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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

NORTHWEST ENVIRONMENTAL
DEFENSE CENTER, a non-profit corporation,
OREGON CENTER FOR ENVIRONMENTAL
HEALTH, a non-profit corporation, and
SIERRA CLUB, a non-profit corporation,
Plaintiffs,

Plaintiffs,

v.

OWENS CORNING CORPORATION, an Ohio
Corporation

Defendant.

No. CV 04 1727 JE

OWENS CORNING CORPORATION'S
ANSWER TO COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF AND CIVIL PENALTIES

(pursuant to Clean Air Act, 42 U.S.C.
§ 7604(a)(3))

Owens Corning Corporation ("Owens Corning") for its Answer and affirmative defenses, to the Complaint hereby admits, denies and alleges as follows:

INTRODUCTION

1. *This is a complaint for injunctive and declaratory relief and civil penalties under the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q. The Northwest Environmental Defense Center, Oregon Center for Environmental Health, and Sierra Club (collectively, "Plaintiffs") bring this citizen suit under § 304(a)(3) of the Clean Air Act (the "Act" or "CAA"), 42 U.S.C. § 7604(a)(3), against Owens Corning Corporation ("Owens Corning" or "Defendant") for past and continuing violations of Section 165(a) of the CAA, 42 U.S.C. § 7475(a) and the State of Oregon's State Implementation Plan ("SIP") implementing the federal CAA, OAR 340-224-0010(2). Defendant Owens Corning is constructing a major emitting facility without a required preconstruction permit, in violation of CAA § 165(a), 42*

1- DEFENDANT OWENS CORNING'S ANSWER

U.S.C. § 7475(a). Plaintiffs allege that this unpermitted construction has violated and is violating Part C of Title I of the Act, 42 U.S.C. §§ 7470–7479, and implementing regulations, 40 C.F.R. § 52.21 (collectively, the "Prevention of Significant Deterioration" or "PSD" law) and related Oregon State law provisions, OAR 340-224-0010 to OAR 340-224-0070. These violations are ongoing as of the date of this complaint.

Admit that Plaintiff's Complaint purports to be a citizen's suit under the Clean Air Act. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 1.

2. Plaintiffs seek declaratory and injunctive relief and the imposition of civil penalties for these violations. Plaintiffs also request that, pursuant to 42 U.S.C. § 7604(g), this Court order that \$100,000 of the civil penalties imposed for these violations be used in local beneficial mitigation projects to enhance public health and the environment. Plaintiffs also seek an award of costs and attorneys' fees pursuant to 42 U.S.C. § 7604(d).

Admit that, by virtue of the pleaded claims in the Complaint, Plaintiff purports to seek damages and recover costs and expenses as alleged. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 2.

JURISDICTION AND VENUE

3. Jurisdiction over this action is conferred by 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 7604(a) (Clean Air Act jurisdiction). An actual, justiciable controversy exists between Plaintiffs and Defendant. The requested relief is proper under 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 42 U.S.C. § 7604(a).

Paragraph 3 of the Complaint contains legal assertions or conclusions to which no responsive pleading is required. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 3.

4. Venue is properly vested in this Court pursuant to 42 U.S.C. § 7604(c), because the events giving rise to this claim occurred at the Owens Corning facility, which is located within this judicial district, at 18456 NE Wilkes Road, Portland, Oregon 97230.

Admit that Owens Corning owns the property at 18456 NE Wilkes Road, Portland. Paragraph 4 of the Complaint contains legal assertions or conclusions to which no responsive pleading is required. Therefore, except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 4.

PARTIES

5. *Plaintiff NORTHWEST ENVIRONMENTAL DEFENSE CENTER ("NEDC") is an Oregon non-profit corporation with its principal place of business located at 10015 SW Terwilliger Boulevard, Portland, Oregon 97219. NEDC was founded in 1969 and is dedicated to the preservation and protection of the natural resources of the Pacific Northwest. NEDC's members are lawyers, scientists, students, and citizens interested in protecting the environment of the Pacific Northwest.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 5 and, therefore, denies the same.

6. *Plaintiff OREGON CENTER FOR ENVIRONMENTAL HEALTH ("the Center") is an Oregon non-profit corporation with its principal place of business located at 516 SE Morrison, Suite 300, Portland, Oregon 97214. The Center's mission is to protect the public health and the environment by promoting alternatives to the use, manufacture, release and disposal of harmful chemicals in Oregon.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 6 and, therefore, denies the same.

7. *Plaintiff SIERRA CLUB is a non-profit corporation with an office in Portland, Oregon and national headquarters in San Francisco, California. Worldwide, the Sierra Club has a membership exceeding 700,000 people, with an Oregon membership of over 20,000 and more than 10,000 members in the Portland Metro area. The Sierra Club's mission is to explore, enjoy, and protect the wild places of the earth; practice and promote the responsible use of the Earth's ecosystems and resources; educate and enlist humanity to protect and restore the quality of the natural and human environment; and use all lawful means to carry out these objectives. This mission includes protecting the air quality and human health in and around the Portland metropolitan area including Gresham and surrounding communities.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 7 and, therefore, denies the same.

8. *Defendant OWENS CORNING CORPORATION is in the process of building a polystyrene foam insulation board manufacturing facility at 18456 NE Wilkes Road, Portland, Oregon 97230. Once constructed, the facility would emit 283 tons annually of 1-chloro-1, 1-difluoroethane, a hydrochlorofluorocarbon commonly called HCFC-142b. The Owens Corning facility will also emit particulate matter, carbon monoxide, and volatile organic compounds.*

Admit that Owens Corning has applied for the air quality permit necessary to operate an extruded polystyrene foam insulation board manufacturing facility at 18456 NE Wilkes

Road, Portland, Oregon 97230. Admit that the proposed facility will emit less than 250 tons annually of HCFC-142b. Admit that the proposed facility will emit particulate matter, carbon monoxide, and volatile organic compounds, all of which will be emitted at levels well below Oregon's relevant generic plant site emissions limits. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 8.

9. *Plaintiffs' members live, work, and recreate near the Owens Corning facility that is currently under construction in Portland and are being adversely affected by the illegal construction that is currently occurring. Members of the Plaintiff organizations have witnessed the Owens Corning facility under construction and are concerned about its impact on human health and the natural resources that Plaintiffs use and enjoy. Owens Corning's construction of its facility, without the required permit, diminishes Plaintiffs' members' enjoyment of activities conducted in the vicinity of the Owens Corning facility.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 9 and, therefore, denies the same.

10. *Plaintiffs' members are concerned about the imminent emissions from Owens Corning's facility. Some of Plaintiffs' members suffer from lupus and other skin ailments. Plaintiffs' members are reasonably concerned that emissions from the Owens Corning facility will increase these members' risks of contracting or exacerbating existing skin diseases and other ailments. Plaintiffs are also reasonably concerned that emissions from the Owens Corning facility will contribute to other health and environmental problems associated with ozone depletion.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 10 and, therefore, denies the same.

11. *Plaintiffs' members are also concerned about the potential "greenhouse" effects of emissions from the Owens Corning facility. Plaintiffs' members use Oregon's waterways, enjoy the diverse plant and animal life in Oregon, recreate along Oregon's coast, and otherwise appreciate Oregon's natural resources. Plaintiff's members are aware of scientific studies that predict that global warming will cause harm to the areas that Plaintiffs use and species that Plaintiffs enjoy. Plaintiffs therefore reasonably fear that Owens Corning's emissions of HCFC-142b will contribute to and exacerbate these environmental injuries, and thereby diminish Plaintiffs' enjoyment of Oregon's natural resources and environment.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 11 and, therefore, denies the same.

12. *Plaintiffs' members are also concerned about the immediate, localized impacts of the Owens Corning facility's emissions. Some of Plaintiffs' members suffer from asthma and other respiratory illnesses. These members are concerned that Owens Corning's emissions of particulate matter will exacerbate their respiratory problems. Plaintiffs' members are also concerned about other health and environmental impacts caused by emissions from the Owens Corning facility.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 12 and, therefore, denies the same.

13. *Plaintiffs believe that Owens Corning's premature construction has made it more likely that it will emit the pollutants in the amounts for which it has sought permission, regardless of Plaintiffs' objections to Owens Corning's permit application. Plaintiffs therefore fear that the health and environmental impacts from Owens Corning's operations have become more likely and more imminent as a result of Owens Corning's violation of the preconstruction permit requirement.*

Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 13 and, therefore, denies the same.

14. *Plaintiffs' members also suffer procedural harm as a result of Owens Corning's failure to comply with the CAA's preconstruction review requirements. Plaintiffs believe that their concerns about the facility's construction and operations should have been addressed, as the CAA requires, before Owens Corning began constructing its facility. Plaintiffs are concerned that the construction, which is proceeding without the required preconstruction review, will foreclose an adequate review of Owens Corning's proposal seeking authorization to construct and operate its facilities. The purpose of the preconstruction permit requirement is to prevent any facility from beginning construction until the environmental impacts of the facility are fully evaluated and, where necessary, mitigated. Plaintiffs believe that they have been denied the procedural rights afforded under the CAA's preconstruction permit requirements. Plaintiffs believe that, without this Court's intervention, they will be unable to adequately participate in the Owens Corning permit process.*

Paragraph 14 of the Complaint contains legal assertions or conclusions to which no responsive pleading is required. As to the remainder of assertions in Paragraph 14, Owens Corning lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 14. Therefore, except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 14.

LEGAL BACKGROUND

The Clean Air Act

15. Congress enacted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population." CAA § 101 (b)(2); 42 U.S.C. § 7401(b)(2).

Owens Corning states that the statutes speak for themselves and that no further answer to Paragraph 15 is required.

16. Pursuant to 42 U.S.C. § 7409, the Administrator of the United States Environmental Protection Agency ("EPA") has promulgated regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for certain criteria air pollutants, including ozone, SO₂, NO₂, and particulate matter ("PM"). The primary NAAQS must adequately protect the public health, and the secondary NAAQS are to be sufficiently protective to safeguard the public welfare from any known or anticipated adverse effects associated with the presence of air pollutants in the ambient air.

Owens Corning states that the statute and regulations speak for themselves and that no further answer to Paragraph 16 is required.

17. Pursuant to 42 U.S.C. § 7410, each State must adopt and submit to EPA for approval a State Implementation Plan ("SIP") that provides for the attainment and maintenance of the NAAQS.

Owens Corning states that the statute speaks for itself and that no further answer to Paragraph 17 is required.

18. Pursuant to 42 U.S.C. § 7407(d), each State must designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an "attainment" area; an area that does not meet the NAAQS is a "nonattainment" area.

Owens Corning states that the statute speaks for itself and that no further answer to Paragraph 18 is required.

19. Pursuant to 42 U.S.C. § 7407(d), the State of Oregon has designed areas within its boundaries as "attainment" areas, which are those that meet the NAAQS, and "nonattainment" areas, which are those that do not meet the NAAQS. Oregon has also established a third category of air quality, "maintenance" areas, which are areas that were once nonattainment areas but have since moved into attainment and are managed according to a maintenance plan approved by the EPA. OAR 340-204-0010(14).

Owens Corning states that the statute and regulations speaks for themselves and that no further answer to Paragraph 19 is required.

Title VI of the CAA

20. *Title VI of the Clean Air Act implements the Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol"). 42 U.S.C. § 7671–7671(q). Under Title VI, certain ozone-depleting substances are categorized as either "Class I" or "Class II" As of January 1, 2000, Class I substances can no longer be produced in any amount. CAA § 604; 42 U.S.C. § 7671c. Effective January 1, 2030, "it shall be unlawful for any person to produce any class II substance." CAA § 605(b)(2); 42 U.S.C. § 7671 d(b)(2). HCFC-142b is a Class II substance subject to this prohibition. CAA § 602(b); 42 U.S.C. § 7671a(b).*

Owens Corning states that the statutes speak for themselves and that no further answer to Paragraph 20 is required.

21. *Congress also gave EPA authority under Title VI to establish a more expedited phase-out schedule for Class II substances. CAA § 606(a); 42 U.S.C. § 7671e(a). EPA has exercised this authority by promulgating an expedited phase-out schedule for HCFC-142b. 40 C.F.R. Part 82. Under this schedule, no person may produce HCFC-142b after January 1, 2010, unless the HCFC-142b is to be used in equipment manufactured before January 1, 2010. 40 C.F.R. § 82.16(c). If the HCFC-142b is used in equipment manufactured before 2010, the prohibition against its production takes effect in 2015. 40 C.F.R. § 82.16(d).*

Owens Corning states that the statutes and regulations speak for themselves and that no further answer to Paragraph 21 is required.

Prevention of Significant Deterioration and New Source Review

22. *Part C of subchapter I of the CAA, §§ 160-169B, 42 U.S.C. §§ 7470-7492, establishes the requirements for the prevention of significant deterioration of air quality in those areas attaining the NAAQS. The PSD programs are designed to protect public health and welfare from actual or potential adverse effects which may reasonably be anticipated to occur from air pollution, notwithstanding attainment with NAAQS; to insure that economic growth will occur in a manner consistent with the preservation of existing air resources; "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments . . . and other areas of special national or regional natural, recreational, scenic or historic value"; and to assure that any decision to permit increased air pollution is made only after careful evaluation of all the consequences of a decision and after adequate procedural opportunities for informed public participation in the decision making process. 42 U.S.C. § 7470.*

Owens Corning states that the statutes speak for themselves and that no further answer to Paragraph 22 is required.

23. *Section 165(a) of the Act establishes New Source Review ("NSR") requirements, which prohibit the construction of a "major emitting facility" unless the facility has received a PSD permit and the facility employs the best available control technology ("BACT") to control its emissions. 42 U.S.C. §§ 7475(a)(1)&(a)(4). A "major emitting facility" is defined as either 1) any one of a category of listed stationary sources that emits, or has the potential to emit, 100 tons per year or more of any air pollutant; or 2) any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. CAA § 169(1); 42 U.S.C. § 7479(1). A "stationary source" is any "building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(3). An "air pollutant" is any "air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air." CAA § 302(g); 42 U.S.C. § 7602(g).*

Owens Corning states that the statutes speak for themselves and that no further answer to Paragraph 23 is required.

24. *Pursuant to CAA § 161, 42 U.S.C. § 7471, each State's SIP must contain emissions limitations and such other measures as may be necessary, as determined under federal, regulations, to prevent significant deterioration of air quality in attainment areas. A state may comply with § 161 either by obtaining from EPA delegated authority to enforce the federal regulations set forth at 40 C.F.R. § 52.21, or by having its own PSD regulations that must be at least as stringent as those set forth at 40 C.F.R. § 51.166, approved as part of its SIP by EPA.*

Owens Corning states that the statutes and regulations speak for themselves and that no further answer to Paragraph 24 is required.

25. *Pursuant to Part C of the CAA, Oregon's SIP prohibits the construction of a major source without a required air contaminant discharge permit from the Oregon Department of Environmental Quality ("DEQ"). OAR 340-224-0100(2). A proposed new federal major source¹ must demonstrate, before it obtains a permit to construct in an attainment area, that it will meet required technology-based treatment requirements; perform required air quality monitoring; and provide an analysis of the air quality impacts from the proposed source. OAR 340-224-0050 to 340-224-0070.*

¹ Oregon defines a "federal major source" as any source that is a major emitting facility under the CAA. OAR 340-200-0020(52).

Owens Corning states that the statutes and regulations speak for themselves and that no further answer to Paragraph 25 is required.

Enforcement Provisions

26. *Under 42 U.S.C. § 7604(a)(3), any person may file suit in federal district court against any person who constructs a major emitting facility without a PSD permit.*

Owens Corning states that the statute speaks for itself and that no further answer to Paragraph 26 is required.

27. *The CAA defines "person" to include, inter alia, an individual, corporation, partnership, and association. 42 U.S.C. § 7602(e). Under this definition, all of the Plaintiffs and the defendant are "persons" within the meaning of 42 U.S.C. § 7602(e).*

Admit that Owens Corning and Plaintiffs are persons as defined in 42 U.S.C. § 7602(e).

28. *42 U.S.C. § 7413(b), amended in part by the Debt Collection Improvement Act of 1996, authorizes injunctive relief and civil penalties of up to \$27,500 per day for each violation occurring between January 30, 1997 and March 15, 2004, and \$32,500 per day for each violation occurring after March 15, 2004. 28 U.S.C. § 2461; 31 U.S.C. § 3701; 40 C.F.R. Part 19.*

Owens Corning states that the statutes and regulations speak for themselves and that no further answer is to Paragraph 28 is required.

FACTUAL BACKGROUND

29. *Owens Corning has proposed to construct a polystyrene foam insulation board manufacturing plant in Portland, Oregon. If constructed, the facility will use and emit more than 283 tons of HCFC-142b, an ozone-depleting substance and significant greenhouse gas.*

Admit that Owens Corning proposes to build an extruded polystyrene foam insulation board manufacturing facility in Portland, Oregon. Admit that if constructed, the facility will emit less than 250 tons of HCFC-142b per year. Except as expressly admitted herein, Owens Corning expressly denies the rest and remainder of Paragraph 29.

30. *HCFC-142b is a known ozone-depleting substance. The stratospheric ozone layer protects the earth from dangerous ultraviolet-B ("UV-B") radiation. Depletion of stratospheric ozone allows more UV-B radiation to penetrate to the earth's surface.*

Increased radiation, in turn, has been linked to higher incidence of certain skin cancers, skin ailments such as lupus, cataracts, suppression of the human immune system, damage to crops and aquatic organisms, and increased formation of ground-level ozone. Although depletion of the ozone layer is most commonly associated with creation of the "ozone hole," ozone depletion is also documented in the Northern Hemisphere, at latitudes in which Plaintiffs' members live and recreate.

Admit that HCFC-142b is listed in section 602 of the Clean Air Act as a Class II ozone-depleting substance. Except as expressly admitted herein, Owens Corning lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 30 and, therefore, deny the rest and remainder of Paragraph 30.

31. Pursuant to federal regulations, the production of HCFC-142b by Owens Corning could be prohibited in 2010. If, however, Owens Corning is allowed to construct its facility, it may be allowed to produce HCFC-142b until 2015.

Admit that under the Montreal Protocol, the United States and other developed nations are obligated to achieve a certain percentage of progress towards the total phase-out of HCFCs, by certain dates. Admit that the EPA has plans to phase out the importation of HCFC-142b except for use in manufacturing equipment in place before 2010. Except as expressly admitted herein, the remainder of the assertions are legal assertions and the statutes and regulations speak for themselves, and as to any factual assertions, Owens Corning lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 31 and, therefore, deny the rest and remainder of Paragraph 31.

32. HCFC-142b is also a strong greenhouse gas, with a global warming potential approximately 2,000 times as potent as carbon dioxide. A recent report from the State of Oregon estimates that global warming will have the following impacts in the Pacific Northwest: increased regional temperatures leading to an increased elevation in the upper tree line, prolonged allergy season, earlier breeding by animals and plants, and an increased fire season; rising sea levels, leading to increased erosion and a loss of land along the coastline; a decline in snowpack, which will lead to an increase in spring runoff, followed by decreased water levels in streams in the summer and fall; and a change in ocean circulation which will cause increased stress on estuarine species. See Governor's Advisory Report on Global Warming, State of Oregon, Oregon Strategy for Greenhouse Gas Reductions,

Appendix D, Scientific Consensus Statement on the Likely Impacts of Climate Change on the Pacific Northwest (Oct. 13, 2004).

In answer to Paragraph 32, Owens Corning incorporates and realleges answers to Paragraphs 29, 30, and 31. Owens Corning further states that the report cited speaks for itself and that no further answer is required. Except as expressly admitted herein, Owens Corning lacks sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in Paragraph 32 and, therefore, deny the rest and remainder of Paragraph 32.

33. The area in which Owens Corning proposes to operate its facility is designated a "maintenance area" for carbon monoxide and ozone. OAR 340-204-0040. The area is an "attainment area" for all other air pollutants. OAR 340-204-0030 (listing nonattainment areas).

Admit that Owens Corning proposes to build an extruded polystyrene foam insulation board manufacturing facility at 18456 NE Wilkes Road, Portland, Oregon. Paragraph 32 contains legal assertions or conclusions to which no responsive pleading is required. Owens Corning also states that the regulations speak for themselves and that no further answer is required. Therefore, except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 33.

34. Pursuant to the Oregon SIP requirements governing major sources in attainment areas, Owens Corning initially applied to the DEQ for an Air Contaminant Discharge Permit ("ACDP" or "Permit") on or about November 4, 2003. This application was deemed incomplete, however, because Owens Corning had not yet obtained a Land Use Compatibility Statement required under Oregon's land use laws. Owens Corning later obtained the required Land Use Compatibility Statement on July 7, 2004.

Admit that Owens Corning submitted an ACDP permit on or about November 4, 2003 for a proposed facility at 18456 NE Wilkes Road, Portland, Oregon. Admit that the City of Gresham issued a Land Use Compatibility Statement for the proposed facility on July 7, 2004. Paragraph 34 contains legal assertions or conclusions to which no responsive pleading is required. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 34.

35. *On or about August 11, 2004, Owens Corning submitted a revised permit application to DEQ.*

Admit that Owens Corning submitted a revision to its permit application in August, 2004, which revision changed the classification of some information in the application from "Business Confidential" to non-confidential, publicly available information.

36. *On October 20, 2004, DEQ issued a public notice that a draft Permit was available for public review and comment. The public notice issued by DEQ on October 20, 2004, was factually incorrect. The notice described HCFC-142b as a "weak" greenhouse gas and stated that greenhouse emissions from the Owens Corning facility would be equivalent to the greenhouse emissions generated by 100 cars.*

Admit Paragraph 36, except that the notice was issued on October 19, 2004.

37. *On November 9, 2004, DEQ held a public hearing. During that hearing, a chemistry professor from Linfield College notified DEQ that it had misstated the global warming potential of HCFC-142b. The scientist informed DEQ that the EPA classifies HCFC-142b as a potent greenhouse gas. The professor also informed DEQ that the emissions from the Owens Corning facility would be equivalent to the greenhouse emissions generated by 100,000 cars annually.*

Admit that on November 9, 2004, DEQ did hold a public hearing and that, at that hearing, an individual made comments along the lines set forth in Paragraph 37. Except as expressly admitted herein, Owens Corning denies the remainder of Paragraph 37.

38. *On November 17, 2004, DEQ issued another public notice, in which it extended the public comment period for the proposed preconstruction permit for the Owens Corning facility. In the public notice, DEQ stated that it had "erred in past notifications stating that HCFC-142b was a weak greenhouse gas." DEQ clarified that "EPA classifies HCFC-142b as a potent greenhouse gas."*

Admit Paragraph 38.

39. *The public comment period on the proposed preconstruction permit now ends on December 10, 2004.*

Deny Paragraph 39. Admit the public comment period is open until January 24, 2005.

40. *Although it has not received the required preconstruction permit, Owens Corning has begun construction on the facility.*

Deny that the facility, which will emit less than 250 tones of HCFC – 1426 per year, requires the sort of preconstruction permit to which Plaintiffs apparently refer. Admit that Owens Corning constructed elements at 18546 NE Wilkes Road, Portland Oregon, 97230 that are not capable of emitting regulated air pollutants, under a valid building permits issued by the City of Gresham and with prior authorization by the Oregon Department of Environmental Quality ("DEQ"). Admit that Owens Corning has voluntarily halted all construction activities at this site (with the exception of those necessary to secure the site) pending DEQ's issuance of an ACDP for the proposed polystyrene foam insulation board manufacturing plant. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 40.

41. Based on personal observation and photographs, Plaintiffs estimate that between one-third and one-half of the necessary construction is complete. Specifically, Owens Corning has installed the roof, and the construction of the outer walls is nearly complete. The cement floor inside the building has been poured, beams and structural supports are up inside the building, and an outside swale has been constructed and landscaped.

Admit that on or about the date the Complaint was filed, Owens Corning had installed the roof, and the construction of the outer walls, that the cement floor inside the building had been poured, beams and structural supports were up inside the building, and an outside swale had been constructed and landscaped. Further, Owens Corning admits that no emissions source had been or has been brought to, constructed at, or installed at the site. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 41.

42. Upon information and belief, Owens Corning is continuing to construct the facility, despite the fact that it has not yet obtained a required preconstruction permit.

Deny Paragraph 42. Admit that Owens Corning has voluntarily halted construction activities at this site (with the exception of those necessary to secure the site) pending DEQ's issuance of an ACDP for the proposed polystyrene foam insulation board manufacturing plant.

CLAIM FOR RELIEF

(Failure to Obtain PSD Permit Pursuant to Clean Air Act)

43. *Plaintiffs hereby incorporate all preceding Paragraphs.*

In answer to Paragraph 43, Owens Corning incorporates and realleges its specific answers to all preceding Paragraphs, as if set forth within.

44. *Owens Corning has begun construction on and is constructing a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.*

The phrase "began construction on and is constructing" is ambiguous. Admit that Owens Corning proposes to operate an extruded polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230. Except as expressly admitted herein, Owens Corning denies the rest and remainder of Paragraph 44.

45. *The facility will, when operational, emit approximately 283 tons annually of HCFC-142b.*

Deny Paragraph 45 in its entirety. Admit that the proposed facility would emit less than 250 tons annually of HCFC-142b.

46. *HCFC-142b is an air pollutant regulated under the Clean Air Act.*

Admit Paragraph 46.

47. *Owens Corning is therefore constructing a major emitting facility, as that term is defined in CAA § 169(1), 42 U.S.C. § 7479(1).*

Deny Paragraph 47 in its entirety.

48. *Although Owens Corning has applied for a PSD permit, it has not yet received the required preconstruction permit.*

Deny Paragraph 48 in its entirety. Admit that no preconstruction permit is required to construct the facility (a building shell) as currently constructed, and that Owens Corning has voluntarily halted all further construction activities at this site (with the exception of those necessary to secure the site) pending DEQ's issuance of an ACDP for the proposed manufacturing operation.

49. *Therefore, Owens Corning is and has been, since it began construction, in violation of 42 U.S.C. 7475(a) and Oregon's SIP.*

Deny Paragraph 49 in its entirety.

50. *Unless restrained by an order of this Court, these violations of the CAA will continue.*

Deny Paragraph 50 in its entirety.

51. *As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and civil penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required PSD permit.*

Deny Paragraph 51 in its entirety.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court

1. *Declare that Owens Corning has violated Section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a) and Oregon's SIP by constructing a major emitting facility without first obtaining a preconstruction permit;*

2. *Permanently enjoin Owens Corning from constructing its facility except in accordance with the federal Clean Air Act and Oregon SIP;*

3. *Assess civil penalties against Defendants of \$32,500 per day for each day of unpermitted construction in violation of the CAA's PSD requirements and Oregon's SIP;*

4. *Allocate \$100,000 of the civil penalties assessed to a beneficial mitigation project that will provide a local environmental and public health benefit to Plaintiffs' members and other residents of Oregon, pursuant to 42 U.S.C. § 7604(g);*

5. *Award the Plaintiffs their costs of this action and attorneys' fees; and*

6. *Grant such other relief as the Court deems just and proper.*

Answering Paragraphs 1, 2, 3, 4, 5, and 6, in this section, Owens Corning denies the Plaintiffs are entitled to any of the relief requested.

OWENS CORNING'S AFFIRMATIVE DEFENSES

Owens Corning alleges the following affirmative defenses to the Complaint. In asserting these affirmative defenses, Owens Corning does not assume the burden to establish

any fact or proposition where that burden is properly imposed on Plaintiffs.

1. Plaintiffs have failed to state a claim upon which relief may be granted.
2. Plaintiffs have failed to plead sufficient facts to establish a right to recover under the citizen's suit provisions of the Clean Air Act, 42 U.S.C. §§ 7401-7671q.
3. Plaintiffs' claims are barred, either in whole or in part, by the absence of subject matter jurisdiction.
4. Plaintiffs lack U.S. constitutional standing to maintain the claims asserted in the Complaint.
5. Plaintiffs lack standing under the Clean Air Act, 42 U.S.C. §§ 7401-7671q to maintain the claims asserted in the Complaint.
6. Plaintiffs' claims are moot because Owens Corning's currently proposed facility is not a federal Major Source subject to federal preconstruction permit guidelines for PSDs.
7. Plaintiffs' claims are barred, either in whole or in part, because they allege wholly past violations that are not likely to be repeated.
8. Plaintiffs' claims are barred, either in whole or in part, because the citizen suit provision of the Clean Air Act is unconstitutional.
9. Plaintiffs have failed to satisfy all conditions precedent to bringing this action.
10. The Complaint and each cause of action therein may be barred, in whole or in part, to the extent Plaintiffs have waived or are estopped from, or are barred by the doctrine of laches from, asserting such causes of action.
11. Plaintiffs have failed to join a party under Rule 19.
12. Plaintiffs' claims are barred because the Owens Corning had prior authorization from the Oregon Department of Environmental Quality for all the construction activities that have taken place to date the site of the proposed facility.

13. Owens Corning presently has insufficient knowledge or information on which to form a belief as to whether they may have additional, as yet unstated, defenses available. Owens Corning reserves the right to assert additional defenses that are revealed by further investigation or by discovery.

PRAYER

WHEREFORE, Owens Corning prays for judgment or relief against the Plaintiffs as follows:

1. That the claim against Owens Corning is dismissed with prejudice and that the Plaintiffs take nothing;
2. That Owens Corning be awarded its attorneys' fees, costs and disbursements incurred in defending this matter; and
3. Such other and further relief, including declaratory, equitable relief and damages, as this Court deems just and proper.

DATED this 7th day of January, 2005.

Tom Lindley, OSB No. 85060
Lynne M. Paretchan, OSB No. 02593

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **ANSWER TO COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND CIVIL PENALTIES** on:

Melissa Powers
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219

Attorney for Plaintiffs

by causing a full, true, and correct copy thereof to be sent by the following methods on the date set forth below:

- by **E-Notification pursuant to LR 100.13(c)**
- by **mailing** in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon to all parties.
- by **hand-delivery** to _____
- by sending via **overnight courier** in a sealed prepaid envelope to _____

DATED: January 7, 2005.

PERKINS COIE LLP

By: s/Tom Lindley
Tom Lindley, OSB No. 85060
Lynne Paretchan, OSB No. 02593

Telephone: (503) 727-2000

Attorneys for Defendant Owens Corning
Corporation