

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

[State ex rel.] The Sierra Club,	:	
Plaintiff-Relator,	:	
v.	:	No. 05AP-643
Joseph Koncelik, Director of Environmental Protection,	:	(REGULAR CALENDAR)
Defendant-Respondent.	:	
	:	

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O P I N I O N

Rendered on December 6, 2005

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*E. Dennis Muchnicki*, for The Sierra Club.

*Jim Petro*, Attorney General, *Nathaniel S. Orosz*,  
*Christopher D. Wiest* and *John K. McManus*, for Joseph  
Koncelik.

*Vorys, Sater, Seymour and Pease LLP*, *William D. Hayes* and  
*Richard P. Fahey*, for Intervener FDS Coke Plant, LLC.

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IN PROHIBITION  
ON MOTION TO DISMISS

KLATT, J.

{¶1} Relator, The Sierra Club, is a non-profit environmental advocacy group that has opposed issuance by respondent, Joseph Koncelik, Director of the Ohio Environmental Protection Agency ("EPA" or "Director"), of a permit requested by FDS

Coke Plant, LLC, that would allow the company to install a coke oven battery and related facilities in Lucas County, Ohio. Various proceedings arising out of an eventual grant of the requested permit are currently pending before the Environmental Review Appeals Commission ("ERAC"), and the current original action seeking a writ of prohibition is a collateral attack upon the propriety of certain aspects of those proceedings. Because the present matter is before us on a motion to dismiss Sierra Club's complaint, a posture that requires us to take the factual allegations in the complaint as true, we will take the following description from the complaint of proceedings before the EPA and ERAC as accurate solely for purposes of assessing the motion to dismiss.

{¶2} The director issued on June 14, 2004 a "Permit to Install the Proposed Coke Oven Battery in Lucas County." Both Sierra Club and FDS Coke appealed to ERAC from the permit as issued, each presumably concluding that the permit was respectively too liberal or too restrictive. Sierra Club moved to intervene in the FDS Coke appeal; that motion was denied by ERAC, and Sierra Club has appealed from that denial to this court in a separate appeal presently pending.

{¶3} The director subsequently issued on May 10, 2005 to FDS Coke a "draft permit to install modification" affecting the 2004 permit previously issued to FDS Coke. The gist of the present action is that Sierra Club believes that the issuance of such a permit modification by the director, during the pendency of the pending cross-appeals to ERAC and to this court, constituted an "adjudication" as defined in R.C. 119.01(D), and that such adjudication was in derogation of the exclusive original jurisdiction provided to ERAC under R.C. 3745.04 over questions regarding the lawfulness and reasonableness of issued permits, as well as being in derogation of the appellate jurisdiction of this court

during the pendency of the appeal presently pending before us regarding ERAC's denial of Sierra Club's motion to intervene in FDS Coke's appeal before ERAC.

{¶4} Sierra Club accordingly requests issuance of a writ of prohibition setting forth that the director has no jurisdiction to take action to modify the 2004 permit while appeals are pending before ERAC and this court. Sierra Club also requests issuance of an unspecified "alternative writ" seeking the same relief, presumably in the event that prohibition is found not to lie in the present matter.

{¶5} FDS Coke has been granted leave to intervene in the matter, and has filed a motion to dismiss Sierra Club's complaint. The Director of the EPA, has also filed a motion to dismiss. Sierra Club has responded with a motion for summary judgment.

{¶6} Pursuant to Civ.R. 12(B)(6), a complaint or petition may be dismissed if it fails to state a claim for which relief can be granted. The complaint may be dismissed only where, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in favor of the nonmoving party, it appears beyond doubt from the face of the complaint that "no provable set of facts warrants relief." *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 570. In order for a writ of prohibition to issue, the petition must demonstrate "(1) that the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying the writ would cause injury for which there is no other adequate remedy in the ordinary course of law." *State ex rel. Tollis v. Court of Appeals for Cuyahoga Cty.* (1988), 40 Ohio St.3d 145, 147. While the parties argue all three elements of the above-outlined standard in the present case, in the context

of the present motion to dismiss, the third element is dispositive and we limit our discussion accordingly.

{¶7} We find that the present petition for a writ of prohibition must be dismissed because Sierra Club has an adequate remedy at law. Pursuant to R.C. 3745.04, all actions of the Director may be appealed to ERAC, which has the exclusive jurisdiction to initially review the lawfulness and reasonableness of the Director's actions. The statute, as well as Ohio Adm.Code 3746-5-13, in addition, outline ERAC's authority to issue a stay pending review of the Director's actions. If, in fact, the Director lacks the authority to modify the previously-issued permit or issue a new permit for essentially the same facility planned by FDS Coke during the pendency of various appeals to ERAC or this court, review by ERAC, and subsequently by this court or the Supreme Court of Ohio, is available to Sierra Club on appeal from the Director's actions in doing so.

{¶8} Because the issuance of a permit modification in this case by the Director is appealable to ERAC pursuant to R.C. 3745.04, and Sierra Club or any other protesting party may seek a stay of the permit during such an appeal, Ohio Adm.Code 3746-5-13, a legal remedy is available that renders unnecessary the issuance of a writ of prohibition.

{¶9} We recognize that in reaching this conclusion we must distinguish the case of *State ex rel. Republic Steel Corp. v. Environmental Bd. of Review* (1978), 54 Ohio St.2d 75, which is relied upon by Sierra Club in this case. *Republic Steel*, like the case before us, involved the issuance of a permit for a coke-producing facility. *Republic Steel*, however, when it came before the Supreme Court of Ohio in a prohibition action, was postured with significant differences from the present case. Most pertinently, in *Republic Steel*, the issuance of the contested temporary permit had been appealed to ERAC (then

known as the Environmental Board of Review) and remanded back to the Director with instructions. When the Director issued the permit pursuant to the remand from ERAC, the permit was again appealed to ERAC by an objecting party. Republic Steel, the permit applicant, moved to dismiss the appeal, but ERAC denied dismissal, leading Republic Steel to seek a writ of prohibition, first before this court and then before the Supreme Court of Ohio. The Supreme Court eventually allowed the writ prohibiting further action by ERAC: "[a] comparison of the foregoing assignments of error and the order of the board \* \* \* reveals a common issue in the original appeal to the board, the appeal pending in the Court of Appeals and in the second appeal to the board; i.e., whether the issuance of the orders permitting the operation of [the coke battery] was proper under the law on the facts presented." *Id.* at 80. The writ issued because ERAC was attempting to rule on factual and legal issues pending in a direct appeal of the permit process then pending before this court. The question was not whether the Director had jurisdiction to consider another permit application, but whether ERAC had jurisdiction to address identical issues to those pending before the court of appeals.

{¶10} In the present case, it is a separate, modified permitting process that is at issue in the present action seeking a writ. We do not have pending before us any appeal from a determination by ERAC of the propriety of this action by the Director. Without addressing the question of whether the Director has in fact exceeded his authority in issuing such a modified permit, the posture of the case does not lend itself to issuance of a writ of prohibition because that question can still be brought to ERAC and eventually this court if necessary through the statutorily-provided appeal process.

{¶11} In accordance with the foregoing, the motion to dismiss of respondent Joseph Koncelik and intervenor FDS Coke Plant, LLC, is granted. The pending cross-motions for summary judgment are rendered moot. Relator Sierra Club's petition seeking a writ of prohibition is dismissed.

*Petition dismissed.*

PETREE and SADLER, JJ., concur.

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