



PENN FUTURE v. ULTRA RESOURCES: **COLLATERAL ATTACKS ON STATE PERMITTING**

by
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In *Citizens for Pennsylvania's Future* (“PennFuture”) v. *Ultra Resources, Inc.* (“Ultra”), the U.S. District Court for the Middle District of Pennsylvania concluded that it has jurisdiction over a citizen suit under the federal Clean Air Act (“CAA”), where PennFuture seeks to collaterally attack final permitting decisions of the Pennsylvania Department of Environmental Protection (“PADEP”). *Citizens for Pennsylvania's Future v. Ultra Resources, Inc.*, 2012 U.S. Dist. LEXIS 136494 (M.D. Pa. Sept. 24, 2012). The District Court also declined to read an exhaustion requirement into the CAA and, although clearly troubled by the inequities of PennFuture’s attempt to end-run the state administrative process, decided not to abstain. These rulings, we suggest, overlook a more fundamental problem with PennFuture’s case which, once identified and addressed, compels dismissal of the case—either for failure to state a claim, if the court is willing to take judicial notice of certain undisputed facts, or upon motion for summary judgment.

The problem with PennFuture’s case is that it simply cannot prevail on the merits. As matter of state law, the central question before the District Court has been conclusively and finally answered adverse to PennFuture. PennFuture cannot avoid the legal significance of its failure to challenge PADEP’s permitting decision in state court by embedding a challenge to that decision in a CAA citizen suit. Although conceptually related, this is not an exhaustion problem for PennFuture nor a jurisdictional problem for the District Court. Nor is it, necessarily, a failure by the District Court to properly abstain. Rather, dismissal here follows from recognizing that the CAA citizen suit provisions are not intended to, and do not, override otherwise applicable principles of state law such as administrative finality and preclusion. The CAA’s citizen suit provisions, in short, do not wipe the factual and legal slate clean so that plaintiffs are relieved of the legal consequences of their prior actions or inaction.

Brief Statutory and Regulatory Background. An “experiment in cooperative federalism,” the CAA establishes a comprehensive program for controlling and improving the nation’s air quality through state and federal regulation. *Michigan v. EPA*, 268 F.3d 1075, 1083 (D.C. Cir. 2001). The CAA assigns responsibility to the EPA for identifying air pollutants and establishing National Ambient Air Quality Standards (“NAAQS”). 42 U.S.C. §§ 7408–7409. The states, by contrast, bear the primary responsibility for implementing those standards.¹

Pursuant to those goals, each state is required to create and submit to the EPA for approval a State Implementation Plan (“SIP”) “which provides for implementation, maintenance, and enforcement of [NAAQS] within such State.” 42 U.S.C. § 7410(a)(1). Once a SIP is approved by EPA, its requirements have the force and effect of federal law and are enforceable in federal court.²

¹ 42 U.S.C. § 7407(a); 42 U.S.C. § 7401(a)(3).

² See, e.g., *Trustees for Alaska v. Fink*, 17 F.3d 1209, 1210 n.3 (9th Cir. 1994); *Her Majesty the Queen in Right of the Province of Ontario v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989).

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Under the CAA, a construction permit is required to build a new major stationary source or to make a modification to an existing major source that increases air pollutant emissions from the source. 42 U.S.C. §§ 7410(a)(2)(C), 7475(a), 7505(c)(5), and 7503. This New Source Review (“NSR”) permit program for major sources has two different components—one for areas where the air is not meeting NAAQS, and the other for areas where the air meets the NAAQS or is unclassified. Permits for sources located in attainment (or unclassifiable) areas are called Prevention of Significant Deterioration (“PSD”) permits and those for sources located in nonattainment areas are called nonattainment NSR permits. *Id.*

Pennsylvania’s EPA-approved SIP contains an integrated plan approval and a state-only operating permit and federal operating permit program. *See generally* 40 C.F.R. § 52.2020. Under Pennsylvania’s SIP, persons seeking to construct and operate a major source in a NAAQS attainment area must comply with the preconstruction permitting requirements under the PSD program. 25 Pa. Code Chapter 127 Subchapter D. Those seeking to do the same in a non-attainment area in Pennsylvania must comply with the preconstruction permitting requirements under the non-attainment NSR program. 25 Pa. Code Chapter 127 Subchapter E.

PADEP’s EPA-approved SIP also provides for the issuance of general plan approvals and general operating permits when PADEP determines that a category of sources are similar and can be adequately regulated using standardized specifications and conditions. 25 Pa. Code Chapter 127 Subchapter H. By issuing a general permit, PADEP indicates that it approves the activities authorized by the general permit, provided that the owner or operator of the source meets the requirements of the general permit. An emission source is eligible to use a general permit provided that source is not subject to the PSD and NNSR requirements specified in 25 Pa. Code Chapter 127, Subchapters D and E. If an emission source is not eligible to use a general permit, an owner or operator of that source must go through the regular plan approval and individual operating permit process, which is a time-intensive case-by-case review of an individual application. 25 Pa. Code § 127.12.

By statute, any person, *including third parties*, aggrieved by PADEP’s issuance or denial of an air quality permit, has the right, within 30 days from actual or constructive notice of the action, to appeal the action to the Environmental Hearing Board (“Board”).³ It has the power and duty to hear and determine all appeals from appealable actions of PADEP, including all types of air quality permits. 35 P.S. § 4006. If no appeal is properly filed, *by statute*, PADEP’s permitting decision becomes *final* and is no longer appealable. 35 P.S. § 7514(c). Appeals from the Board’s decisions can be taken to the Commonwealth Court. 42 P.S. § 763(a). Petitions for allowance of appeal may subsequently be taken to the Pennsylvania Supreme Court. 42 P.S. § 723(a).

Under Pennsylvania law, the doctrine of administrative finality amounts to the application of collateral estoppel principles to agency decisions. *Delaware Riverkeeper v. DEP*, 879 A.2d 351, 357 (Pa. Cmwlth. 2005). Under that doctrine, where an act creates a right or liability or imposes a duty and prescribes a particular remedy for its enforcement, such remedy is exclusive and must be strictly pursued. One who fails to exhaust his statutory remedy may not thereafter raise an issue which *could have and should have been raised* in the proceeding afforded by that remedy. This is particularly true of special statutory appeals from the action of administrative bodies.⁴ These principles of administrative finality are essentially the same as those under federal law.⁵

PADEP’s Permitting Decisions and PennFuture’s Challenge. PADEP issued seven authorizations to use General Permit-5 (“GP-5”) to Ultra for facilities in the Marcellus Shale.⁶ All of Ultra’s authorizations to use GP-5 were publicly noticed in the *Pennsylvania Bulletin*. 2012 U.S. Dist LEXIS 136464, at *9, n.10. By making these authorizations, PADEP determined that Ultra satisfied all of the regulatory and technical requirements to

³ 35 P.S. § 4010.2, § 7514(c); *see also* 25 Pa. Code § 1021.52.

⁴ *See DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975) (emphasis added) (internal quotation and ellipses removed); *see also DEP v. Peters Township Sanitary Authority*, 767 A.2d 601, 603 (Pa. Cmwlth. 2001).

⁵ *See, e.g., City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958); *Islander East Pipeline Company, LLC v. Blumenthal*, 478 F. Supp.2d 289, 297 (D. Conn. 2007).

⁶ 2012 U.S. Dist. LEXIS 136494, at *7. General Permit-5 (“GP-5”), among other things, authorizes the construction or modification of a natural gas production or recovery facility, and associated emissions sources like internal combustion engines and other equipment that meets the best available technology (“BAT”) requirements of 25 Pa. Code §§ 127.1 and 127.12(a)(5).

use GP-5 as the permit mechanism to construct and operate the facilities. *See* 25 Pa. Code §§ 127.621-127.622.

PennFuture, despite having public notice of the issuance of each GP-5 to Ultra, did not take any appeals to the Board. 2012 U.S. Dist. LEXIS 136464, at *9. Moreover, PennFuture sat back and watched as Ultra constructed each GP-5 permitted facility. *Id.* at *9, *19. PennFuture then filed suit in federal court under the CAA's citizen suit provisions, claiming that Ultra's facilities constitute a single, major source of nitrogen oxide ("NOx") emissions that were constructed without the appropriate NNSR permit, even though Ultra had obtained permits from PADEP under the Commonwealth's EPA-approved SIP authorizing construction of the sources. According to PennFuture, PADEP was obligated to aggregate all of Ultra's facilities and consider them as a single NOx emitting source. *Id.* at *1-*2, *7.

The District Court's Decision. The District Court rejected Ultra's motion to dismiss for lack of jurisdiction, concluding that it has jurisdiction to hear PennFuture's case based on "a plain reading" of Section 304(a)(3) of the CAA. Section 304(a)(3) provides, in pertinent part, that "any person may commence a civil action on his own behalf" against "any person who proposes to construct or constructs any new or modified major emitting facility *without a permit required* under part C of title I [42 U.S.C. §§ 7470 *et seq.*] (relating to PSD) or part D of title I [42 U.S.C. §§ 7501 *et seq.*] (relating to nonattainment NSR)." 42 U.S.C. § 7604(3). Additionally, the District Court, while "disturbed" over PennFuture's dilatory behavior, declined to conclude that PennFuture was obligated to exhaust its state and administrative remedies before proceeding in federal court, reasoning that it "will not read in an exhaustion requirement where there is none provided [in Section 304(a)(3) of the CAA]." 2012 U.S. Dist. LEXIS 136494, at *19-*21.

The Case Should Be Dismissed. Section 304(a)(3) of the CAA does not, as the District Court concluded, contain an express exhaustion requirement. That is, there is no administrative remedy that *must* first be exercised by a citizen plaintiff prior to commencing such an action. That does not mean, however, that a citizen plaintiff is free to ignore the consequences of its failure to exercise available statutory remedies under state law. When Section 304(a)(3) of the CAA is read along side Pennsylvania's unique administrative review provisions for PADEP actions, the reach of Section 304(a)(3) is limited.

Because PennFuture, after public notice, failed to appeal from PADEP's issuance of the CAA permits to Ultra's facilities, those permitting decisions were, under the Commonwealth's EPA-approved SIP, *and as a matter of Pennsylvania law*, administratively final as to any potentially aggrieved third party. PennFuture, by failing to appeal to the Board from the PADEP's publicly-noticed issuance of the permits, is bound by PADEP's permitting determinations that Ultra's facilities are *not* subject to the PSD and NNSR requirements. The District Court, moreover, was obligated to apply the State's SIP provisions and accept the undisputed fact that Ultra *had* obtained the necessary PADEP-issued CAA permits for construction of its facilities and, further, that those permitting decisions were administratively final under Pennsylvania law. The District Court, therefore, should have concluded that PennFuture's complaint, which asserts that Ultra "failed" to obtain "required" CAA permits, fails to state a claim and dismissed the action.

If the District Court's decision stands, it has the potential to invite additional collateral attacks on PADEP's permitting determinations under its EPA-approved SIP and, further, will afford citizen plaintiffs unwarranted relief in federal court from the legal consequences of their failure to exercise their state appeal rights for review of PADEP actions. This cannot be the result that Congress intended, and is a particularly harsh outcome where, as here, the defendant relied upon facially valid and unchallenged permits issued by PADEP.

Federal courts have precluded EPA and citizens from filing enforcement actions in federal court that collaterally attack state-issued permits:

... we cannot find in the text of the Clean Air Act, or elsewhere, any indication that Congress expressly or by implication meant to authorize the EPA to mount a collateral attack on a permit by bringing a civil penalty action as many as five years after the permit had been granted and the modification implemented, 28 U.S.C. § 2462, by which time a defendant would have accrued a potential liability in excess of \$40 million even though it had been operating under a permit valid on its face and never before challenged. That would be a harsh remedy and we cannot be confident in the absence of any clues that it was one intended to be usable in the circumstances of this case.

U.S. v. AM General Corp., 34 F.3d 472, 475 (7th Cir. 1994).⁷

There is, similarly, nothing in the CAA to suggest that Congress intended that citizen suits could be used to collaterally attack facially-valid state permits.⁸ The District Court, moreover, was obligated to view Ultra's motion to dismiss through the lens of PennFuture's failure to exercise its statutory right to appeal from PADEP's issuance of the permits to Ultra and the consequences for PennFuture, under Pennsylvania law, of its failure to exercise those rights—administrative finality.

Case law supports this conclusion. In *League to Save Lake Tahoe, Inc. v. Trounaday*, the Ninth Circuit rejected the plaintiffs' attempt to use the CAA's citizen suit provisions to bring an untimely challenge Nevada's decision to issue registration certificates for two new hotels under the provisions of Nevada's SIP:

Appellants' challenge to the administrative determinations made by Nevada officials pursuant to relevant provisions of the Nevada Plan should have been pursued through the administrative review procedures set forth as part of that plan. Their failure to pursue that avenue of review within the applicable time limitations does not now entitle them to a remedy in a federal forum.

598 F.2d 1164, 1175 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979).

A similar result was reached by the Second Circuit in *Action for Rational Transit v. West Side Highway Project by its Exec. Dir. Bridwell*. 699 F.2d 614, 616-17 (2d Cir. 1983). In that case, the Second Circuit held that plaintiffs were barred from challenging a final action of the New York State Department of Environmental Control under the citizen's suit provisions of the CAA, where plaintiffs could have sought review under New York law but did not. 699 F.2d at 616-17. The Second Circuit, quoting *Trounaday*, explained:

Even if we were to find the plaintiffs' complaints sufficient to state a cause of action under the 1979 SIP, however, the failure to pursue these claims in state court would bar our consideration of them here. The New York State Department of Environmental Control (NYSDEC), the state agency responsible for ensuring compliance with the SIP, concluded that Westway would not violate any portion of the SIP, including transportation control measures and ambient air quality standards. Plaintiffs could have challenged that finding under New York law, but failed to do so. That determination is now final, representing the end product of an administrative process 'entrusted by Congress to state officials.'

The plaintiffs here knew that their interests were at stake in the indirect source proceedings; their initial complaint was filed in 1972, at least two years before the proceedings commenced. 'Their failure to pursue [the state] avenue of review within the applicable time limitations does not now entitle them to a remedy in a federal forum.' Plaintiffs are thus estopped because the issues they urge were aired, or could have been aired, in the proceedings before NYSDEC.

699 F.2d at 616 (internal citations omitted).

PennFuture's complaint is really with PADEP for issuing the GP-5 permits to Ultra, not with Ultra for constructing its facilities "without a permit." PennFuture could have appealed PADEP's actions and raised the very claim it now asserts before the District Court— that PADEP's CAA permits for Ultra's facilities are somehow flawed. PennFuture, however, did not do so and, as a result, is citizen suit under the CAA, which is premised on overturning PADEP's administratively final decisions, must be dismissed.

⁷ See also *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).

⁸ See *TVA*, 175 F. Supp. 2d at 1079.