

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JON GOODMAN : CIVIL ACTION
: :
v. : No. 07-4779
: :
PA D.E.P., et al. : :
: :
: :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

June 30, 2008

Pennsylvania Department of Environmental Protection (DEP), Superior Tube Co., Inc., and Accellent, Inc. ask me to dismiss Jon Goodman’s claim because the Clean Air Act does not prohibit the emission of more than 50 tons of volatile organic compounds (VOCs), and they have complied with the DEP’s permits. Goodman contends DEP violated the Clean Air Act by granting the permits. The Defendants argue Goodman cannot challenge the validity of the permits in federal court, but must appeal to the appropriate administrative agency. I am sympathetic to Goodman’s concern, but I must grant Defendants’ motion to dismiss because he has failed to state a claim for which relief can be granted.

FACTS¹

Jon Goodman, a resident of Montgomery County, Pennsylvania, alleges DEP violated the Clean Air Act by giving Superior Tube Co., Inc., and Accellent, Inc., permits to emit more than 50 tons of VOCs per year. Goodman claims EPA regulations prohibit more than 50 tons of VOC

¹ I accept all allegations in, and reasonable inferences from, the Complaint as true and view them in the light most favorable to Goodman. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

emissions per year and require the implementation of control technology.

On August 8, 2006, DEP issued Superior Tube a permit to emit more than 166 tons of VOC per year. DEP then issued Accellent a permit to emit more than 94 tons of VOC per year on November 8, 2006. Goodman is not challenging the permit applications submitted by Superior Tube and Accellent, nor the sufficiency of these applications. Goodman is challenging the permits' validity because they allow more than 50 tons of VOC emissions per year without control technology.

DISCUSSION

A 12(b)(6) motion to dismiss admits the complaint's well pleaded allegations, but denies their legal sufficiency. *Hospital Building Co. v. Trustees of the Rex Hospital*, 425 U.S. 738, 740 (1976); *T.R. Ashe, Inc. v. Bolus*, 34 F. Supp. 2d 272, 274-75 (M.D. Pa. 1999). The complaint and every doubt is resolved in the plaintiff's favor. *In re Arthur Treacher's Franchise Litigation*, 92 F.R.D. 398, 422 (E.D. Pa. 1981). The court must accept the complaint's factual allegations as true, as well as all its reasonable inferences. *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). "[A] case should not be dismissed unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations." *Id.* (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Only the complaint's allegations, matters of public record, orders, and exhibits attached to the complaint are considered. *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3d Cir.1990). Courts must allow plaintiffs to amend unless amendment would be "inequitable or futile." *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (citing *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002)).

District courts have jurisdiction over private citizen actions regarding the enforcement of current EPA emission standards and challenges to permit preconditions and requirements. *See, e.g., Delaware Valley Citizens Council for Clean Air v. Davis*, 932 F.2d 256, 265 (3d Cir. 1991) (citing 42 U.S.C. § 7604);² *Ogden Projects, Inc., et al. v. New Morgan Landfill Company, Inc.*, 911 F.

² Section 7604 reads:

a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (I) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

Supp. 863, 865 (E.D. Pa. 1996) (permitting private citizen law suits against those constructing facilities without the necessary permit pre conditions and requirements). Individuals can sue in federal court regarding violations of the Clean Air Act's emission standards. 42 U.S.C. § 7604(a)(1). These individuals must then ultimately prove which and how the Clean Air Act's emission standards were violated. *Id.* Regarding the permits, individuals can sue those who have not met permit requirements, preconditions, or who have violated the permit's conditions. 42 U.S.C. § 7604(a)(3).

Goodman makes two arguments. First, he argues the Clean Air Act prohibits emissions of more than 50 tons of VOC per year and requires the use of control technology. The Clean Air Act lacks such a prohibition. Sections 7511(a)-(c) require facilities with the potential to emit more than 50 tons per year to endure specific permit and compliance requirements. *See* 42 U.S.C. § § 7511(a)-(c)(b)(2). Nevertheless, Goodman misinterprets Sections 7511(a)-(c)³ as prohibiting more than 50 tons without control technology or requiring control technology. This section serves as guidelines for facilities to comply with State Implementation Plans. Alleged violations of this section must be brought before the EPA and then the Court of Appeals. 42 U.S.C. § 7607(b)(1); *Benning v. Browner*, No. 97-7058, 1998 WL 717436, at *1 (E.D. Pa. Sept. 24, 1998). Goodman in all his pleadings and in his hearing, and request to amend, has failed to identify or allege any violation of the Clean Air Act.

Goodman's second argument challenges the validity of the permits. Goodman argues the Defendants should not be allowed to use their permits as a defense because the permits violate the

42 U.S.C. § 7604

³ Goodman's pleadings, including his motion for leave to file an amended complaint, identify this section as Section 184.

Clean Air Act. District courts do not have jurisdiction over collateral attacks to facially valid permits. *National Parks Conservation Ass'n. v. TVA*, 175 F. Supp. 2d 1071, 1078 (E.D. Tenn. 2001). Goodman would be able to challenge the permits before this Court if he alleged the permits failed to include all the appropriate application and requirements. *See Ogden Projects, Inc., et al.*, 911 F. Supp. at 865 (stating dispute was whether defendants had the requisite permit); *Commonwealth of Pennsylvania v. Allegheny Energy, Inc.*, No. 05-585, 2006 WL 1509061, at *6 (W.D. Pa. Apr. 19, 2006) (finding jurisdiction because plaintiff challenged the permit requirement and the appropriate “applications of emissions limitations and other operating conditions,” distinguishing from a collateral attack). Challenges to the validity of a permit must go through the appropriate administrative process within 60 days after the permit’s approval.⁴ 42 U.S.C. § 7661(d)(b)(2). Based on the Clean Air Act’s provisions and case law, Goodman has failed to state

⁴ The relevant statute reads:

(2) If the Administrator does not object in writing to the issuance of a permit pursuant to paragraph (1), any person may petition the Administrator within 60 days after the expiration of the 45-day review period specified in paragraph (1) to take such action. A copy of such petition shall be provided to the permitting authority and the applicant by the petitioner. The petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period). The petition shall identify all such objections. If the permit has been issued by the permitting agency, such petition shall not postpone the effectiveness of the permit. The Administrator shall grant or deny such petition within 60 days after the petition is filed. The Administrator shall issue an objection within such period if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this chapter, including the requirements of the applicable implementation plan. Any denial of such petition shall be subject to judicial review under section 7607 of this title. The Administrator shall include in regulations under this subchapter provisions to implement this paragraph. The Administrator may not delegate the requirements of this paragraph.

42 U.S.C. § 7661d(b)(2).

a claim for which this Court may grant him relief.

An appropriate order follows.

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ORDER

AND NOW, this 30th day of June, 2008, Defendants' 12(b)(6) Motion to Dismiss (Document 8) is GRANTED. Because leave to amend would be futile, Plaintiff's request for Leave to File Amendment to Complaint (Document 18) is DENIED.

The Clerk of Court is directed to mark the above-captioned case CLOSED.

BY THE COURT:

/s/Juan R. Sánchez, J.
Juan R. Sánchez, J.