IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Benjamin Butler, Cheryll Riley Clapper, Angela Collins, Charles H. Howard, Karen Kasper, Joel Parris, and Jennifer Tsonas,

Plaintiffs,

v.

New-Indy Catawba, LLC, d/b/a New-Indy Containerboard, LLC, and New-Indy Containerboard, LLC

Defendant.

C/A No. 0:22-cv-2366-SAL

ORDER

This matter is before the court on Defendants New-Indy Catawba LLC, d/b/a New-Indy Containerboard, LLC's and New-Indy Containerboard, LLC's (together, "New-Indy") motion to dismiss Plaintiffs' complaint, ECF No. 29. For the reasons below, the court grants the motion.

BACKGROUND

Plaintiffs allege they have "endured over eighteen months of unrelenting misery" caused by New-Indy's allegedly wrongful emission of "malodorous, harmful air pollutants and other contaminants released therefrom." [ECF No. 40 at 8 (citing ECF No. 2., Compl., ¶¶ 1-2).] If this sounds familiar, that is because another group of plaintiffs (though represented by the same counsel) are suing New-Indy for damages incurred because of these same allegedly wrongful emissions in two putative class actions that are consolidated before this court. *See In re New Indy Emissions Litigation*, Case Nos. 0:21-cv-01480-SAL, 0:21-cv-01704-SAL ("Odor Class Action"). The alleged source of these pollutants and contaminants? New-Indy's Catawba, South Carolina

paper mill ("Mill"), which is located less than ten miles from Plaintiffs' homes. [ECF No. 1 ¶¶ 1-2.] The Mill can emit at least 100 tons per year of a certain regulated pollutants and so is considered a major stationary source of air pollutants. *Id.* ¶ 5 (citing S.C. Code Regs. 61-62.5, Standard 7 and 40 C.F.R. § 52.21).

Because New-Indy is considered an "existing major source of air pollution in an attainment area," it must apply to the South Carolina Department of Health and Environmental Control ("DHEC") for a construction permit before it can make a physical change to the Mill. *Id.* ¶ 29. If the change "would not result in a net significant increase in any of the pollutants that are regulated under the [Clean Air Act ("CAA")] New Source Review requirements," New-Indy need only apply for a minor construction permit. *Id.* But if the change *would* result in a net significant increase of a regulated air pollutant, New-Indy would need to apply for a Prevention of Significant Deterioration ("PSD") permit. *Id.* (citing 42 U.S.C. § 7475). PSD permits require applicants to fulfill certain obligations, such as "potential modeling of the ambient impact of the increased emission and other adverse impacts on the population, and the allocation of Best Available Control Technology to control the emissions resulting from the change." *Id.* Minor construction permits do not have those same requirements. *Id.* ¶ 33.

New-Indy applied to DHEC for and received a minor construction permit in July 2019. [ECF No. 2-1 at 7.] In April 2020, New-Indy submitted an addendum to the construction permit application "to address changes in the project scope." *Id.* Specifically, New-Indy wanted to take its hazardous air pollutant steam stripper, located inside the Mill, out of service and construct a hard pipe to transport its process-generated foul condensate to the Mill's outdoor wastewater treatment system or plant ("WWTP"). [ECF No. 2 ¶ 28.] In its April 2020 application, New-Indy

completed a section titled "PSD Non-Applicability." [ECF No. 2-1 at 12.] In that section, New-Indy represented it is not subject to PSD permitting requirements based on emissions calculations described in the application. *Id.* New-Indy ultimately did "obtain findings by DHEC" that this was a "minor" change that did not require a PSD permit, and DHEC issued a minor construction permit on May 13, 2020. [ECF No. 2 ¶ 33; *see also* ECF No. 29-2.]

After New-Indy received the minor construction permit, it closed the Mill's manufacturing operations from September to November 2020 to convert the Mill from producing white paper to containerboard grade paper. [ECF No. 2 ¶ 12.] New-Indy resumed the Mill's operations, and, in February 2021, the Mill allegedly began emitting high levels of total reduced sulfur ("TRS"), including hydrogen sulfide (H_2S), methyl mercaptan, and other toxic air pollutants. *Id.* ¶¶ 6, 12. Soon after, residents living in nearby communities in both South Carolina and North Carolina submitted complaints of strong odors and negative health effects to DHEC. *Id.* ¶ 16. According to Plaintiffs, those complaints were legion—around 17,000 in less than two months, and a cumulative total just south of 30,000 by August 8, 2021. *Id.* ¶¶ 16, 19. Residents reported many health effects and impacts to quality of life, such as nausea, headaches, migraines, stress, and anxiety. *Id.* ¶¶ 17-18.

Investigations and enforcement actions soon followed. After investigating the source of the odors, DHEC issued to New-Indy a Determination of Undesirable Levels and an Order to Correct Undesirable Level of Air Contaminants on May 7, 2021. *Id.* ¶ 20. And on May 13, 2021, the Environmental Protection Agency ("EPA") ordered New-Indy to reduce, monitor, and limit its emissions and submit a long-term plan to control H_2S emissions moving forward ("EPA Order"). *Id.* ¶ 26. Two groups of plaintiffs brought the Odor Class Actions in May and June 2021, and the

EPA filed its own action to enforce the EPA Order in May 2021. *See United States v. New Indy Catawba, LLC*, Case No. 0:21-cv-02053-SAL.

These Plaintiffs brought this citizen suit on July 22, 2022, alleging New-Indy made misrepresentations to DHEC on its April 2020 application such that it was not required to obtain a PSD permit or demonstrate compliance with South Carolina air pollutant regulations. *Id.* ¶¶ 28-39. Plaintiffs ask the court to provide them injunctive relief and penalties against New-Indy for its alleged violations of the Clean Air Act, 42 U.S.C. § 7604(a)(3). As to the injunctive relief, Plaintiffs ask the court to require New-Indy to apply for "*and obtain*" a PSD permit, restrain New-Indy from emitting excessive TRS and H_2S, and require New-Indy to immediately act to eliminate the discharges they complain of. *Id.* ¶ 41 (emphasis added), Prayer for Relief ¶ 2.

New-Indy moved to dismiss Plaintiffs' complaint for lack of subject matter jurisdiction. [ECF No. 29.]. New-Indy argues the CAA's citizen suit provision does not apply here, the court should abstain from hearing this matter under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), and Plaintiffs do not have Article III standing. *See id.* New-Indy also argues allowing the citizen suit to proceed would violate separation of powers principles. *Id.* at 15-25. Plaintiffs opposed New-Indy's motion on all grounds, and New-Indy replied in further support of its motion. [*See* ECF Nos. 40, 43.] The court heard oral argument on the motion on June 20, 2023, and took the motion under advisement.

DISCUSSION

New-Indy argues the court must dismiss Plaintiffs' complaint for several reasons, including because the court does not have jurisdiction over those claims. New-Indy also argues that, even if the court *does* have jurisdiction, it should abstain from hearing Plaintiffs' claims under the doctrine

set out in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). While the court does not agree it lacks jurisdiction over Plaintiffs' claims, it *does* agree abstention is warranted in this situation. It thus dismisses Plaintiffs' claims without prejudice.

I. *Can* the court hear plaintiff's claims?

Plaintiffs bring their citizen suit under 42 U.S.C. § 7604(a)(3), which allows a person to bring a civil action "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 . . . or part D of subchapter I . . . ." *Id.* New-Indy's argument here is straightforward: § 7604(a)(3) only confers jurisdiction on a district court "when the defendant has failed to obtain either a minor permit or a PSD permit." [ECF No. 29 at 5.] Since DHEC issued a minor source permit to New-Indy, it argues, the court does not have jurisdiction over Plaintiffs' claims. But "courts that have squarely addressed the argument, that the issuance by a state permitting agency of a minor source permit based upon a determination that a major source permit is not required precludes the exercise of federal jurisdiction . . . have rejected it." *Voigt v. Coyote Creek Mining Co., LLC*, No. 1:15-cv-00109, 2016 WL 3920045, at *4-5 (D.N.D. July 15, 2016) (collecting cases). That is because "the plain language of § 7604(a)(3) . . . clearly permits citizens to bring an action against a major source for beginning construction without having a major source construction permit and does not contain an exception for when a state has determined one is not required and issued a minor source permit to satisfy state requirements." *Id.* at *4. We agree. Here too DHEC—a state agency—issued New-Indy a minor source permit. Neither parts C nor D of Subchapter I of the CAA account for such a permit. We thus decline to find the court lacks jurisdiction over Plaintiffs' claims.

II. *Should* the court hear plaintiffs' claims?

A. *Burford* abstention framework

In *Burford*, the defendant, Sun Oil Co., brought a federal action challenging the validity of an order issued by the Texas Railroad Commission. *Burford*, 319 U.S. at 317. The order at issue was part of a general regulatory system Texas created for the conservation of oil and gas. *Id.* at 318. The Texas legislature "established a system of thorough judicial review by its own [s]tate courts," where parties could appeal Commission orders to a state district court in a particular county. *Id.* at 325. A branch of the Texas Court of Civil Appeals and Texas Supreme Court could then review the orders. *Id.* But the *Burford* court noted the exercise of federal jurisdiction over such orders ultimately led to delay, misunderstanding of local law, and federal conflict with state policy—the very confusion Texas's regulatory system was designed to alleviate. *Id.* at 327. In one instance, a federal court "flatly disagreed" with the same position a Texas court later took as to Texas law. *Id.* at 327-28. Citing the "[c]onflicts in the interpretation of state law," which were "almost certain to result from the intervention of the lower federal courts," the *Burford* court concluded that "[u]nder such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand." *Id.* at 333.

Since that time, the Supreme Court has "distilled" the *Burford* decision into the following analysis:

> 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."

NOPSI, 491 U.S. at 361 (quoting *Colorado Water Conservation Dist. v. United States*, 424 U.S. 800, 814).

As New-Indy points out, the Fourth Circuit examined the *Burford* abstention doctrine in *Sugarloaf Citizens Ass'n v. Montgomery Cnty., Md.* In that case, the Maryland Department of the Environment ("MDE") issued two permits—a "Permit to Construct" and "Refuse Disposal Permit"—to Montgomery County, Maryland, which was building a waste-to-energy incinerator facility. *Sugarloaf*, 1994 WL 447442, at *1. The Sugarloaf Citizens' Association spent about five years spearheading efforts to challenge the permits MDE issued for the facility using procedures available under Maryland's regulatory scheme. *Id.* The Secretary of MDE ultimately accepted a state administrative law judge's recommendation to issue the permits at issue. *Id.* Sugarloaf appealed MDE's decision to the appropriate state circuit court and, less than two weeks later, filed a citizen suit in federal court against Montgomery County and the Northeast Maryland Waste Disposal Authority. *Id.* The district court considered Sugarloaf's claim "a collateral challenge to the permitting decisions of the Maryland state environmental agencies," and abstained under *Burford* in favor of the still-pending state court proceedings. *Id.* at *2.

Applying the *NOPSI* framework, the Fourth Circuit concluded the district court did not abuse its discretion in abstaining under *Burford*. First, it found the first *NOPSI* prong applicable because the case "centers on the permitting of a waste facility that may affect [the state's] environment, a matter of obvious public import with significant repercussion transcending the results of this litigation." *Id.* at *3. It also found the second *NOPSI* prong warranted *Burford* abstention because Maryland's "complex" regulatory scheme "satisfi[ed] *Burford* by providing 'impartial and fair administrative determinations subject to expeditious and adequate judicial

review' in these 'important matters of state policy.'" *Id.* at *4 (quoting *Browning-Ferris, Inc. v. Baltimore Cnty.*, 774 F.2d 77, 79 (4th Cir. 1985)). The Fourth Circuit reasoned exercising federal jurisdiction over MDE's permitting decisionswould "disrupt Maryland's complex statutory scheme and frustrate the State's efforts to establish a coherent environmental policy, thereby warranting *Burford* abstention . . . ." *Id.*

The Fourth Circuit also noted Sugarloaf's claims simply challenged the substantive basis for MDE's *permitting decision* and thus amount to nothing but "a collateral attack of MDE's permitting decisions." *Id.* at *4, *6. The CAA's citizen suit provision "does not allow such a challenge, and a federal court should abstain from rendering such review." *Id.* at *6. Courts in this circuit have found this distinction to be critical. When a plaintiff raises a "traditional citizen-suit enforcement action alleging that defendants are *violating a permit*," for example, district courts have found such challenges proper. *Winyah Rivers Alliance v. Active Energy Renewable Power, LLC*, No. 7:21-cv-43-D, 2022 WL 17987640, at *2 (E.D.N.C. Dec. 29, 2022) (declining to abstain under *Burford* where plaintiff raised Clean Water Act challenging a permit for chemical charge violations); *see also Sierra Club v. Virginia Elec. And Power Co.*, 145 F. Supp. 3d 601, 608 (E.D. Va. 2015) (distinguishing *Sugarloaf* where the *Sierra Club* plaintiffs' claims alleged the defendant "is *violating* a validly issued permit, not raising a challenge to the *issuance* of the permit itself"). Where a plaintiff's claims are "'nothing more than a collateral attack of a prior permitting decision,'" however, courts in the Fourth Circuit typically abstain under *Burford*. *Id.* (quoting *Palumbo v. Waste Tech. Indus.*, 989 F.2d 156, 158 (4th Cir. 1993)).

Given the importance of state administrative agencies to *Burford*'s framework, we briefly discuss South Carolina's regulatory policy on air control permitting before addressing New-Indy's request.

B. South Carolina Regulatory Background

Though Congress enacted the CAA to regulate air pollution at the federal level, it also acknowledged "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments[.]" 42 U.S.C. §7401(a)(3). Part of the CAA's purpose, then, is to "encourage the enactment of improved and . . . uniform State and local laws relating to the prevention and control of air pollution[.]" *Id.* § 7402(a). Congress directed every state to "adopt and submit to the Administrator [of the EPA] . . . a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State." *Id.* § 7410(a)(1).

South Carolina submitted and received approval of such a plan (a State Implementation Plan or "SIP"). *See* 40 C.F.R. § 52.2122. The SIP includes regulations governing permit applications, which are located at S.C. Code Regs. 61-62.5 Standard 7. Standard 7 is located within the regulations governing DHEC and, specifically, in DHEC's Air Pollution Control Regulations and Standards. *See id.* 61-62. DHEC promulgated those standards to "maintain reasonable standards of purity of the air resources of [South Carolina] consistent with the public health, safety, and welfare of its citizens, maximum employment, the industrial development of [South Carolina], the propagation and protection of terrestrial and marine flora and fauna, and the protection of physical property and other resources." *Id.* 61-62(A). Titled "Prevention of Significant Deterioration," Standard 7 applies to the construction of new major stationary sources

or projects at existing major stationary sources in areas designated as attainment or unclassifiable. S.C. Code. Regs. 61-62.5 St. 7(A)(2)(a). It sets forth extensive regulations concerning rates that constitute "significant emissions." South Carolina's SIP requires all permit applications from sources located in the state to be sent to DHEC "rather than to EPA's Region 4 office." 40 C.F.R. § 52.2131.

DHEC issues several types of construction permits through its Bureau of Air Quality ("BAQ"), including minor source permits, minor synthetic permits, and major source (or PSD) permits. https://scdhec.gov/environment/air-quality/construction-permits-air-quality. The BAQ issues minor source construction permits "for projects where potential emissions are below the major source permitting thresholds." *Id.* While both minor synthetic permits and major source/PSD permits require a 30-day public notice period, minor source permits do not require any sort of public notice. *Id.* Minor source permits also are not subject to certain heightened application obligations, including application of best available control technology ("BACT") and analyzing ambient air quality in areas that would be affected by the major stationary source or major modification. *See* S.C. Code. Regs. 61-62.5 St. 7(A)(2)(b) (those requirements only apply to "the construction of any new major stationary source or major modification of any major stationary source" except as otherwise noted).

In its briefing and again at the hearing, New-Indy directed the court to a provision in the Pollution Control Act which allows a person to "petition [DHEC] in writing for a declaratory ruling as to the applicability of a specific, existing regulatory program to a proposed or existing discharge into the environment," provided the discharge was not exempt or excluded from permitting under the act. S.C. Code Ann. § 48-1-90(A)(4). Under that provision, anyone seeking such a declaration

must name the person[1] proposing to emit or emitting discharge and serve them with the petition. *Id.* DHEC has sixty days after receiving a petition to issue a declaratory ruling as to the applicability of the program to the discharge at issue. *Id.*

If DHEC determines a permit is required under the program and no exception or exclusion exists, it "*must*" issue a declaration requiring the person to apply to permit the discharge at issue pursuant to the applicable program. *Id.* DHEC can also determine "immediate action is necessary to protect the public health or property due to . . . unpermitted discharge." *Id.* If DHEC determines immediate action is necessary, it may issue an emergency order and order any action it considers necessary to address the emergency. *Id.* If the person to whom the order is directed applies to the Administrative Law Court for relief, a hearing must take place within forty-eight hours. *Id.* And anyone contesting *any* DHEC decision on a petition can request a contested case hearing before the Administrative Law Court. *Id.* Finally, the Administrative Law Court's decision can be appealed to the state Court of Appeals. Rule 31, SCALC.

With both the *Burford* abstention and South Carolina regulatory framework in mind the court turns to its central question: should we abstain under *Burford*?

C. Abstention is appropriate under *Burford*

As discussed above, *Burford* abstention is appropriate if (1) "timely and adequate" state court review is available and (2) there are difficult questions of state law, *or* exercising federal

[1] A "person" is "any individual, public or private corporation, political subdivision, government agency, municipality, industry, copartnership, association, firm, trust, estate, or any other legal entity whatsoever[.]" S.C. Code Ann. § 48-1-10(1).

jurisdiction would disrupt the state's efforts to establish a coherent regulatory policy. *See NOPSI*, 491 U.S. at 361. We address each factor in turn.

First, "timely and adequate" review is available under South Carolina law. New-Indy points us to S.C. Code § 48-1-90(A)(4) which, as the court reads it, allows Plaintiffs to, at any time, petition DHEC for a declaration New-Indy must apply for a PSD permit. Plaintiffs would have DHEC's ruling on that issue within 60 days. If they do not agree with DHEC's ruling, they can file a request for a contested case hearing with the Administrative Law Court. And if they do not agree with *that* decision, they can appeal it to the South Carolina Court of Appeals. The statutory scheme also allows DHEC to take additional, emergency action if it considers such action necessary. The statute does not say what actions DHEC may take to address the emergency. But based on the court's independent research it appears DHEC can, for instance, order a respondent to immediately cease making discharges. *See, e.g.*, *In re Tindall Corp.*, No. 01-ALJ-07-0280-CC, 2001 WL 1147358, at *1 (Sept. 12, 2001) (discussing emergency order requiring respondent to immediately cease discharges of process wastewater); *South Carolina Dep't of Health & Env. Control v. Cardinal Companies, L.P.*, No. 00-ALJ-07-0695-CC, 2001 WL 761916, at *2 (July 9, 2001) (noting DHEC issued an emergency order requiring respondent to, among other things, cease unauthorized or unpermitted discharges and immediately shut down all processes with the potential to make unpermitted or uncontrolled releases).

Plaintiffs here request we compel New-Indy to apply to DHEC for *and obtain* a PSD permit and order them to immediately cease or curb their discharges. [ECF No. 2 ¶ 41.] Putting aside (for now) the question of whether the court can force DHEC to do anything, a plain reading of § 48-1-90(A)(4) indicates the very relief Plaintiffs seek is available directly from DHEC itself. If

Plaintiffs do not like DHEC's decision, they can go to the Administrative Law Judge. And if they do not agree with that judge's decision—onward to the court of appeals.

Plaintiffs do not meaningfully challenge the adequacy of South Carolina's review mechanisms. Instead, they suggest abstention is improper here because DHEC did not issue any public notice before it issued New-Indy's minor source permit. [*See* ECF No. 40 at 15-18.] But the *NOPSI* "distillation" frames the question as whether there is adequate state-court "*review*" of state administrative agencies' orders and procedures—not whether there is adequate public notice *before* an agency issues an order. *See NOPSI*, 491 U.S. at 361. To be sure, at least one court has declined to abstain under *Burford* when the state agency issued a minor source permit without first requiring public notice. *See Voigt v. Coyote Creek Mining Co., LLC*, No. 1:15-cv-00109, 2016 WL 3920045. But in that case the applicable state review mechanism was only available to those people who participated in or provided comments during the state agency's permitting hearing process. *Id.* at *13. Even then, the mechanism limited review to only issues "actually raised" before the state agency. *Id.* Section 48-1-90(A)(4) contains no such limitation, nor do Plaintiffs suggest it does. And the other case on which Plaintiffs rely concerned a situation where the plaintiff challenged both the state agency's permit decisions *and* the defendants' pre-permit conduct. *WildEarth Guardians v. Extraction Oil & Gas, Inc.*, 457 F. Supp. 3d 936, 948-49 (D. Colo. 2020) (declining to abstain under *Burford* because it was not clear that the state-court review process would address pre-permit violations).[2] That is not the case here. Plaintiffs do not

[2] Plaintiffs also pointed to *Weiler v. Chatham Forest Prods.*, 392 F.3d 532, 536 (2d Cir. 2004) at the hearing, arguing that the case counseled in favor of declining to abstain under *Burford*. [*See* ECF No. 53, Hrg. Tr. 37:16-38:9.] But that case does not involve any sort of abstention analysis—it simply holds a state's determination that a prospective source of air pollution is not a "major

challenge New-Indy's pre-permit conduct. Plaintiffs challenge what they allege are misrepresentations New-Indy made to DHEC in its minor source permit application that, according to Plaintiffs, led to DHEC issuing the minor source permit. [*See* ECF No. 1 ¶¶ 28-39; ECF No. 53, Hrg. Tr. 41:2-12 (Plaintiffs' "intent with [bringing the action] was to draw attention to the fact that they had submitted paperwork under penalties of perjury to DHEC concerning certain emissions estimates that were just flat wrong").] As discussed above, § 48-1-90(A)(4) appears to provide a mechanism for Plaintiffs to raise those concerns with DHEC. New-Indy certainly espouses this view, and Plaintiffs do not—and did not—argue it does not.[3]

Second, exercising jurisdiction here "would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI*, 491 U.S. at 361.[4] As discussed above, South Carolina's permitting regulations are part of a larger body of regulations DHEC deemed necessary to maintain the purity of South Carolina's air resources for its citizens, its plant and animal life, and its industrial development. These are certainly matters of "substantial public concern." DHEC set forth in those regulations a comprehensive mechanism for applying for and receiving certain air permits. And South Carolina provides an avenue for review even

emitting facility" does not prevent a plaintiff from suing under the CAA. *Id.* at 539. *Weiler* thus does not provide any guidance on the *Burford* issue.

[3] The court asked Plaintiffs to address § 48-1-90 at the hearing on this motion. [ECF No. 53, Hrg. Tr. 38:19-39:9.] Plaintiffs merely responded their "recollection is that this is a statute that enables you to go to circuit court if there is a violation of the Pollution Control Act." *Id.* And that is a correct statement. *See* S.C. Code Ann. § 48-1-200 (anyone can appeal from any DHEC order to the court of common pleas of the county where the pollution occurs). But as discussed above it also appears to allow for Plaintiffs to seek from the state review process the same relief they seek here. Plaintiffs did not make any argument in opposition to that point.

[4] New-Indy does not suggest there are difficult questions of state law at issue so we do not address that *NOPSI* prong.

where, as is the case here, there was no public notice before DHEC issued a permit. *See* S.C. Code § 48-1-90(A)(4).

Likewise, hearing Plaintiffs' claims would disrupt DHEC's efforts to establish its regulatory policy. The parties do not dispute that New-Indy applied for a minor source permit and that DHEC reviewed that application, found New-Indy did not need to apply for a PSD permit, and issued the minor source permit. [*See* ECF No. 2 ¶ 22 (". . . Defendants sought *and obtained* findings by DHEC that the deactivation of the steam stripper and reliance on the wastewater treatment system was a 'minor' change that did not require a PSD permit . . .") (emphasis added).] Plaintiffs essentially argue that was the wrong call and New-Indy should have applied for a PSD permit. To be sure, Plaintiffs do not explicitly lay the blame at DHEC's feet. Instead, they allege DHEC arrived at its decision based on incorrect information—or misrepresentations—New-Indy supplied on its application. But that does not change what Plaintiffs ultimately ask the court to do: second guess DHEC's decision and require New-Indy to apply for and, somehow, obtain a PSD permit, even though DHEC concluded a minor source permit was sufficient. *Id.* ¶ 41 ("Plaintiffs file this action seeking injunctive relief . . . requiring [New-Indy] to apply for *and obtain* a PSD permit . . . ."), Prayer For Relief ¶ 2 ("Order [New-Indy] to reduce pulp production . . . until [New-Indy] appl[ies] for *and obtain*[*s*] a PSD Permit . . . .").

It is not hard to see the practical problems with Plaintiffs' request. As New-Indy points out, DHEC has already concluded it a minor source permit is suitable. So what happens if the court steps in, decides DHEC was wrong, and orders New-Indy to go out and get a PSD permit? New-Indy now has contradictory orders in its hands: one from the very agency that promulgated the regulations governing the permit and the other from a federal court "not as

familiar with state law not as familiar in state regulatory law. . . ." *Jamison*, 493 F. Supp. 2d at 791. And it is not clear the court can compel DHEC—a state agency not before this court on this issue in any way—to issue a PSD permit when it already found a minor source permit was sufficient. [*See* ECF No. 53, Hrg. Tr. 44:20-45:12.] Or what if the court weighs in on DHEC's decision and *agrees* that a minor source permit is sufficient. Couldn't Plaintiffs turn around and petition DHEC for a ruling as allowed by § 48-1-90(A)(4)? And if DHEC reverses itself in the appeals process and concludes New-Indy *does* have to apply for a PSD permit, where does that leave the parties? Under either situation, we are left with two conflicting rulings—a problem created by a federal court interfering with South Carolina's attempts to establish its regulatory policy where state review is already available.

At bottom, Plaintiffs mount a collateral attack on DHEC's decision to issue New-Indy a minor source permit after reviewing its application. The Fourth Circuit and other courts in this circuit have repeatedly held *Burford* abstention is appropriate in such circumstances. *See, e.g.*, *Sugarloaf*, 1994 WL 447442, at *4-5 (abstaining under *Burford* where Sugarloaf's allegations amounted to "'noting more than a collateral attack on the prior permitting decisions of'" the state agency) (citing *Palumbo v. Waste Technologies Indus.*, 989 F.2d 156, 159 (4th Cir. 1993)); *Jamison*, 493 F. Supp. 2d at 791 (deeming plaintiffs' claim under the CAA a "collateral attack on a state agency decision made under state regulatory law" and noting to find defendant's permit invalid it would "necessarily have to conclude that the [state agency's] permitting decision . . . was incorrect); *Schneider v. Donaldson Funeral Home, P.A.*, No. JFM-16-2843, 2017 WL 68644, at * (D. Md. Jan. 6, 2017) (dismissing plaintiff's CWA claim against one defendant where the claim was "simply [an] expression of displeasure with the alleged inadequacies of [the state agency's]

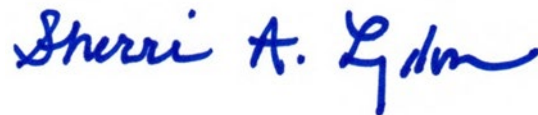
review" and thus "'constitut[ed] an impermissible collateral attack") (internal citations omitted). *See also Natural Resources Defense Council, Inc. v. BP Products North America*, No. 2:08-cv-024 PS, 2009 WL 1854527, at * (D. N. Ind. June 26, 2009) ("The bottom line is this: the NRDC thinks the [state agency] got the call wrong. It may have. But the proper remedy is through the Indiana regulatory and state court process; otherwise, there is an impermissible risk of disrupting [] Indiana's attempt to ensure uniformity.").[5]

Exercising jurisdiction over Plaintiffs' claims would disrupt South Carolina's efforts "to establish a coherent policy with respect to a matter of substantial public concern." *Jamison*, 493 F. Supp. 2d at 791. And, as discussed above, timely and adequate state court review is available to Plaintiffs. We thus abstain.

CONCLUSION

For these reasons the court **GRANTS** New-Indy's motion [ECF No. 29] and dismiss Plaintiffs' complaint without prejudice. Because we conclude abstention is warranted under *Burford*, we need not reach New-Indy's standing or separation of powers argument.

IT IS SO ORDERED.



August 24, 2023
Columbia, South Carolina

Sherri A. Lydon
United States District Judge

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[5] Plaintiffs argue *NRDC* and *Sugarloaf* are inapplicable because in those cases other parties (*NRDC*) or the plaintiffs (*Sugarloaf*) initiated state court review proceedings *before* suing under the CAA. [*See* ECF No. 40 at 16-178.] No such proceedings are pending here. But Plaintiffs do not point to any authority suggesting *Burford* abstention *requires* ongoing state court proceedings. In fact, at least one circuit has held such proceedings are *not* required. *See Sierra Club v. City of San Antonio*, 112 F.3d 789, 798 (5th Cir. 1997) ("Legally, *Burford* abstention does not require the existence of an ongoing state proceeding with which the federal court action directly interferes.").