UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiff,	)	Case No. 2 08 CV 0204
v.	)	Judge Philip P. Simon
BP PRODUCTS NORTH AMERICA, INC., Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT BP PRODUCTS NORTH AMERICA, INC.'S MOTION TO DISMISS AMENDED COMPLANT OR IN THE ALTERNATIVE FOR A STAY OF PROCEEDINGS

Plaintiff Natural Resources Defense Council, Inc. ("NRDC") respectfully opposes Defendant BP Products North America, Inc.'s ("BP") motion to dismiss. NRDC's First Amended Complaint ("Am. Compl.") (Dkt. 38) alleges that Defendant BP Products North America, Inc. ("BP") has been in violation of the Clean Air Act ("CAA") since 2005 by constructing a major modification without a major source permit. As explained below, the CAA citizen suit provision, by its plain text, provides this Court with jurisdiction over NRDC's claims.

In response, BP argues that a state law minor source permit that was issued by the Indiana Department of Environmental Management ("IDEM") in 2008 both deprives this Court of jurisdiction and requires it to abstain. This case is not a collateral attack on an IDEM decision. Rather, it is a direct attack on BP's failure to comply with controlling federal law, specifically, the CAA's requirement that major sources of air pollution obtain major source permits, prior to construction, when they engage in major modifications of the source. Further, dismissal of this case for the tenuous reasons put forth by BP would not only be contrary to the plain text of the CAA, but also to its structure of "cooperative federalism," which relies on the

availability of federal citizen suits as a supplement to governmental action, to ensure that federal requirements are enforced. BP is unable to point to any case involving dismissal of a challenge under the CAA citizen suit provision – like NRDC's here – to construction of a major source or modification in the absence of a federally required major source permit. It is well established that federal courts have a "virtually unflagging obligation" to exercise the jurisdiction provided to them by Congress, particularly in a case such as this one that involves federal law issues of national concern. BP's requested dismissal of this case would frustrate Congress's intent in creating a citizen suit remedy applicable to the precise circumstances at issue in this case. It should be rejected by this Court.

STANDARD OF REVIEW

"When reviewing a dismissal for lack of subject matter jurisdiction, . . . a district court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 625 (7th Cir.1999). Although the Court may consider evidence outside the pleadings "to determine whether in fact subject matter jurisdiction exists," *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698, 701 (7th Cir. 2003), such evidence is immaterial if it does not "call[] jurisdiction into doubt," *Hay v. Indiana State Bd. of Tax Comm'rs*, 312 F.3d 876, 879 & n.2 (7th Cir. 2002). The same standard applies to a motion to dismiss on abstention grounds: the Court should "look no further than the Complaint and the applicable statutes and case law" unless there is a material dispute of fact relating to whether the Court should exercise jurisdiction. *Discovery House, Inc. v. Consolidated City of Indianapolis*, 970 F. Supp. 655, 657-58 (S.D. Ind. 1997); *see also Beres v. Village of Huntley, Ill.*, 824 F. Supp. 763, 766 (N.D. Ill. 1992).

STATUTORY AND REGULATORY BACKGROUND

The CAA is designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b)(1). Under section 110(a) of the Act, 42 U.S.C. § 7410(a), states are responsible for implementing many of the regulatory requirements of the Act, including provisions of the Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") programs (described below), through State Implementation Plans ("SIPs"). SIP provisions must satisfy the requirements of the Act before they are approved by the United States Environmental Protection Agency ("EPA"). 42 U.S.C. § 7410(k). EPA regulations set detailed minimum requirements for the contents of SIPs, including PSD and NNSR provisions, 40 C.F.R. § 51.166 (PSD); *id.* § 51.165 (NNSR), and states must "use the specific provisions" and regulatory definitions contained therein unless the state is able to demonstrate to EPA that a proposed deviation is "at least as stringent" as EPA's default rule. *Id.* § 51.165(a)(1), (a)(2)(ii), (a)(3)(F), (a)(6) (NNSR); *id.* § 51.166(a)(7)(iv), (b), (i)(6), (r)(6) (PSD).

Part C of subchapter I of the Act, 42 U.S.C. §§ 7470-7492 (the "PSD program"), sets forth requirements for the prevention of significant deterioration of air quality in areas designated as "attainment areas" for particular pollutants.[1] These requirements are designed to protect public health and welfare, to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources, and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of

[1] Pursuant to section 109 of the Act, 42 U.S.C. § 7409, EPA has established National Ambient Air Quality Standards ("NAAQS") to protect human health and the environment for seven "criteria pollutants," including sulfur dioxide, nitrogen oxides, particulate matter, carbon monoxide, and ozone. 40 C.F.R. pt. 50. Under section 107(d) of the Act, 42 U.S.C. § 7407(d), each state must designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified because of insufficient data. An area that meets the NAAQS for a particular criteria pollutant is an "attainment" area for that pollutant. An area that does not meet the NAAQS for a particular criteria pollutant is a "nonattainment" area for that pollutant. An area that cannot be classified for a particular criteria pollutant is "unclassifiable" for that pollutant.

such a decision and after adequate procedural opportunities for informed public participation in the decision making process. 42 U.S.C. § 7470. Section 165(a) of the Act, 42 U.S.C. § 7475(a), prohibits the construction and operation of a "major emitting facility" in an attainment area unless a permit has been issued that complies with the requirements of section 165, including the requirement that the facility install the best available control technology ("BACT") for each pollutant subject to regulation under the Act that is emitted from the facility. *See also* 40 C.F.R. § 51.166. Section 169(2)(C) of the Act, 42 U.S.C. § 7479(2)(C), defines "construction" to include "modification." Indiana's federally approved SIP implements the PSD provisions of the Act in Indiana. *See* 326 IAC 2-2; 72 Fed. Reg. 33,395 (June 18, 2007).

Part D of subchapter I of the Act, 42 U.S.C. §§ 7501-7515 (the "NNSR program"), sets forth requirements for nonattainment areas that are designed to achieve attainment of the NAAQS. *See* 42 U.S.C. § 7502. Like the PSD program, the NNSR program requires major emitting facilities to obtain permits before undertaking modifications, as defined in section 111(a) of the Act, 42 U.S.C. § 7411(a). 42 U.S.C. § 7503; 42 U.S.C. § 7501(4). The NNSR program further requires such a facility, among other things, to limit emissions of nonattainment pollutants to the lowest achievable emissions rate ("LAER"), and to obtain emission offsets for nonattainment pollutants. 42 U.S.C. § 7503; 40 C.F.R. § 51.165. Indiana's federally approved SIP also implements the NNSR provisions of the Act in Indiana. *See* 326 IAC 2-3; 72 Fed. Reg. 33,395 (June 18, 2007).

Under both the PSD and NNSR 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 federally or otherwise practicably enforceable physical or operational limitations; 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 increase" in emissions, in a calculation process known as "netting." *See* 42 U.S.C. §§ 7475(a) (PSD), 7503(c) (NNSR); 40 C.F.R. §§ 51.166 (PSD), 51.165 (NNSR); 326 IAC 2-2-1 & 2-2-2 (PSD), 2-3-1 & 2-3-2 (NNSR). 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"). *See* 326 IAC 2-7-10.5.

Even after approving a state's SIP, EPA retains supervisory authority over the state permitting authority, including the authority to rescind its approval of the SIP, 42 U.S.C. § 7413(a), to require changes to the SIP, *id.* § 7410(k)(5), (*l*), and to act on its own to enforce CAA provisions, *id.* §§ 7413(b)-(f), 7420. In addition, the CAA contains a citizen suit provision, 42 U.S.C. § 7604, which authorizes "any person" to commence an enforcement action against an entity who is violating the CAA under certain circumstances, including the construction of "any new or modified major emitting facility" without a required PSD or NNSR permit. *Id.* § 7604(a)(3).

STATEMENT OF FACTS

This case is about BP's proposed expansion of its refinery in Whiting, Indiana. The expansion is intended to enable BP to process an additional volume of Canadian extra heavy oil ("CXHO"). Am. Compl. ¶ 42. BP commenced construction of its refinery expansion in early 2005 through a Turnaround Project ("TAR Project") at one of the refinery's fluidized cracking

units ("FCU 500"). *Id.* BP did not apply for any CAA permit prior to commencing construction on the 2005 TAR Project at FCU 500. *Id.* ¶ 43.

In 2006, BP submitted an application to IDEM for a major source permit for other, different construction activities – not including the TAR Project at FCU 500 – related to the refinery expansion project. *Id.* ¶ 44. In October 2007, however, BP withdrew its application for a major source permit and submitted a revised application that sought only a minor source permit, based on new netting numbers purporting to show that the refinery expansion would not result in a significant net emissions increase. *Id.* ¶ 45. IDEM, relying on BP's netting analysis in that application, issued a state law minor source permit to BP on May 1, 2008. *Id.* ¶ 46.[2]

In November 2007, EPA issued BP a Notice of Violation ("NOV") alleging that the 2005 TAR project was a major modification requiring a CAA major source permit, which BP had failed to obtain. *Id.* ¶¶ 2, 47. In October, 2008, EPA amended the NOV to allege that commencement of the 2005 TAR project was effectively commencement of the CXHO Project, and hence that the CXHO Project had also been unlawfully commenced in 2005 without a major source permit. *Id.* ¶¶ 2, 48.

NRDC's First Amended Complaint alleges that BP's refinery expansion project is a major modification, and therefore that BP's commencement of construction without a major source permit violates the CAA. *Id.* ¶¶ 50-96. BP has been in violation of the CAA since 2005, when it commenced construction of the TAR Project at FCU 500 (with neither a major nor a minor source permit). *Id.* ¶¶ 42-43, 82-87. In addition, BP has been in violation of the CAA with respect to the construction activities it commenced in 2008, because those activities, even

[2] Several environmental organizations appealed IDEM's issuance of the minor source permit to the Indiana Office of Environmental Adjudication ("OEA"). *See* Am. Compl. ¶ 46. NRDC did not join that appeal. Although it is true that NRDC's counsel also represent an organization that is participating in the OEA proceeding, *see* BP Mem. Ex. A, that fact is irrelevant to BP's motion here.

when considered separately from the 2005 TAR Project, constitute a major modification for which BP has not obtained a major source permit. *Id.* ¶¶ 50-80, 89-96. In order to come into compliance with the CAA, BP must apply for and receive a CAA permit that requires BACT controls on any pollutant subject to regulation under the PSD program, as well as LAER limits and emissions offsets for any pollutant subject to regulation under the NNSR program, including particulate matter that is less than 2.5 microns in diameter ("PM 2.5"). *Id.* ¶¶ 50-52, 87, 89-96.

NRDC filed its initial Complaint in this action on July 9, 2008. (Dkt. 1.) On November 5, 2008, NRDC moved for leave to amend its pleading to add allegations concerning BP's 2005 TAR Project, which motion the Court granted on November 26, 2008. (Dkt. 29, 36.) BP moved to dismiss NRDC's First Amended Complaint on January 12, 2009. (Dkt. 44.)

ARGUMENT

A. This Court Has Jurisdiction over NRDC's Challenge to BP's Construction of A Major Modification to Its Refinery without A CAA-Required Major Source Permit.

The CAA plainly provides jurisdiction here. Under the CAA citizen suit provision, in pertinent part, "any person may commence a civil action . . . against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under [the PSD program or the NNSR program]." 42 U.S.C. § 7604(a)(3). NRDC alleges in its First Amended Complaint that BP commenced construction of its expansion of the Whiting refinery in early 2005, Am. Compl. ¶ 42, and it is undisputed that construction is ongoing and that BP has not obtained a major source pre-construction permit under either the PSD or NNSR provisions of the CAA, *id.* ¶¶ 43-49. Further, NRDC alleges in its First Amended Complaint that BP's refinery expansion is a "major modification," triggering major source permitting requirements under both the PSD and NNSR programs. *Id.* ¶¶ 50-96. Pursuant to these alleged facts, which must be assumed to be true for the purposes of this motion to dismiss, *St. John's*

United Church of Christ, 502 F.3d at 625, NRDC contends that BP commenced construction of a major modification without a major source permit, in violation of the CAA. Am. Compl. ¶¶ 50-96. This is precisely the type of claim that is authorized by 42 U.S.C. § 7604(a)(3).

In its motion to dismiss, however, BP urges the Court to ignore the plain text of the CAA and find that it does not have jurisdiction, because BP applied for, and was granted, a minor source permit from IDEM in 2008 that did not require compliance with CAA PSD or NNSR provisions. *See* BP Mem. at 7-8. BP further urges the Court to ignore NRDC's allegations that it in fact began construction in 2005, prior to seeking a permit from IDEM, because it claims that "such allegations badly mischaracterize the project." *Id.* at 4. In effect, BP is asking the Court to assume that its version of the facts is true and to find that it has no jurisdiction over NRDC's claims on that basis. BP's attempt to recast its position on the merits of NRDC's claims as a jurisdictional argument is improper, and it should be rejected by this Court. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.").

BP has provided no support for its contention that the 2008 IDEM state law minor source permit, which permitted different activities than those commenced in 2005 (albeit different parts of the same refinery expansion project), can somehow cure the ongoing 2005 violations complained of in NRDC's First Amended Complaint. On the contrary, once a violation of federal law has taken place, the violator cannot cure the violation *post facto* by obtaining a state law permit that does not require full compliance with CAA major source permitting

requirements. *See United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1161-62 (D. Colo. 1988) (holding that a source that violates CAA requirements may not avoid being treated as a major source based on state permit emissions limits that purport to keep it under the major source permitting threshold); Memorandum from Eric V. Schaeffer, EPA Director of Office of Regulatory Enforcement, to EPA staff and attorneys (Nov. 17, 1998) (EPA guidance on appropriate injunctive relief for major source permitting requirements), *available at* http://www.epa.gov/region07/programs/artd/air/nsr/nsrmemos/nsrguida.pdf (last visited Oct. 24, 2008); *cf. United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1087-92 (W.D. Wisc. 2001) (holding that defendant's settlement with state agency of state law enforcement action did not preclude federal CAA enforcement action involving same underlying activities).

If the allegations in NRDC's First Amended Complaint are true, BP should be subject to civil penalties for its ongoing violations of the CAA. *See* 42 U.S.C. §§ 7604(a), 7413(b). BP does not attempt to argue that EPA cannot bring an enforcement action in federal court to enjoin its ongoing violations and collect those penalties pursuant to its amended NOV grounded in allegations that are substantially similar to those in NRDC's First Amended Complaint. *See* Am. Compl. ¶¶ 2, 48. Nor does BP attempt to make, nor could it, a principled distinction between the rights given by the CAA to EPA and those given to citizen groups in this regard. Rather, BP's ongoing violations of federal law give rise to jurisdiction in this Court for a federal enforcement action, whether by EPA or citizen groups. The state law minor source permit issued by IDEM in 2008 has no effect on that.

Even if BP had not begun construction prior to obtaining a minor source permit, the CAA would still provide jurisdiction here. BP's assertion that the state law permit it obtained from IDEM is "a permit required by Part C . . . or Part D," within the meaning of 42 U.S.C.

§ 7604(a)(3), ignores the fact that those statutory provisions apply only to "major emitting facilities." Part C requires major emitting facilities in attainment areas to obtain PSD permits, 42 U.S.C. § 7475(a), while Part D requires major emitting facilities in non-attainment areas to obtain NNSR permits, 42 U.S.C. § 7503. The minor source permit that BP did obtain is a creature of state law alone. *See* 326 IAC 2-7-10.5. BP's 2008 IDEM minor source permit was not "required," in any sense of that word, by Parts C or D.

Indeed, in a case directly analogous to this one, the Second Circuit held that 42 U.S.C. § 7604(a)(3) authorized a citizen suit against a private company to enjoin construction of a facility that was allegedly a major source, where the company had only obtained a minor source permit from the state permitting authority. *Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 539 (2d Cir. 2004). In so holding, the Second Circuit first acknowledged, "as a guiding principle[,] that citizen suits play an important role in the [CAA's] enforcement scheme." *Id.* at 536. Even though a state appeal of the permitting authority's decision to grant the minor source permit was available, the *Weiler* court found that, in light of the plain meaning of the citizen suit provision, as well as "the absence of any express statutory language or other strong indication of congressional intent" that citizen suits be precluded under such circumstances,[3] federal jurisdiction must be available. *Id.* at 536, 539. In other words, the *Weiler* court found that "[i]f Congress intended to foreclose citizen suits in this context, it could have said so," and it

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[3] On the contrary, the legislative history of 42 U.S.C. § 7604(a)(3) indicates that Congress intended every major source to comply with CAA PSD and NNSR provisions, and that citizens were authorized to sue to enjoin their construction whenever they did not. The House Conference Report to what would become Pub. L. No. 95-95, which created § 7604(a)(3), explains that the Senate added that provision to the legislation "to allow a citizen to bring suit to prevent construction of a major emitting facility without a permit in compliance with section 110(g), the [PSD program.]" H. Conf. Report No. 95-564, at 173 (1977), *available at* 1977 U.S.C.C.A.N. 1502, 1553 (emphasis added). Not only did the House conferees agree with the Senate amendment, they expanded it to include the NNSR program. *Id.* The House Conference Report stated that "[c]itizen suits are authorized against sources to enforce compliance only with respect to . . . (2) any proposal to construct or the construction of any new or modified major emitting facility without a permit under the prevention of significant deterioration provision or the nonattainment provision." *Id.*

did not. *Id.* at 539. While recognizing that such citizen suits "would challenge the determinations of state agencies," the *Weiler* court noted that "Congress has required both state agencies and private entities to meet the demands of the [CAA]." *Id.* at 538-39. As "[t]he plaintiffs allege that both the agency and the private entity have not met their responsibilities," the *Weiler* court concluded, "we do not see why the private entity should be immune from this suit." *Id.* at 539.

Other courts have agreed with this analysis. In *Ogden Projects, Inc. v. New Morgan Landfill Co.*, 911 F. Supp. 863 (E.D. Pa. 1996), the court held that a citizen suit was available under 42 U.S.C. § 7604(a)(3) to challenge construction of a landfill. In that case, the state permitting authority had issued a solid waste permit for the landfill and determined that CAA NNSR provisions did not apply. *Ogden Projects*, 911 F. Supp. at 866. The *Ogden Projects* court found that it had jurisdiction over plaintiffs' citizen suit, notwithstanding the state's issuance of a facially valid state law permit, because plaintiffs' challenge was not to the "terms and conditions" of the permit that the state had issued, but rather to "the failure to require a [federal NNSR] permit at all." *Id.* at 867. If it were the former case, the court found, it would be "appropriate to defer to state law procedures for judicial review of state agency action"; however, because "Congress left no room for discretion" with respect to whether a major source in a non-attainment area had to comply with NNSR requirements, the court found that it was "competent to address" plaintiffs' challenge to the source's failure to obtain a NNSR permit. *Id.* Further, in rejecting the defendant's argument that it did not have jurisdiction, the court noted that the CAA citizen suit provision "does not contain any language conditioning the availability

of a federal court citizen suit on the nonexistence of a state agency applicability determination." *Id.* at 868.[4]

In addition, in two cases, EPA's Environmental Appeals Board (the "EAB") addressed factual situations virtually identical to this case and concluded that CAA citizen suits are available even when a source has a state-issued minor source permit.[5] In both *In re: Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 2001 WL 206031 (EAB 2001), and *In re: DPL Energy Montpelier Electric Generating Station*, 9 E.A.D. 695, 2001 WL 254272 (EAB 2001), the EAB confronted state-issued minor source permits that citizens had challenged as not effectively limiting the source's emissions below the threshold for triggering major source PSD permitting requirements. In both cases, the EAB ruled that it had no jurisdiction to review the minor source permits, while stressing that its ruling would not deprive the citizens of a remedy, in part because federal CAA citizen suits under 42 U.S.C. § 7604(a)(3) were available to enjoin the construction of a major source, regardless of whether there was a state-issued minor source permit. *See In re: Carlton*, 9 E.A.D. at 693; *In re: DPL Energy*, 9 E.A.D. at 699.

Moreover, *In the Matter of: Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, 2003 WL 1383468 (EAB Mar. 5, 2003), the EAB considered the extent of its jurisdiction in a case in which IDEM had determined that a power plant expansion did not have to comply with PSD requirements. IDEM had approved an amendment to an operating permit issued pursuant to

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[4] *See also Pennsylvania v. Allegheny Energy, Inc.*, No. 05-885, 2006 WL 1509061, at *7-8 (W.D. Pa. Apr. 19, 2006) (Mag. Rep. and Recommendation), *adopted* 2006 WL 1520650 (May 30, 2006) (rejecting argument that facially valid state operating permit precluded CAA citizen suit for failure to obtain CAA pre-construction PSD or NNSR permit for major modifications); *cf. Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002) (holding that a citizen suit under the Clean Water Act, 33 U.S.C. § 1365 ("CWA"), was available to challenge alleged discharges of pollutants even where state permitting authority has determined that a CWA discharge permit was not required).

[5] The EAB is EPA's supreme adjudicative body. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992). Among other matters, the EAB reviews direct appeals from CAA permitting decisions in states that have been delegated authority to implement the CAA, but that have not yet received final approval of their SIPs for the program under which the permit was issued. *Id.* at 5321.

CAA Title V, which the agency claimed did not constitute a modification that would trigger PSD requirements. *Id.* The EAB ruled that it lacked jurisdiction to review the permit, as it found that its own "jurisdiction is limited to federal PSD permits that are actually issued" and "does not extend to state decisions reflected in state-issued permits, even when those decisions lead to the conclusion not to require a PSD permit at all." *Id.* In justifying its holding, however, the EAB explained that

> since Petitioner is, in essence, alleging that the construction project contemplated by the Permit will violate the CAA requirement that major sources obtain PSD permits, there are options in the enforcement arena for addressing his concern, including exercising the right to bring a citizen suit under CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3).

Id. at n.10.

EAB decisions represent the position of the EPA Administrator with respect to the matters brought before it. *See Tennessee Valley Auth. v. EPA*, 278 F.3d 1184, 1198–99 (11th Cir. 2002) (finding EAB decision to be "final agency action"). Although, as noted above, the plain text of the CAA clearly favors jurisdiction here, to the extent that the Court finds 42 U.S.C. § 7604(a)(3) ambiguous, EPA's interpretation of the provision, as announced by the EAB, must be upheld unless the Court finds it unreasonable. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-843 (1984); *see also Illinois EPA v. EPA*, 947 F.2d 283, 290 (7th Cir. 1991) (EPA's interpretation of CAA "is entitled to great deference") (citing *Cerro Copper Prod. Co. v. Ruckelshaus*, 766 F.2d 1060, 1067 (7th Cir. 1985)).

In the face of all this contrary authority, the only case law that BP is able to cite in support of its argument that this Court lacks jurisdiction is a single, Fifth Circuit case that addressed a very different factual scenario than the one presented here.[6] In *CleanCOALition v.*

[6] BP does cite some additional cases in a footnote, even as it admits that these additional cases are "arguably distinguishable from the present one." BP Mem. at 6 n.4. As BP notes, the Ninth Circuit's decision in *Romoland*

TXU Power, 536 F.3d 469 (5th Cir. 2008) [hereinafter *TXU*], the Fifth Circuit dismissed for lack of jurisdiction a CAA citizen suit that purported to assert claims against a proposed source that was still in the permitting process, based on alleged errors in the source's application for a PSD permit. *See TXU*, 536 F.3d at 470-71. In dismissing the case, the Fifth Circuit held that the CAA citizen suit provision does not authorize suits "simply [because the major source] fil[ed] a permit application that fails to comply with the CAA" while a state major source permitting process is still ongoing. *Id.* at 473-79 & n.10.

The *TXU* case is thus legally and factually distinct from this case. Here, most importantly, NRDC alleges that BP began construction in 2005, over three years prior to obtaining the IDEM minor source permit. Further, unlike in *TXU*, the state permitting process has concluded, and a minor source permit has been issued that does not require compliance with CAA PSD or NNSR provisions. The *TXU* court itself acknowledged the limitations of its holding. Distinguishing the *Ogden Projects* case, the Fifth Circuit found that "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.'" *Id.* at 479 (quoting *Ogden Projects*, 911 F. Supp. at 867-68). The *TXU* court also cited *Weiler* with approval, albeit on a different point of law.

School District v. Inland Empire Energy Center, 548 F.3d 738 (9th Cir. 2008), applies only to California and other states whose approved SIPs provide that major sources obtain construction and operating permits through a single permitting process. *See Romoland Sch. Dist.*, 548 F.3d at 754-55 (holding that such permits can only be challenged under 42 U.S.C. § 7661d, not under 42 U.S.C. § 7604). The other cases BP cites in the footnote are equally off point. *National Parks Conservation Association v. Tennessee Valley Authority* involved dismissal of a complaint that the court found to be a *de facto* challenge to the Tennessee SIP. *See* 175 F. Supp. 2d 1071, 1078 (E.D. Tenn. 2001) (finding that the emissions events challenged by plaintiffs "do[] not violate the Tennessee SIP"). BP's two other cases both involved EPA's authority to initiate enforcement proceedings under CAA § 113, 42 U.S.C. § 7413. Not only did these cases not involve the CAA citizen suit provision, 42 U.S.C. § 7604, they were also decided before the Supreme Court's decision in *Alaska Department of Environmental Conservation v. EPA*, in which the Court recognized that Section 113 provides EPA with broad powers to initiate enforcement proceedings against sources that fail to comply with CAA major source permitting provisions. *See* 540 U.S. 461, 484-95 (2004) [hereinafter *Alaska DEC*]. To the extent that BP's cases are inconsistent with the Supreme Court's decision in *Alaska DEC*, they are no longer good law. In any event, none of the cases relied on by BP involved the factual circumstances at issue here, i.e., that of a major source first commencing construction prior to obtaining any CAA permit, and thereafter obtaining only a state law minor source permit that did not fully account for all construction activities and sources of increased emissions.

See id. at 474. Thus, BP's attempt to argue that the *TXU* case somehow creates a circuit split between the Second and Fifth Circuits, BP Mem. at 9-11, glosses over important distinctions between *Weiler* and *TXU*, and is belied by a careful reading of *TXU* itself. Contrary to BP's assertions, *TXU* does not apply to this case.

BP supplements its reliance on the inapposite *TXU* case with a policy argument that, because the CAA is based on a structure of "cooperative federalism" whereby some enforcement authority is delegated to state agencies, the availability of a state administrative appeal should preclude NRDC's claim here. *See* BP Mem. at 10-12. As noted above, both *Weiler* and *Ogden Projects* rejected such arguments, in light of the plain meaning of 42 U.S.C. § 7604(a)(3). *See Weiler*, 392 F.3d at 537-39 (rejecting arguments that citizen suits under these circumstances are "unnecessary" or would "undermine [the] role" of states under the CAA); *Ogden Projects*, 911 F. Supp. at 867 (holding that state remedies are not exclusive because the § 7604(a)(3) plainly provides federal jurisdiction and "Congress left no room for discretion" as to whether major sources must obtain the permits that the CAA requires). Further, courts have repeatedly recognized that the availability of a federal citizen suit enforcement mechanism is also a vital structural component of the CAA, allowing citizens to participate in the enforcement process, in particular when state or federal agencies fail to act. *See, e.g.*, *Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) ("Congress enacted [42 U.S.C. § 7604] specifically to encourage citizen participation in the enforcement of standards and regulations established under [the CAA], and intended the section to afford citizens very broad opportunities to participate in the effort to prevent and abate air pollution.") (internal citations and quotation marks omitted); *Weiler*, 392 F.3d at 536 ("The citizen suit provisions were designed not only to motivate government agencies to take action themselves, but also to make

citizens partners in the enforcement of the [CAA's] provisions.") (internal citations and quotation marks omitted). Accordingly, this Court should follow the plain meaning of 42 U.S.C. § 7604(a)(3) and find that it has jurisdiction over NRDC's claims.

B. This Court Should Not Abstain from Deciding the Important Questions of Federal Law Raised in This Case.

BP's abstention argument fares no better. "Jurisdiction, if properly conferred, is meant to be exercised." *Prop. & Cas. Ins. Ltd. v. Central Nat'l Ins. Co. of Omaha*, 936 F.2d 319, 320-21 (7th Cir. 1991). Federal courts have a "virtually unflagging obligation" to exercise the jurisdiction given to them by Congress. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colo. R. Water Conserv. Dist. v. United States*, 424 U.S. 800, 821 (1976)). "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983) (quoting *Colo. R.*, 424 U.S. at 813). "Underlying these assertions is the undisputed constitutional principle that Congress, not the Judiciary, defines the scope of federal jurisdiction within the constitutionally permissible bounds." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) [hereinafter *NOPSI*].

In seeking to shoehorn the facts of this case into the "extraordinary and narrow" doctrine of abstention, BP invokes the Supreme Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), in which the Court found it appropriate to abstain from deciding a challenge to the order of a state agency making a state law decision based on "predominantly local factor[s]." *Burford*, 319 U.S. at 347. As the Supreme Court later explained, *Burford* abstention is only appropriate in

a case that involves either (1) "difficult questions of state law" or (2) "state efforts to establish coherent policy" that would be disrupted by federal interference. *NOPSI*, 491 U.S. at 361.

Neither of these factors is implicated here. This is a federal CAA citizen suit to enforce federal law, and it belongs in federal court. Indeed, portions of NRDC's First Amended Complaint are fundamentally grounded in the same law and factual allegations are EPA's amended NOV – a claim brought by a federal agency on explicitly federal authority. Am. Compl. ¶¶ 2, 48.

Congress established the CAA "in response to 'dissatisfaction with the progress of existing air pollution programs.'" *Alaska Dep't of Envtl. Conserv. v. EPA*, 540 U.S. 461, 469 (2004) (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1971)) [hereinafter *Alaska DEC*]. The CAA requires states to develop SIPs and submit them to EPA for approval. 42 U.S.C. § 7410(a)(1); *cf. id.* § 7410(c)(1) (EPA shall promulgate an implementation plan if the state's plan is inadequate). SIPs must "'include enforceable emission limitations and other control measures, means, or techniques . . . as may be necessary or appropriate to meet the applicable [CAA] requirements.'" *Id.* at 470 (quoting 42 U.S.C. § 7410(a)(2)(A)) (alterations in original). EPA regulations set detailed minimum requirements for the contents of SIPs, including PSD and NNSR provisions. *See* 40 C.F.R. §§ 51.165 & 51.166. These EPA regulations require that a state "use the specific provisions" and regulatory definitions contained therein, unless the state is able to demonstrate to EPA that a proposed deviation is "at least as stringent" as EPA's default rule. 40 C.F.R. § 51.165(a)(1), (a)(2)(ii), (a)(3)(F), (a)(6) (NNSR); *id.* § 51.166(a)(7)(iv), (b), (i)(6), (r)(6) (PSD). As a result, Indiana, like most states, has simply adopted the vast majority of the PSD and NNSR provisions in its SIP almost word-for-word from the model EPA regulations. *Compare* 40 C.F.R. §§ 51.165 & 51.166 *with* 326 IAC 2-2, 2-3.

Pursuant to EPA's approval, IDEM now has "initial responsibility" for implementing the SIP, but it still must exercise its authority in a way that is consistent with federal requirements. *Alaska DEC*, 540 U.S. at 488-89; *see also Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1346-48 (11th Cir. 2005) (state cannot interpret SIP contrary to mandates of CAA); *Michigan Dep't of Envtl. Quality v. Browner*, 230 F.3d 181, 185 (6th Cir. 2000) ("Although the CAA grants states considerable latitude, it 'nonetheless subjects the states to strict minimum compliance requirements,' adherence with which must be determined by the EPA."). Even after approving the Indiana SIP, EPA retains supervisory authority over IDEM, including the authority to rescind approval of the SIP if IDEM does not implement it consistently with the CAA, 42 U.S.C. § 7413(a), and to object to individual PSD and NNSR permits that IDEM issues pursuant to the SIP if EPA finds that the permits do not comply with the CAA, *Alaska DEC*, 540 U.S. at 502.

Moreover, when EPA approved Indiana's SIP, it promulgated the plan's requirements as federal regulations, while attaching a number of additional conditions. 40 C.F.R. §§ 52.769-98. Also, the EPA approval process is iterative: whenever EPA determines that revisions to the SIP are required to comply with controlling federal law and policy, IDEM must propose revisions to the SIP for EPA approval. 42 U.S.C. § 7410(k)(5), (*l*); *see also* 40 C.F.R. § 52.770 (detailing lengthy history of IDEM proposing SIP revisions to EPA, and EPA approving some but not all of those revisions).

Accordingly, the CAA is primarily a creature of Congress and the EPA, not the Indiana legislature or IDEM. It is simply incorrect to say, as BP does, that NRDC's claims are "not even primarily federal." BP Mem. at 15. Although Indiana has incorporated federal CAA requirements into state law through its SIP, "a valid, approved SIP has the force and effect of

federal law." *United States v. AM General Corp.*, 808 F. Supp. 1353, 1358 (N.D. Ind. 1992). Thus, many courts have refused to abstain from deciding citizen suits brought under federal environmental laws, because of the predominantly federal character of the regulatory scheme and the central role played by federal enforcement actions, including citizen suits, in implementing those laws. *See, e.g.*, *PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 619 (7th Cir. 1998) (holding that abstention from Resource Conservation and Recovery Act ("RCRA") citizen suit in favor of state administrative proceeding would be an improper "end run around RCRA"); *Oregon State Public Interest Research Group, Inc. v. Pac. Coast Seafoods Co.*, 341 F. Supp. 2d 1170, 1177-78 (D. Or. 2004) [hereinafter *OSPIRG*] ("[B]y enacting the [Clean Water Act ("CWA"),] Congress created a widespread federal system of regulation, from which an area for state enforcement was carved. To avoid violating federal law, state laws and regulations must satisfy specific requirements set forth in federal laws and regulations. Accordingly, state courts have no greater competence than federal courts in interpreting such laws.") (citing *United States v. Cargill, Inc.*, 508 F. Supp. 734, 746-47 (D. Del. 1981)); *White & Brewer Trucking, Inc. v. Donley*, 952 F. Supp. 1306, 1312 (C.D. Ill. 1997) ("It is because the RCRA citizen suit is exclusively a federal cause of action that the Court finds *Burford* abstention to be inappropriate in the case at bar.").[7] In these cases, the courts each noted that the scope of citizen suit jurisdiction, and the extent to which deference to state proceedings was appropriate, was carefully defined by Congress in the statute itself. *See PMC*, 151 F.3d at 619 ("Congress has *specified* the conditions under which the pendency of other proceedings bars suit under RCRA

[7] Courts frequently rely on CWA and RCRA cases to interpret the CAA citizen suit provision, and vice versa. *See, e.g.*, *Pound v. Airosol Co.*, 498 F.3d 1089, 1094 (10th Cir. 2007) (describing CWA and CAA citizen suit provisions as "*in pari materia*" and noting that "courts often rely upon interpretations of the Clean Water Act to assist with an analysis under the Clean Air Act") (citing *United States v. Dell'Aquilla*, 150 F.3d 329, 338 n.9 (3d Cir. 1998)); *Ashioff v. City of Ukiah*, 130 F.3d 409, 413 (9th Cir. 1997) (noting with respect to the CWA, RCRA, and the CAA that "[c]ourts have relied on cases interpreting the citizen suit provisions in each of these statutes to interpret the other's citizen suit provision") (citing *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992); *Hallstrom v. Tillamook County*, 493 U.S. 20, 29 (1989)).

and . . . those conditions have not been satisfied here.") (emphasis in original); *OSPIRG*, 341 F. Supp. 2d at 1178 (noting that "Congress has explicitly granted jurisdiction to federal district courts to hear CWA citizen suits"); *White & Brewer Trucking*, 952 F. Supp. at 1314 ("[B]ecause federal regulations have been established, it is unlikely that Congress considered the issue of environmental safety to be one of merely local concern.").[8]

It is true, as BP emphasizes, that some courts have abstained from deciding citizen suits because they found that the suit was, in effect, a "collateral attack" on a facially valid state permit. *See Ellis v. Gallatin Steel*, 390 F.3d 461 (6th Cir. 2004); *Sugarloaf Citizens Ass'n v. Montgomery County*, No. 93-2475, 1994 WL 447442 (4th Cir. Aug. 17, 1994); *Jamison v. Longview Power*, 493 F. Supp. 2d 786, 790 (N.D. W.Va. 2007). None of these three cases, however, involved a dismissal of a challenge – like NRDC's here – to construction of a major source or modification where *no* federally-required major source permit had been issued: the circumstance addressed by the plain language of § 7604(a)(3). Rather, 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. Accordingly, in each case, the court dismissed the suit to avoid micromanaging the state's permitting authority, while expressly recognizing that abstention is generally improper from a properly pleaded federal citizen suit. *See Ellis*, 390 F.3d at 481 (where citizens argued that an second facility's emissions should have

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[8] In addition to the cases cited above, a number of other courts have agreed with this analysis. *See Cannata v. Forest Preserve Dist. of DuPage County*, No. 06 C 2196, 2006 WL 2927604 (N.D. Ill. Oct. 11, 2006); *Spillane v. Commonwealth Edison Co.*, 291 F. Supp. 2d 728, 732-34 (N.D. Ill. 2003); *College Park Holdings, LLC v. RaceTrac Petroleum, Inc.*, 239 F. Supp. 2d 1322, 1326-29 (N.D. Ga. 2002); *Comm'y of Cambridge Envtl. Health & Comm'y Devl. Group*, 115 F. Supp. 2d 550, 560-61 (D. Md. 2000); *L.E.A.D. v. Exide Corp.*, No. Civ. 96-3030, 1999 WL 124473 (E.D. Pa. Feb. 19, 1999); *Long Island Soundkeeper Fund v. N.Y. City Dep't of Envtl. Protection*, 27 F. Supp. 2d 380, 385 (E.D.N.Y. 1998); *Culbertson v. Coats American, Inc.*, 913 F. Supp. 1572, 1577-78 (N.D. Ga. 1995); *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 484 (D. Minn. 1995); *Natural Resources Defense Council v. Outboard Marine Corp.*, 692 F. Supp. 801, 810-12 (N.D. Ill. 1988); *Student Public Interest Research Group of N.J., Inc. v. P.D. Oil & Chem. Storage*, 627 F. Supp. 1074, 1085 (D.N.J. 1986); *Brewer v. Bristol*, 577 F. Supp. 519 (E.D. Tenn. 1983).

been rolled a federal major source permit obtained by another entity, court held, "the question is not whether citizens may sue companies that *fail to obtain* a PSD permit; they may and *Burford* abstention rarely will present an obstacle to those claims") (emphasis added) (citing *Weiler* and *Hammersley*); *Sugarloaf Citizens Ass'n*, 1994 WL 447442, at *4-6 (where plaintiffs brought suit challenging, inter alia, insufficient emission reduction measures contained in a federal major source permit, court held that abstention was appropriate because "count-by-count examination" of complaint demonstrated that its gravamen was "actually an objection to a state agency's findings under state law" rather than a properly pleaded CAA and RCRA citizen suit); *Jamison*, 493 F. Supp. 2d at 790-91 (court held that abstention was appropriate because plaintiffs had mischaracterized their claim as a § 7604(a)(3) claim for failure to obtain a major source permit, when in fact a major source permit had been issued by the state permitting authority).[9]

BP's argument that these "collateral attack" cases require dismissal here is essentially BP's jurisdictional argument repackaged under a different name, and this argument fails for the same basic reason: it undercuts the express language of the statute, which provides citizens a remedy for precisely the problem at issue here. The CAA created a regulatory structure based on an active federal review and enforcement role, including through citizen suits such as this one.

Notwithstanding BP's opinion on Congress's wisdom in so doing, Congress believed compliance with the CAA PSD and NNSR programs, and the protection that they afford to regional air quality, to be sufficiently critical as to merit a specific citizen suit remedy in the event that a major source of air pollution begins construction without the proper CAA permit. 42

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[9] Another case cited by BP, *League to Save Lake Tahoe v. Trounday*, 598 F.2d 1164 (9th Cir. 1979), is even less applicable to this case. In *Trounday*, the plaintiffs challenged Nevada's decision to issue a registration certificate to an indirect source of pollution pursuant to its SIP. *Trounday*, 598 F.2d at 1167-68. The Ninth Circuit held that it had jurisdiction over the plaintiffs' claim under 42 U.S.C. § 7604(a)(1), but that the plaintiffs had failed to state a claim on which relief could be granted because their complaint failed to allege that Nevada had actually violated the provisions of the SIP. *Id.* at 1168-74.

U.S.C. § 7604(a)(3). And as the Second Circuit held in *Weiler*, adjudication of a § 7604(a)(3) claim such as NRDC's cannot be said to constitute undue federal interference in any state agency decisions or state proceedings, because the plain language of the CAA places mandatory duties on both the states and private entities and expressly authorizes the enforcement of those duties in federal court. *See Weiler*, 392 F.3d at 538 (rejecting argument that "Congress must have intended to foreclose citizen suits brought under [42 U.S.C. § 7604(a)(3)] that would challenge the determinations of state agencies"); *see also Ogden Projects*, 911 F. Supp. at 867; *cf. Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002) (holding that CWA citizen suit was available to challenge alleged discharges of pollutants even where state permitting authority has determined that a CWA discharge permit was not required).

Moreover, a § 7604(a)(3) suit such as NRDC's will not be disruptive of any related state proceedings, because the goal of any such proceedings will be the same as this one: to ensure that BP is in full compliance with the CAA. *See Spillane v. Commonwealth Edison Co.*, 291 F. Supp. 2d 728, 733-34 (N.D. Ill. 2003). The mere fact that there may be a state administrative process available does not, without more, require this court to abstain. *See NOPSI*, 491 U.S. at 362 (*Burford* "does not require abstention whenever there exists [a state administrative] process, or even in all cases where there is a potential for conflict with state regulatory law or policy") (internal quotation marks omitted); *see also NRDC v. Outboard Marine Corp.*, 692 F. Supp. 801, 810-12 (N.D. Ill. 1988) (refusing to abstain from citizen enforcement suit on the basis that permit at the heart of suit was being appealed administratively, because the "permit appeal . . . is not equivalent to an enforcement action").

Burford abstention is thus inappropriate here. NRDC's claim is primarily federal, not involving any legal or policy issues that are unique to state law or have particular local significance. *See NOPSI*, 491 U.S. at 361-62; *OSPIRG*, 341 F. Supp. 2d at 1177-78; *White & Brewer Trucking*, 952 F. Supp. at 1314. The CAA allows for states to adopt "requirement[s] respecting control or abatement of air pollution" that are more stringent than the federal requirements, 42 U.S.C. § 7416, but no such unique state laws or policies are at issue in this case. Indeed, Indiana did not even have a federally approved PSD program until 19 months ago – thirty years after the PSD program was codified into the CAA by Congress and two years after the CAA violations alleged in NRDC's First Amended Complaint first occurred. 72 Fed. Reg. 33,395 (June 18, 2007). Rather, all of the relevant law and policy at issue here has been established by Congress and EPA, making these issues of national concern, not merely local concern. *See OSPIRG*, 341 F. Supp. 2d at 1177-78; *White & Brewer Trucking*, 952 F. Supp. at 1314; *Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc.*, 877 F. Supp. 476, 484 (D. Minn. 1995). And although a state administrative appeal of IDEM's decision to grant BP a minor source permit would have been available to NRDC, NRDC elected instead to seek relief in federal court, as it is entitled to do under 42 U.S.C. § 7604(a)(3). Accordingly, this Court must follow its "virtually unflagging obligation" to exercise the jurisdiction provided by the CAA and allow NRDC's claims to proceed before it.

C. <u>A Stay Is Inappropriate Because There is No Parallel State Proceeding.</u>

Finally, a stay of this proceeding pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) is inappropriate.[10] It is a *sine qua non* of

[10] As the Seventh Circuit has recognized, the "general presumption against abstention" carries equal weight under both the *Colorado River* and *Burford* abstention doctrines. *AXA Corp. Solutions v. Underwriters Reins. Corp.*, 347 F.3d 272, 278 (7th Cir. 2003) (citing *Sverdrup Corp. v. Edwardsville Cmty. Unit Sch. Dist. No. 7*, 125 F.3d 546, 549-50 (7th Cir. 1997)).

abstention pursuant to the *Colorado River* doctrine that a "parallel" state proceeding must exist, i.e., a state proceeding that, among other things, involves "substantially the same parties." *E.g.*, *Tyrer v. City of South Beloit, Ill.*, 456 F.3d 744, 752 (7th Cir. 2006) ("Among other things, to determine whether two suits are parallel, a district court should examine whether the suits involve the same parties . . . ."). That is not the case here, as NRDC is not a party to any state proceeding relating to this case.

BP argues, however, that NRDC should be treated as if it were a party to state administrative proceedings that are currently pending before the Indiana Office of Environmental Adjudication ("OEA"), because its interests are "congruent" to the interests of petitioners there. BP Mem. at 17. That diffuse allegation, however, is not the standard. The relevant fact – and determining factor – is that NRDC is not a party to that OEA proceeding. *See* BP Mem. Ex. A. Although it is true that NRDC's counsel also represent an organization that is participating in the OEA proceeding, that fact is irrelevant to BP's motion for a stay. On the contrary, as the Supreme Court recently recognized, the mere fact that different parties raising nearly identical claims are represented by the same attorney does not place those parties in privity for the purposes of claim or issue preclusion. *Taylor v. Sturgell*, 128 S. Ct. 2161, 2171-80 (2008) (close business associates seeking same documents through Freedom of Information Act litigation not in privity, even though represented by the same counsel); *see also Headwaters, Inc. v. U. S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) (environmental groups bringing nearly identical legal claims against same agency not in privity, even though represented by the same counsel). As NRDC is not in privity with any of the parties in the OEA proceeding, the specter of piecemeal litigation or inconsistent outcomes that BP raises does not exist.

BP may not like that it is facing multiple challenges to its refinery expansion from different parties, but if NRDC's allegations here are true, BP has been violating federal law since 2005. A stay of this proceeding while BP continues construction of its refinery expansion would be manifestly inappropriate.

CONCLUSION

For the reasons set forth above, NRDC respectfully urges the Court to deny BP's motion to dismiss.

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Respectfully submitted,

s/ Thomas Cmar

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CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2009, I electronically filed **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT BP PRODUCTS NORTH AMERICA, INC.'S MOTION TO DISMISS AMENDED COMPLANT OR IN THE ALTERNATIVE FOR A STAY OF PROCEEDINGS** with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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