone constituted a major modification; (c) that the so-called “Combined OCC Project” was therefore required to obtain, but did not get, a major new source review permit in 2005; and (d) that the permit that was ultimately issued by IDEM does not cure this alleged “violation”. See Amended Complaint ¶¶ 2, 81-87; Memorandum in Support of NRDC's Motion for Leave To Amend (Doc. # 30) at pp: 5 - 6. This claim differs somewhat from those asserted in Counts I and III in that it is premised on events occurring before IDEM issued the permit to construct to BP. But the gravamen of the Count II, like that of Counts I and III, is that the permit IDEM issued is invalid. Thus, no less than the claims asserted in counts I and III, the claim asserted in Count II is simply another collateral attack on a state-issued permit.

³ The NOV is itself nothing but an allegation. “In most cases, the enforcement process is initiated with an EPA-issued violation notice” which is commonly referred to as a notice of violation or NOV. *Sierra Club v. Johnson*, 541 F.3d 1257, 1261 (11th Cir. 2008). No adjudication is required before EPA issues an NOV as it is merely “EPA's process for leveling allegations against a party it perceives to be violating clean air requirements,” and it provides an alleged violator with “notice of the accusations leveled against them prior to EPA taking further enforcement action.” *Id.* at 1267; see also *U.S. v. A.M. General Corp.*, 808 F. Supp. 1353, 1362-63 (N.D. Ind. 1992); *Royster-Clark v. Johnson* 391 F. Supp. 2d 21 (D. D.C. 2005) (No legal consequences flow from the issuance of an NOV because it merely notifies the violator of their existing obligations under the CAA). Thus, NOVs are allegations, not actual determinations, that a violation has occurred. *Citizens for Clean Air & Water v. Air Pollution Control Div.*, 181 F.3d 393, 396 (Co. App. 2008). NOVs are not appealable because they are not final agency determinations. *Pacificcorp v. Thomas*, 833 F.2d 661 (9th Cir. 1988); *West Penn Power v. Train*, 522 F.2d 302 (3rd Cir. 1975); *A.M. General Corp.*, *Id.*; *Royster Clark*, *Id.*

III. ARGUMENT.

A. The Court Lacks Jurisdiction Over The Claims Asserted In The Amended Complaint

NRDC asserts that section 304(a)(3) of the Clean Air Act, 42 USC §7604(a)(3), provides this court with jurisdiction to entertain these claims. That contention was rejected by the Fifth Circuit in *CleanCOALition v. TXU Power*, 536 F.3d 469 (5th Cir. 2008), *cert. denied* 2008 U.S. LEXIS 8771, 77 U.S.L.W. 3324 (December 1, 2008).⁴

In *CleanCOALition*, the district court held that Congress never intended to allow §304(a)(3) to be used as a vehicle for collateral attacks on a state’s permitting process. Rather, the court held that federal courts had jurisdiction only if an entity proposed or started to build a major source or modification with no 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. . . . See *Citizens*

⁴ See also *Romoland School District v. Inland Empire Energy Center, LLC*, 2008 U.S. App.LEXIS 23854 (9th Cir., Nov. 18, 2008) In *Romoland*, the Ninth Circuit affirmed a district court’s finding that Clean Air Act’s citizen suit provisions did not provide the district court with jurisdiction to hear claims which amounted to attacks on a combined construction and operating permit issued for a new power plant. This case is arguably distinguishable from the present one because there the state issued a single permit that authorized both construction and operation of a new facility and the court relied on federal rules that explicitly provided that the state-level appeals process was the exclusive remedy for challenging state-issued operating permits. Nonetheless, the case is illustrative of the reluctance of federal courts to entertain collateral attacks on state-issued permits where state-level appellate process are available. Furthermore, other federal courts, including the Seventh Circuit Court of Appeals, have precluded USEPA and citizens from filing enforcement actions in federal court that collaterally attack state-issued permits. See *U.S. v. AM General Corp.*, 34 F.3d 472 (7th Cir. 1994); *U.S. v. Solar Turbines*, 732 F. Supp. 535 (M.D. Pa. 1989); *National Parks Conservation Assoc. v. TVA*, 175 F. Supp. 2d 1071 (E.D. Tenn. 2001) (citing *AM General* and *Solar Turbines* to find that “no evidence in the language of the Clean Air Act to indicate that Congress intended that citizen suits could be used to collaterally attack facially valid state permits”, and dismissing Clean Air Act citizens suit).

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.

CleanCOALition v. TXU Power, Case No. W-06-CA355 (W.D. TX. May 21, 2007), at pp. 19-20 (Exhibit C) (emphasis in original). The Fifth Circuit affirmed finding

that:

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 supra, 536 F.3d at 479 (emphasis added).

NRDC is likely to advance three arguments in its efforts to distinguish or rebut the Fifth Circuits' holding. First, NRDC may argue that the *CleanCOALition* actually *supports* jurisdiction in this case, since, in Count II of the Amended Complaint, NRDC now alleges that BP commenced construction “with no permit at all.” Had NRDC brought this action *before* IDEM issued a construction permit for the project, this argument might well have had merit. However, at this point even NRDC admits that permits authorizing construction and operation of the project have been issued. Amended Complaint at ¶ 1. Thus, the Court cannot grant NRDC the relief it seeks for its second claim without invalidating the permits issued by IDEM and

without thereby pre-empting the state's administrative review process. It is this fact that deprives the court of jurisdiction.

As the Fifth Circuit recognized, where no permit has been issued, Section 304(a)(3) allows the Court to exercise jurisdiction over a citizen's claim that a permit was required. Where a permit has been issued, however, that section does not authorize the Court to exercise jurisdiction over a claim that the permit is invalid or that its terms and conditions are inadequate. These latter questions are to be resolved in the state appeals process, a process in which NRDC is even now participating and in which it is asserting each of the claims it now seeks to assert here.

Second, NRDC is likely to argue that *CleanCOALition* is distinguishable in that the permittee in that case had in fact applied for and received a "major" new source review permit whereas, BP obtained a "minor" new source review permit. In NRDC's view, a "minor" new source review permit is not a "permit required by Part C . . . or Part D . . ." of the Act. Thus, NRDC will argue, BP does not have "a permit required by Part C . . . or Part D." It should be noted that nothing in the opinions of either the district court nor the Fifth Circuit provides any support for the argument that the type of permit at issue was important to the court's holding. Beyond that, however, NRDC's argument that the distinction between "major" and "minor" permits is material to the jurisdictional issue is simply wrong. The issue under §304(a)(3) 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 D" of the Clean Air Act. Both parts contain provisions describing terms and conditions that must be met by "major" modifications. *See* CAA §§ 165 and 173, 42 U.S.C. §§7475 and 7503. However, as NRDC has recognized, permits for the construction of "major" new sources and/or major modifications of existing sources are not the only types of permits that are required under parts C and D of the Clean Air Act:

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 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 emission 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) . . .

See NRDC’s Memorandum in Opposition to BP’s Motion to Dismiss at pp 3-4 (Doc. # 22).

Thus, there are two ways to satisfy the permitting requirements of Parts C and D, obtaining a permit that requires the source to comply with substantive requirements imposed by law upon major modifications, or obtaining a permit that that contains conditions that assure that the modification will not result in a “significant net emissions increase.” If a permittee does not obtain the former, Parts C and D require it to obtain the latter.

The permit that IDEM issued to BP is the latter, as BP went through the “netting” process when it submitted its permit application to IDEM, and the permit that IDEM issued contains terms and conditions that IDEM has determined will satisfy IDEM regulations that implement Parts C and D and assure that the project will not result in a significant net emissions increase for any regulated pollutants. NRDC may not like the permit that IDEM issued to BP, but the permit is a permit “required under” Parts C and D as described in §304(a)(3) of the Clean Air Act.

Finally, NRDC will point out that there is a split of authority on this issue as the Second Circuit has held that §304(a)(3) allows citizen suits to be used to attack state permitting actions despite the availability of state administrative and judicial remedies. *See Weiler v. Chatham Forest Prods., Inc.* 392 F.3d 532 (2nd Cir. 2004). The Fifth Circuit’s holding in *CleanCOALition*

should be followed in this case, however, as it is far more consistent with the structure of the Clean Air Act than the Second Circuit's decision.

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 of the Act, 42 U.S.C. §7408, assigns to U.S. EPA 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.”⁵ 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.⁶ However, these federal rules apply only if the State permit programs required by §110(a)(2)(c) have not yet been approved by U.S. EPA as a part of the SIP. *See, e.g.*, 42 C.F.R. 52.21(a). The Indiana rules implementing Parts C and D of the Act have been approved by U.S. EPA, 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. 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 seek administrative and 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 is the filing of a petition for review with the OEA. *See* IC 13-15-6-1. The OEA is a specialized

⁵ *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).

⁶ *See* 40 C.F.R. §52.21 (Part C) and 40 C.F.R. Part 51, Appendix S (Part D).

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 for reviewing permit applications, securing public input, and providing an opportunity to challenge permitting decisions *de novo* in 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 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 obtaining any permit at all. The Fifth Circuit’s interpretation comports with the structure and organization of the Clean Air Act when an entity starts construction without obtaining any type of pre-construction permit because in such a case, the aggrieved parties could not avail themselves of state remedies, like appealing a permit to OEA, because there is no permit to appeal. Here, BP has applied for and obtained a valid permit from IDEM. Thus, objecting parties must avail themselves of the administrative and judicial review processes provided by Indiana law. NRDC had the

opportunity to file a petition for review of the permit with the OEA. While NRDC did not file a petition in its own name, it is representing other parties in the filing and litigation of petitions for review of the permit at OEA that address all of the issues and claims that NRDC raises in its Amended Complaint.

The court lacks subject matter jurisdiction over the NRDC's claims and its Amended Complaint should be dismissed.

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

Even if the Court determines that it has jurisdiction over NRDC's claims, the abstention doctrine first articulated in *Burford v. Sun Oil Company*, 319 U.S. 315 (1943) requires that the case be dismissed so as to avoid disrupting Indiana's comprehensive preconstruction air permitting program. As the Seventh Circuit has held:

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 NRDC's Amended Complaint should be dismissed. See *U.S. v. Riverside Laboratories, Inc.*, 678 F. Supp. 1352, 1360 (N.D. Ill. 1988).

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, this exact

issue has been presented in a number of other cases in other jurisdictions. In every case where the *Burford* abstention doctrine was considered, the court concluded that abstention was required. See *Ellis v. Gallatin Steel Co.*, 390 F. 3d 461 (6th Cir. 2004); *Sugarloaf Citizens Assoc. v. Montgomery County, Maryland*, No. 93-2475, 1994 U.S. App. LEXIS 21985 (4th Cir. Aug. 17, 1994); *Jamison v. Longview Power, LLC*, 493 F. Supp. 2d 786 (D. W.V. 2007). See also, *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). Even in *Weiler*, the only case to have concluded that jurisdiction to entertain such suits exists, the Second Circuit expressly invited the district court on remand to consider *Burford* abstention. See *Id.* at 539, notes 8 and 9. On remand, there, the defendant moved the Court to dismiss on abstention grounds noting that the plaintiff failed to take advantage of the judicial process for challenging permits provided by New York law, that other persons had exercised these rights, and the state's permitting decisions were eventually affirmed by a New York Supreme Court. The plaintiffs responded by voluntarily dismissing their action in federal court.

These decisions are consistent with a substantial body of Seventh Circuit case law considering the *Burford* abstention doctrine in other contexts. In those cases, the Seventh Circuit has articulated four factors for district courts to consider in deciding whether to abstain under *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. While it is true that the rules under which IDEM acts have been adopted by Indiana to implement requirements of the federal Clean Air Act, those rules are state, not federal, rules. It is the State's right and duty to interpret and apply those rules. Federal interpretations of similar federal rules will frequently be influential in that effort, but they are not binding on the state. Were this court to entertain this suit, therefore, it would be interpreting and applying state rather than federal law.⁷

Second, the 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 USEPA as meeting all relevant requirements of the Clean Air Act. IDEM's application of this regulatory scheme is at the heart of NRDC's claims. Indiana's air permitting scheme is similar to those of other states which have been deemed to be "complex" and "systematic processes" to evaluate facilities which have an impact on the environment and warrant *Burford* abstention. *See e.g. 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 air and hazardous waste regulatory schemes as "comprehensive and complex" and affirming dismissal under *Burford*).

Third, there is a need for a coherent state doctrine in the area of environmental regulation in Indiana. The CAA itself expressly recognizes that "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments" CAA §101(a)(3), 42 U.S.C. §7401(a)(3), and the stated purpose of Indiana's own extensive body of environmental law is "to provide for evolving policies for comprehensive environmental

⁷ Indiana's state implementation plan is a collection of state regulations that have been approved by USEPA.

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. Thus, there is an obvious need for the state bodies involved issuing permits and litigating related appeals to be able to independently develop a coherent and consistent interpretation of Indiana law.

Finally, Indiana has created a special state forum to adjudicate the exact issues presented by NRDC 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. The OEA’s decisions are appealable through Indiana’s state court system. IC 4-21.5-16.

The Clean Air Act and Seventh Circuit cases cited herein dictate that the Court should apply the *Burford* abstention doctrine to dismiss NRDC’s Amended Complaint.

C. To The Extent The Court Does Not Dismiss The Amended Complaint Entirely, All Remaining Claims Must Be Stayed To Prevent Duplicative Litigation Pursuant To The *Colorado River* Doctrine.

In the event that any of Plaintiff’s claims survive dismissal for lack of jurisdiction or *Burford* abstention, the Court should stay them pursuant to the *Colorado River* doctrine until the concurrent state permit appeal is litigated to a full and final conclusion.

The *Colorado River* doctrine is grounded in the Supreme Court’s decision in *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800 (1976) which allows district courts to “stay or dismiss⁸ an action when there is a concurrent state court proceeding⁹ and the stay would

⁸ While the *Colorado River* doctrine allows for dismissal, the Seventh Circuit has noted on several occasions that the proper remedy under *Colorado River* is a stay, not dismissal. See *Selmon v. Portsmouth Drive Condominium Assoc.*, 89 F.3d 406 (7th Cir. 1996) (collecting citations).

⁹ For purposes of the *Colorado River* doctrine the OEA’s administrative appeal process is the equivalent of a “state court proceeding.” *Nader v. Keith*, 382 F.3d 729, 732 (7th Cir. 2004) (noting that federal courts can stay actions pending before them under *Colorado River* when parallel state judicial or administrative proceedings are pending); *Chase Brexton Health Services, Inc. v. Maryland*, 411 F.3d 457, 463 FN 2 (4th Cir. 2005) (“For this purpose, administrative proceedings, when adjudicative in nature, are considered state suits.”).

promote wise judicial administration.” *AXA Corporate Solutions v. Underwriters Reinsurance Corp.*, 347 F.3d 272, 278 (7th Cir. 2003). District courts must conduct a two-part inquiry to determine if a stay is appropriate. *Tyrer v. City of South Beloit*, 456 F.3d 744 (7th Cir. 2006). First, the court must determine if the state and federal suits are parallel. *Id* at 751. If they are parallel, the court balances several non-exclusive factors to determine if the circumstances justify a stay. *Id*.

1. This Case and The State Petition Action Are Parallel.

Two suits are parallel "when substantially the same parties are contemporaneously litigating substantially the same issues in another forum." *Clark v. Lacy*, 376 F.3d 682, 686 (7th Cir. 2004). The suits need not be identical, they simply must "arise out of the same facts and raise similar factual and legal issues." *Tyrer*, 456 F.3d at 752; see also *Caminiti and Iatarola, Ltd. v. Behnke Warehousing, Inc.*, 962 F.2d 698, 700 (7th Cir. 1992) (need not be identical); *Day v. Union Mines, Inc.*, 862 F.2d 652, 656 (7th Cir. 1988) (cases parallel when state court would inevitably reach federal case issues even if specific issues not directly raised in state complaint).

Under these standards, this case is clearly parallel to the OEA proceeding: all of the issues raised here have also been raised in the OEA petitions for review. There should be no dispute that all of the claims and issues that NRDC raises in its Amended Complaint are also pending before OEA.¹⁰ In addition, while NRDC is not formally a party to the OEA case, it is representing one of the named petitioners and acting as lead counsel for all of the others.

When the interests of the plaintiffs in state and federal actions are congruent, a stay pursuant to *Colorado River* may be appropriate notwithstanding the non-identity of parties. *Lumen Construction, Inc. v. Brant Construction Company, Inc.*, 780 F.2d. 691, 695 (7th Cir. 1985)

¹⁰ See footnote 1.

citing *Canady v. Koch*, 608 F. Supp. 1460, 1475 (S.D. N.Y. 1985), see also *Behnke Warehousing, Inc.*, 962 F.2d at 701 (parties to the state and federal suits were somewhat different, but slight difference in the parties and issues was not sufficient to destroy the parallel nature of the two proceedings); *Manna v. Greenburgh #11 School District*, 2 F. Supp. 2d 461 (S.D. N.Y. 1998) (parties were similar enough where federal plaintiff was not a party to state action, but was a member of a union that filed state action on her behalf.); *Jordi v. The Sauk Prairie School Board*, 651 F. Supp. 1566 (W.D. WI. 1987) (rejecting argument that parties were not parallel when some plaintiffs in federal court action were not parties to state court action because interests of plaintiffs in all the suits were congruent); *Forrest v. The Gas Company, LLC*, 2008 U.S. Dist. LEXIS 84081 (D. HA. 2008) (rejecting argument that suits not parallel because plaintiffs in each suit were different because plaintiffs in both suits had congruent interests). If the rule were otherwise, the *Colorado River* doctrine could be avoided through the expedient naming of parties. See *Lumen Construction, Inc.*, 780 F.2d. at 695. Here, NRDC's interests are congruent with the petitioner's interests as both actions contain substantially the same claims and both suits are being litigated for them by the same attorney.

2. Exceptional Circumstances Justify A Stay.

Since the suits are parallel, the Court must balance several factors to determine if exceptional circumstances justify a stay:

(1) whether the state has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which jurisdiction was obtained in the concurrent forums; (5) the source of governing law, state or federal; (6) the adequacy of state-court action to protect the federal plaintiffs rights; (7) the relative progress of state and federal proceedings; (8) the presence or absence of concurrent jurisdiction; (9) the availability of removal; and (10) the vexatious or contrived nature of the federal claim.

Behnke Warehousing, Inc., Id. The factors are not to be applied like a mechanical checklist, but

balanced as they apply in a given case. *Moses H. Cone Memorial Hospital v. Mercury Constr. Co.*, 460 U.S. 1, 16, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). While no single factor is necessarily determinative, one factor can be the sole motivating reason for abstention. *Colorado River*, 424 U.S. 800, 818; *Moses H. Cone*, *Id.*

Here, the state of Indiana, through IDEM and OEA, has regulatory jurisdiction over BP's Refinery and has exercised that jurisdiction by issuing permits authorizing BP to construct and operate the CXHO Project, and by presiding over the pending permit appeal which was filed several months before this action and is substantially further along than this action.

Moreover, the risk of piecemeal litigation and inconsistent outcomes is great. "Piecemeal litigation occurs when different tribunals consider the same issue, thereby duplicating efforts and possibly reaching different results." *Day*, 862 F.2d. at 660.¹¹ Piecemeal litigation is inevitable here if both this case and the OEA case proceed simultaneously, since the factual and legal issues presented in this case are identical to those pending before OEA. *See Moorer v. Demopolis Waterworks and Sewer Board*, 374 F.3d 994 (11th Cir. 2004) (affirming district court's stay of Clean Water Act citizen suit pursuant to *Colorado River* based upon danger of piecemeal litigation).

The order of filing, the relative status of the two proceedings, and applicable law in both cases all support a stay of this action. NRDC filed its petition for review with OEA three months prior to bringing this action. The deadline for initiating fact discovery in the OEA case expired at the end of October,¹² petitioners expert reports are due in a few days, and a *de novo* hearing

¹¹ "Forcing the parties to litigate dual proceedings would involve a grand waste of efforts by both the courts and the parties in litigating the same issues in two forums at once." *Id.*

¹² In the state permit appeal BP has responded to 81 interrogatories (not counting hundreds of voluminous sub-parts), and 31 requests for admission with 31 corresponding contingent interrogatories, and produced approximately 40,000 pages of documents. Moreover, the Petitioners have deposed ten BP employees and two

on the merits of the petition is scheduled for August.¹³ In contrast, BP has yet to answer NRDC's Complaint or Amended Complaint in this case, and no discovery has been initiated. Finally, the legal issues presented in both cases are issues of state, not federal law. While Indiana's new source review rules are required by and implement the Clean Air Act, and are part of the state's federally approved state implementation plan, they remain state law and states can and do interpret their own regulations in ways that differ from how USEPA might interpret analogous federal rules.

The OEA proceeding is more than adequate to protect NRDC's rights. OEA is a highly specialized tribunal, the sole function of which is to review IDEM decisions, including air permits. The OEA proceeding culminates in a *de novo* hearing conducted under Indiana's Trial Rules, the Indiana equivalent of the Federal Rules of Civil Procedure, and is presided over by an administrative law Judge who is highly trained and experienced in hearing complex environmental matters of Indiana law.

NRDC should be content with the normal appeal process provided by Indiana, rather than simultaneously pursuing four separate and independent legal challenges to the construction and operating permits issued by IDEM.¹⁴

The court should stay this action pursuant to *Colorado River* because the state and federal

IDEM employees, and noticed 8-10 additional depositions that have yet to be taken. Further, the parties have retained expert witnesses and are required to exchange expert reports this Winter.

¹³ These case deadlines are reflected in a revised case scheduling order that the parties submitted to OEA in early December. The OEA has not entered the order but it is expected to do so very soon.

¹⁴ In addition to this case, NRDC has filed two separate petitions for review at OEA (one for the construction permit that IDEM issued for the project, and another for the operating permit), and a separate petition with the Administrator of USEPA pursuant to 42 U.S.C. § 7661d(b)(2) (Exhibit D) in which it asks USEPA to object to the operating permit that IDEM issued and require IDEM to revise and reissue the permit. USEPA has not taken action on the petition, but when it does, the decision is appealable to the 7th Circuit Court of Appeals. *See* 42 U.S.C. § 7607; *Citizens Against Ruining the Environment v. EPA*, 535 F.3d 670, 672-73 (7th Cir. 2008) (explaining the petition process and judicial review provisions). NRDC's petition to USEPA of the operating permit contains many, but not all, of the same claims that it makes in this case and the in petitions that it filed with OEA. Thus, if this case were to proceed, it could result in two different panels of the Seventh Circuit hearing some of the same claims.

actions are parallel and the balancing test demonstrates exceptional circumstances favor the issuance of a stay.¹⁵

IV. CONCLUSION.

For all of the foregoing reasons, NRDC's Complaint should be dismissed with prejudice. If not dismissed in its entirety, the Court should stay further proceeding in this case until the state permit appeals are litigated to a final conclusion.

Respectfully submitted,

/s/ James H. O'Doherty

Anthony C. Sullivan (# 14974-53)
Joel T. Bowers (# 27037-71)
Barnes & Thornburg, LLP
11 South Meridian Street
Indianapolis, Indiana 46204-3535
Phone: 317.231.7472
Fax: 317.231.7433
tony.sullivan@btlaw.com
joel.bowers@btlaw.com

William L. Patberg (0019771)
Michael A. Snyder* (0069425)
James H. O'Doherty (0071564)
Shumaker, Loop & Kendrick, LLP
1000 Jackson Street
Toledo, Ohio 43604-5573
Phone: 419.241.9000
Fax: 419.241.6894
wpatberg@slk-law.com
msnyder@slk-law.com
jodoherty@slk-law.com

*(A motion for admission of attorney Snyder to the bar of this Court is in the process of being submitted to the Clerk of Courts.)

¹⁵ This court also has the power to stay this case pursuant to its inherent authority to control the disposition of the causes on its docket. See *Landis v. North American Company*, 299 U.S. 248, 57 S. Ct. 163; 81 L. Ed. 153 (1936); *Azar v. Merck & Co., Inc.* 2006 U.S. Dist. LEXIS 78655 (N.D. Ind. 2006); *Beng v. Eli Lilly and Co.*, 553 F. Supp. 2d. 1049 (N.D. 2008); *Radio Corp. of America v. Igoe* 217 F. 2d. 218 (7th Cir. 1954).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *Defendant BP Products North America, Inc.'s Motion to Dismiss and Memorandum in Support* was served via the Court's electronic filing system this 12th day of January, 2009 upon all counsel of record.

/s/ James H. O'Doherty _____
An Attorney for Defendant,
BP Products North America, Inc.