

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT

3 August Term, 2003

4 (Argued September 26, 2003

Decided June 4, 2004)

5 Docket No. 02-9500

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7 JAMES F. WEILER, SANDRA L. WEILER, KIMBERELY  
8 DEWEY, ANN MARTIN, CHARLENE POORE, KENNETH  
9 POORE, KENNETH C. POORE, JR., CLEM CORYER,  
10 MARY CORYER, MARIE E. CRAVEN, SHEILA HOUSE,  
11 PHILLIP DORITY, PAMELA DORITY, GREGORY A.  
12 MILLS, NANCY MILLS, ROBERT WOODARD, LISA  
13 WOODARD, H.A. PATTERSON, BRIAN T. PATTERSON,  
14 GARY MALLETTE, AND ERNESTINE M. RIECK,

15 Plaintiffs-Appellants,

16 v.

17 CHATHAM FOREST PRODUCTS, INC.,

18 Defendant-Appellee.  
19 -----

20 B e f o r e: MESKILL, KATZMANN and RAGGI, Circuit Judges.

21 Appeal from the judgment of the United States District  
22 Court for the Northern District of New York, Scullin, J.,  
23 dismissing the case for failure to state a cause of action under  
24 the Clean Air Act.

25 Reversed and remanded.

26 ROBERT UKEILEY, Georgia Center for  
27 Law in the Public Interest,  
28 Atlanta, GA,  
29 for Appellants.

30 RUTH E. LEISTENSNIDER, Albany, NY  
31 (Nixon Peabody, Albany, NY, of  
32 counsel),

1 for Appellee.

2 MESKILL, Circuit Judge:<sup>1</sup>

3 Appeal from the judgment of the United States District  
4 Court for the Northern District of New York, Scullin, J.,  
5 dismissing the case for failure to state a cause of action under  
6 the Clean Air Act.

7 Reversed and remanded.

8 This appeal requires us to consider whether section  
9 304(a)(3) of the Clean Air Act, 42 U.S.C. § 7604(a)(3), allows a  
10 private litigant to sue in federal court to challenge the  
11 determination of the New York State Department of Environmental  
12 Conservation (NYDEC) that the defendant may proceed with the  
13 construction of a factory without obtaining a particular permit.

14 Defendant-appellee Chatham Forest Products, Inc.  
15 (Chatham) proposes to build and operate an "oriented strand board  
16 manufacturing" factory in Lisbon, New York. The manufacture of  
17 strand board produces pollutants that may be emitted into the  
18 atmosphere. According to the plaintiffs-appellants, a group of  
19 citizens who live and work in the vicinity of Lisbon, Chatham did  
20 not obtain the permit required prior to construction of the  
21 proposed factory. Chatham concedes that it has not obtained the  
22 permit identified by the plaintiffs, a so-called "major source"

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<sup>1</sup> Judge Katzmann provided substantial assistance in the preparation of this opinion.

1 permit. However, it maintains that the NYDEC, in issuing a  
2 different permit, conclusively determined that no major source  
3 permit is required, and that the plaintiffs may not sue in  
4 federal court to challenge the NYDEC's decision. The judge below  
5 held that federal judicial review is prohibited under the  
6 circumstances and dismissed the case for failure to state a cause  
7 of action. We reverse and remand.

#### 8 BACKGROUND

9 Because the facts of the case are somewhat technical in  
10 nature and intimately intertwined with the Clean Air Act's  
11 specific provisions, it is necessary to first lay out its basic  
12 framework as it relates to this case.

#### 13 1. The Clean Air Act

14 The Clean Air Act, 42 U.S.C. §§ 7401-7671q (2000) (the  
15 Act), created a complex and comprehensive legislative scheme to  
16 protect and improve the nation's air quality. See Sierra Club v.  
17 Larson, 2 F.3d 462, 464 (1st Cir. 1993).

18 Broadly speaking, Title I of the statute regulates  
19 stationary sources of pollution and Title II regulates  
20 mobile sources, most importantly motor vehicles. For  
21 specified pollutants, national air quality standards are  
22 promulgated by the EPA. 42 U.S.C. § 7409. Whether new  
23 construction of polluting facilities is permitted in an  
24 area, and what kind of controls are required, depends on  
25 whether the area is below or above the standard for each  
26 pollutant.

27 Id.

28 An entity proposing to construct a major emitting

1 source of pollutants must obtain a permit prior to construction.  
2 See 42 U.S.C. §§ 7475(a), 7502(c)(5). Part C of subchapter I of  
3 the Act (Part C), 42 U.S.C. §§ 7470-7492, governs requirements in  
4 geographical areas where the standard has been attained; Part D  
5 of subchapter I of the Act (Part D), 42 U.S.C. § 7501-7515,  
6 applies to so-called nonattainment areas.

7 The Act defines a "major emitting facility" as "any  
8 stationary facility . . . which directly emits, or has the  
9 potential to emit" the relevant quantity of pollutant as  
10 established by the Environmental Protection Agency (EPA). 42  
11 U.S.C. § 7602(j) (emphasis added). In turn, the EPA defines  
12 "potential to emit" to mean:

13 [T]he maximum capacity of a stationary source to emit a  
14 pollutant under its physical and operational design. Any  
15 physical or operational limitation on the capacity of the  
16 source to emit a pollutant, including air pollution  
17 control equipment and restrictions on hours of operation  
18 or on amount of material combusted, stored, or processed,  
19 shall be treated as a part of its design only if the  
20 limitation or the effect it would have on emissions is  
21 federally enforceable.

22 40 C.F.R. § 52.24(f)(3) (2004) (emphasis added).

23 However, the District of Columbia Circuit held that  
24 this standard was unreasonable because it failed to include  
25 mechanisms that are practically effective, even if not "federally  
26 enforceable," in the determination of a facility's "potential to  
27 emit." See National Mining Ass'n v. EPA, 59 F.3d 1351, 1363-65  
28 (D.C. Cir. 1995) (finding a parallel definition of "potential to

1 emit" unreasonable). In response, the EPA issued an "interim  
2 policy," explaining that "the term 'federally enforceable' should  
3 now be read to mean 'federally enforceable or legally and  
4 practicably enforceable by a state or local air pollution control  
5 agency.'" EPA Interim Policy on Federal Enforceability of  
6 Limitations on Potential to Emit, at 3-4 (Jan. 22, 1996),  
7 available at <http://www.epa.gov/ttn/oarpg/t5/memoranda/pte122.pdf>  
8 (last visited Jan. 12, 2004).

9 In short, then, a proposed facility that is physically  
10 capable of emitting major levels of the relevant pollutants is to  
11 be considered a major emitting facility under the Act unless  
12 there are legally and practicably enforceable mechanisms in place  
13 to make certain that the emissions remain below the relevant  
14 levels.

## 15 2. State Implementation

16 The Act "places the primary responsibility for  
17 enforcement on state and local governments." N.Y. Pub. Interest  
18 Research Group v. Whitman, 321 F.3d 316, 320 (2d Cir. 2003). In  
19 keeping with this principle, the EPA does not itself issue major  
20 source construction permits required by Part D of the Act.  
21 Rather, each state is directed to adopt and submit to the EPA for  
22 approval a state implementation plan (SIP) to implement and  
23 promote the policies and goals of the Act. The SIP must  
24 designate a state agency or its delegates to review applications

1 for major source construction permits under Part D and to monitor  
2 compliance with the permit once a facility has begun operation.  
3 See 42 U.S.C. §§ 7410(a), 7471, 7502(b) & (c), 7503.

4 Under the New York SIP permit scheme, which has been  
5 approved by the EPA, see N.Y. Pub. Interest Research Group, 321  
6 F.3d at 319, a factory that has the capacity to emit major levels  
7 of particular pollutants may avoid the stringent permit  
8 requirements of Part C and Part D and proceed as a "minor  
9 emitting facility" if it agrees to "cap" its pollution output.  
10 If it does so, it may receive a "synthetic minor" source permit.  
11 See N.Y. Comp. Codes R. & Regs. tit. 6, §§ 201-7.1 - 201-7.2.  
12 The NYDEC administers New York's SIP.

### 13 3. The Facts of the Case and the Question Presented

14 In this case, the Chatham factory was approved by the  
15 NYDEC under the synthetic minor source permit scheme because the  
16 NYDEC concluded that the mechanisms in place to limit the  
17 pollution output would be effective and enforceable. The  
18 plaintiffs allege that the factory must be considered a major  
19 emitting facility under the Act because the mechanisms put in  
20 place to limit pollution are neither practically effective nor  
21 enforceable. For instance, plaintiffs argue that the pollution  
22 output monitoring scheme does not adequately account for  
23 pollutants emitted during startup and shutdown of factory  
24 operations. They allege further that upstate New York is a

1 nonattainment area for several of the pollutants that will be  
2 emitted by the factory. As a consequence, they maintain that  
3 Chatham must comply with the demanding permit requirements of  
4 Part D of the Act, and that a synthetic minor source permit is  
5 not sufficient.

6 They sued under section 304(a)(3) of the Act, which  
7 states:

8 [A]ny person may commence a civil action on his own  
9 behalf- . . . (3) against any person who proposes to  
10 construct or constructs any new or modified major  
11 emitting facility without a permit required under part C  
12 of subchapter I of this chapter . . . or part D of  
13 subchapter I of this chapter (relating to nonattainment)  
14 or who is alleged to have violated (if there is evidence  
15 that the alleged violation has been repeated) or to be in  
16 violation of any condition of such permit.

17 42 U.S.C. § 7604(a)(3).

18 The judge below held that this section does not allow a  
19 private litigant to sue in federal court to challenge the NYDEC's  
20 determination that no major source permit is necessary.

#### 21 DISCUSSION

22 Our review of the district court's holding that  
23 plaintiffs have failed to state a cause of action is de novo.  
24 Phillip v. University of Rochester, 316 F.3d 291, 293 (2d Cir.  
25 2003).

26 We begin our analysis, of course, with the text of the  
27 statutory provision in question, namely, section 304(a)(3)'s  
28 citizen suit provision. As stated previously, it provides that

1 any person may sue a "person who proposes to construct . . . any  
2 . . . major emitting facility without a permit required under  
3 part C . . . or part D." 42 U.S.C. § 7604(a)(3). The plaintiffs  
4 have alleged that the proposed factory will be a major emitting  
5 facility within the meaning of the Act and that Chatham has not  
6 obtained the permits required by Part D for major emitting  
7 facilities. These factual allegations, if proven, appear to be  
8 sufficient under the language of the provision to allow the  
9 plaintiffs to succeed in their effort to halt the construction of  
10 the factory. At this stage of the litigation, the district court  
11 was required to accept these allegations as true. Chambers v.  
12 Time Warner, 282 F.3d 147, 152 (2d Cir. 2002). It is therefore  
13 difficult to see in what respect the plaintiffs have failed to  
14 state a cause of action.

15 Chatham's contention appears to be that the structure  
16 of the Act bars citizen suits brought under section 304(a)(3) in  
17 federal court that would undermine the NYDEC's determination that  
18 the proposed factory will not be a "major" source of pollution as  
19 defined by the Act.

20 Before discussing the specific issues raised by this  
21 argument, we note as a guiding principle that citizen suits play  
22 an important role in the Act's enforcement scheme. Wilder v.  
23 Thomas, 854 F.2d 605, 613 (2d Cir. 1988). The citizen suit  
24 provisions were designed not only to "motivate government

1 agencies" to take action themselves, id. (internal quotation  
2 marks omitted), but also to make citizens partners in the  
3 enforcement of the Act's provisions. See Friends of the Earth v.  
4 Consol. Rail Corp., 768 F.2d 57, 63 (2d Cir. 1985). Citizens  
5 serve "as a supplemental and effective assurance that the Act  
6 [is] implemented and enforced." Friends of the Earth v. Carey,  
7 535 F.2d 165, 172 (2d Cir. 1976) (internal quotations omitted).

8 We also note that "Congress has frequently demonstrated  
9 its ability to explicitly provide that . . . an administrative  
10 proceeding or court action will preclude citizen suits." Consol.  
11 Rail Corp., 768 F.2d at 63 (citing statutes in which Congress has  
12 specifically precluded citizen suits where administrative or  
13 judicial proceedings have taken place). That Congress did not do  
14 so in this case strongly suggests that it had no such intent.  
15 See id. Therefore, in the absence of any express statutory  
16 language or other strong indication of congressional intent, we  
17 doubt that Congress intended to preclude citizen suits brought  
18 pursuant to section 304(a)(3) of the Act.

19 Chatham does not point to any express statutory  
20 language or other strong indicators evincing congressional intent  
21 to foreclose suits brought by citizens in this context. Instead,  
22 it argues that (1) Congress has provided other avenues of  
23 enforcement under the Act, thus rendering section 304(a)(3) suits  
24 unnecessary, (2) Congress intended to give states a major role in

1 implementing the Act, and permitting judicial oversight of state  
2 permit decisions would undermine that role, and (3) the EPA's  
3 approval of New York's SIP insulates Chatham from a claim that  
4 the enforcement mechanisms imposed by the NYDEC pursuant to the  
5 SIP are insufficient.

6 With respect to Chatham's first argument, we agree that  
7 other mechanisms of enforcement exist to challenge the NYDEC's  
8 determination. Third parties who would be affected by the  
9 opening of a new facility may challenge the NYDEC's permit  
10 decision by way of an Article 78 administrative proceeding in New  
11 York Supreme Court. N.Y. C.P.L.R. § 7801, et seq. Additionally,  
12 if the EPA disagrees with the state's assessment of a facility's  
13 potential to emit, it may take action on its own, including  
14 filing a civil action to mandate compliance with the major source  
15 requirements.<sup>2</sup> See 42 U.S.C. § 7413(a)(5), (b); cf. United  
16 Steelworkers of Am. v. Oregon Steel Mills, 322 F.3d 1222, 1224  
17 (10th Cir. 2003) (noting the EPA's disagreement with the state  
18 regulator's determination that a source was not subject to major

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<sup>2</sup> Citizens have also tried to appeal to the EPA a state's decision to grant a construction permit to a major source. See In re Alcoa-Warrick Power Plant, PSD App. No. 02-14, 2003 WL 1383468 (EAB Mar. 5, 2003) (citing 42 U.S.C. § 7475 and 40 C.F.R. §§ 52.21, 124.19). However, the EPA has determined that it does not have jurisdiction to consider an appeal of a state decision that a major source permit is unnecessary. Id. (citing In re DPL Energy Montpelier Elec. Generating Station, 9 E.A.D. 695 (EAB 2001); In re Carlton, Inc. North Shore Power Plant, 9 E.A.D. 690 (EAB 2001)). Thus, this process does not serve as an alternative enforcement mechanism in this case.

1 source restrictions). Affected third parties also may sue a  
2 state entity under the Act's citizen suit provisions to require  
3 the entity to comply with the terms of its SIP, see 42 U.S.C.  
4 § 7604(a)(1), so it is at least arguable that the NYDEC would be  
5 susceptible to suit for failing to follow SIP-mandated procedures  
6 for reviewing permit applications.<sup>3</sup> Furthermore, the same  
7 provision might permit citizens to bring suit against private  
8 entities that operate factories that have violated the Act's  
9 standards.

10           However, we fail to understand how the very existence  
11 of alternative enforcement mechanisms evinces congressional  
12 intent to prohibit use of section 304(a)(3) citizen suits in this  
13 context. The alternative mechanisms identified by the defendant  
14 are not adequate substitutes for section 304(a)(3) suits. For  
15 instance, although New York has opted to provide for review of  
16 the NYDEC's decisions in state court, Congress did not require it  
17 to do so; there is also no guarantee that the full range of  
18 remedies and awards that are available in a citizen suit, see 42

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<sup>3</sup> Section 304(a)(1) provides for citizen suits 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.  
42 U.S.C. § 7604(a)(1).

1 U.S.C. § 7604(d), will be available in a suit brought in state  
2 court. It is therefore difficult to understand how New York's  
3 decisions regarding whether to provide state judicial review, and  
4 which remedies to make available, have any relevance to a  
5 determination of Congress' intent in enacting section 304(a)(3)  
6 of the Clean Air Act.<sup>4</sup>

7 Likewise, section 304(a)(1), although it may be  
8 available to plaintiffs, does not provide the same relief sought  
9 in this action in at least two respects. First, plaintiffs  
10 bringing suits under section 304(a)(1) must give sixty days  
11 notice to the EPA, the state, and the private defendant prior to  
12 filing suit. 42 U.S.C. § 7604(b)(1). By contrast, plaintiffs  
13 proceeding under section 304(a)(3) are excused from this  
14 requirement. Oregon Steel Mills, 322 F.3d at 1227. More  
15 significantly, a section 304(a)(1) suit can only be brought  
16 against a private defendant after a facility has been built and  
17 begun operation.<sup>5</sup> By contrast, section 304(a)(3) provides relief  
18 before construction has begun.<sup>6</sup> Given that Congress evidently

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<sup>4</sup> Indeed, there is no evidence that the EPA, much less Congress, had any indication that New York chose to provide state judicial review over the NYDEC's permitting decisions.

<sup>5</sup> Section 304(a)(1) permits suits against entities "who [are] alleged to have violated . . . or to be in violation of" an SIP. 42 U.S.C. § 7604(a)(1). This would not permit suits against a private defendant prior to construction of a facility.

<sup>6</sup> Section 304(a)(3) expressly permits suits against "any person who proposes to construct" a facility. 42 U.S.C.

1 saw a value to creating a pre-construction right to sue, we  
2 cannot agree that a potential post-construction right to sue is  
3 an adequate substitute.

4 Finally, while the EPA may take action in federal court  
5 against the facility if it determines that the facility has  
6 violated the Act, viewing such an enforcement mechanism as a  
7 substitute for a citizen's suit would undermine the very purpose  
8 of the citizen's right to sue. Simply put, we cannot say that  
9 the existence of potentially overlapping enforcement mechanisms  
10 demonstrates Congress' intention to preclude a citizen suit in  
11 this particular case.

12 We are also unpersuaded by the defendant's second,  
13 complementary argument. Based on Congress' intention that states  
14 play a significant role in the implementation of the Act, as  
15 evidenced by the reliance on SIP schemes, the defendant concludes  
16 that Congress must have intended to foreclose citizen suits  
17 brought under section 304(a)(3) that would challenge the  
18 determinations of state agencies.

19 This argument proves too much. This argument, if  
20 accepted, would preclude a section 304(a)(1) challenge against  
21 the NYDEC as well, because a suit against the NYDEC would equally

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§ 7604(a)(3) (emphasis added).

1 undermine New York's enforcement scheme;<sup>7</sup> yet even the defendant  
2 admits that a section 304(a)(1) claim against the NYDEC is  
3 theoretically available to the plaintiffs. Further, we do not  
4 understand how judicial oversight would undermine the exercise by  
5 the state agency of its nondiscretionary duty to implement the  
6 Act. The question in this case is whether Chatham sought, and  
7 the NYDEC granted, the correct permit. If they did, then the  
8 NYDEC properly exercised its authority and Chatham is free to  
9 construct the facility; if there was error, then Chatham may not  
10 yet proceed.<sup>8</sup> Congress has required both state agencies and  
11 private entities to meet the demands of the Act. The plaintiffs  
12 allege that both the agency and the private entity have not met  
13 their responsibilities; we do not see why the private entity  
14 should be immune from this suit.

15 Chatham appears to offer a final argument to support  
16 its contention that it is not subject to a section 304(a)(3) suit  
17 under these circumstances. According to Chatham, once the EPA

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<sup>7</sup> Indeed, one could argue that a suit against the state agency itself undermines the state's enforcement scheme to a far greater extent than a suit against a private entity.

<sup>8</sup>We note that we have ruled in the section 304(a)(1) context that plaintiffs must exhaust administrative and state judicial remedies before proceeding in federal court. Action for Rational Transit v. West Side Highway Project, 699 F.2d 614, 616-17 (2d Cir. 1983) (per curiam). A similar requirement may apply in the section 304(a)(3) context. But because the exhaustion issue is not before us, we do not here rule whether plaintiffs are required to exhaust their permit challenge in the state courts.

1 approves an SIP, a private entity operating pursuant to a permit  
2 issued by a state agency is insulated from a suit brought by a  
3 private citizen. The argument appears to be that the EPA's  
4 decision that an SIP comports with the requirements of the Act  
5 cannot be attacked in a suit such as this one.

6 As with the defendant's other arguments, this claim  
7 fails to sway us. At best, it suggests a policy rationale that  
8 Congress should preclude citizen suits in this context. It  
9 offers no indication, however, that Congress actually chose to do  
10 so.

11 In sum, Chatham's structural arguments cannot overcome  
12 the plain language of the Act. If Congress intended to foreclose  
13 citizen suits in this context, it could have said so.

14 The plain text of the statute, together with an  
15 understanding of the central role played by citizen suit  
16 provisions in enforcing the Act and the EPA's own interpretation,  
17 lead us to conclude that the district court erred when it  
18 determined that federal courts may not entertain suits brought  
19 against private entities under section 304(a)(3) to challenge a  
20 state agency's determination that no major source permit is  
21 necessary.

1 CONCLUSION

2 For the reasons we have stated, we conclude that a  
3 state determination that a prospective source of air pollution is  
4 not a major emitting facility does not prevent a private  
5 plaintiff from bringing a suit seeking to enjoin the construction  
6 of the facility pursuant to section 304(a)(3) of the Act, 42  
7 U.S.C. § 7604(a)(3). Accordingly, the judgment below is vacated  
8 and this matter is remanded for further proceedings consistent  
9 with this opinion.<sup>9</sup>

10 The NYDEC shall receive a copy of this order.

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<sup>9</sup> Because the judge below dismissed for failure to state a cause of action, he did not consider the alternative grounds suggested by the defendant for dismissing the case. On remand, the judge may address those issues. In addition, the EPA and the NYDEC may participate in the proceedings on remand as appropriate.