

MELISSA POWERS, OSB No. 02118
ALLISON LAPLANTE, OSB No. 02361
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6727, (503) 768-6894
(503) 768-6642 (fax)
powers@lclark.edu, laplante@lclark.edu

Attorneys for Plaintiffs

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,

v.

OWENS CORNING CORPORATION,

Defendant.

Civil No.: 04-CV-1727-JE

FIRST AMENDED COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF AND CIVIL PENALTIES

(Pursuant to Clean Air Act § 304(a)(1)
and (3), 42 U.S.C. § 7604(a)(1) and (3))

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)(1) and (3) of the Clean Air Act (the “Act” or “CAA”), 42

U.S.C. § 7604(a)(1) and (3), against Owens Corning Corporation (“Owens Corning” or “Defendant”) for past and continuing violations of § 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 340-210-0215, 340-210-0240, 340-216-0020, 340-224-0100.

2. Defendant Owens Corning is constructing a polystyrene foam insulation board manufacturing facility which has the potential to emit more than 250 tons of a potent greenhouse gas and ozone-depleting substance without a required preconstruction permit, in violation of CAA § 165(a), 42 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, 40 C.F.R. § 51.166 (collectively, the “Prevention of Significant Deterioration” or “PSD” law) and related Oregon State Implementation Plan (“SIP”) “Major New Source Review” (“NSR”) provisions, OAR 340-224-0010 to OAR 340-224-0100.

3. In addition, Plaintiffs allege that Owens Corning’s unpermitted construction has violated and is violating provisions of the Oregon SIP which require any facility that will emit more than 100 tons per year of a regulated air pollutant to obtain an Air Contaminant Discharge Permit (“ACDP”) prior to construction. OAR 340-216-0020. Owens Corning’s unpermitted construction also has violated and is violating the written notice and approval provisions of the Oregon SIP, OAR 340-210-0215 and OAR 340-210-0240.

4. 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).

JURISDICTION AND VENUE

5. 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).

6. As required by CAA § 304(b), 42 U.S.C. § 7604(b), on December 15, 2004, Plaintiffs sent Owens Corning a sixty-day notice of intent to sue for violations of Oregon's SIP (attached as Exhibit 1). Plaintiffs also sent copies of the sixty-day notice letter to officers of the Oregon Department of Environmental Quality and the United States Environmental Protection Agency, as well as to Oregon Governor Ted Kulongoski and United States Attorney General John Ashcroft.

7. 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.

PARTIES

8. 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.

9. 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.

10. 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.

11. 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 have the potential to emit more than 250 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.

12. Plaintiffs' members live, work, and recreate near the Owens Corning facility under construction in Portland. 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.

13. Plaintiffs' members are concerned about the imminent emissions from Owens Corning's facility. At least one member of the Plaintiff organizations suffers from lupus and other skin ailments related to photosensitivity and is reasonably concerned that emissions from the Owens Corning facility will increase this member's risks of contracting or exacerbating existing 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.

14. 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. Plaintiffs' 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.

15. Plaintiffs' members are also concerned about the immediate, localized impacts of the Owens Corning facility's emissions. At least one member of the Plaintiff organizations suffers from asthma, a respiratory illness, and is concerned that Owens Corning's emissions of particulate matter will exacerbate this respiratory problem. Plaintiffs' members are also concerned about other health and environmental impacts caused by emissions from the Owens Corning facility.

16. Plaintiffs believe that Owens Corning's premature construction has made it more likely that it will emit HCFC-142b and other pollutants from the facility for which it has sought a permit, 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 requirements.

17. 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 proceeded 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 and Oregon's preconstruction permit requirements. Plaintiffs believe that, without this Court's intervention, they will be unable to adequately participate in the Owens Coming permit process.

LEGAL BACKGROUND

The Clean Air Act and National Ambient Air Quality Standards

18. Congress enacted the CAA "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).

19. Congress directed the Administrator of the United States Environmental Protection Agency ("EPA") to publish a list of pollutants, "the emissions of which . . . cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare," and to promulgate regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for such pollutants. CAA §§ 108(a) and 109(a); 42 U.S.C. §§ 7408(a) and 7409(a).

20. The primary NAAQS must "protect the public health" with an "adequate margin of safety," and the secondary NAAQS must "protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant[s] in the ambient air." CAA § 109(b)(1) and (2); 42 U.S.C. § 7409(b)(1) and (2). EPA has promulgated NAAQS for six pollutants, referred to as "criteria" pollutants: sulfur dioxide (SO₂), particulate matter (PM), nitrogen oxide (NO_x), carbon monoxide (CO), ozone (O₃), and lead (Pb). *See* 40 C.F.R. Part 50.

21. States are primarily responsible for the air quality within the geographic area comprising each state. CAA § 107(a); 42 U.S.C. § 7407(a). 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. CAA § 107(d); 42 U.S.C. § 7407(d). 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. The state of Oregon has 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 EPA. OAR 340-204-0010(14).

22. Each state must adopt, after public notice and comment, and submit to EPA for approval a State Implementation Plan (“SIP”) that provides for the attainment and maintenance of the NAAQS. CAA § 110(a); 42 U.S.C. § 7410(a). Section 110 of the CAA, as well as EPA’s regulations at 40 C.F.R. Part 51, set forth detailed requirements for SIPs to obtain federal approval. Among other requirements, SIPs must include enforceable emissions limitations and other control measures, specific schedules and timetables for compliance with NAAQS, a plan for monitoring and analyzing air quality data, and a program for regulating the construction or modification of stationary sources of air pollution. CAA § 110(a)(2); 42 U.S.C. § 7410(a)(2).

Prevention of Significant Deterioration and New Source Review

23. 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. CAA § 160; 42 U.S.C. § 7470.

24. 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) and (4). EPA’s regulations define “construction” to include “any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in emissions.” 40 C.F.R. § 52.21(b)(8). Thus a major emitting facility may not begin *any* construction without having first received a permit and complied with the other PSD/NSR requirements.

25. A “major emitting facility” is 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 250 tons per year or more of any air pollutant. CAA § 169(1); 42 U.S.C. § 7479(1). A “stationary source” is defined in the CAA as 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).

26. EPA’s regulations further define “potential to emit,” for purposes of determining whether the construction of a stationary source will trigger the preconstruction review requirements. “Potential to emit” means “the maximum capacity of a stationary source to emit a pollutant under its physical and operational design.” 40 C.F.R. § 52.24(f)(3).

Preconstruction Requirements of Oregon’s SIP

27. Pursuant to CAA § 161, 42 U.S.C. § 7471, each State’s SIP must contain emissions limitations and other measures, 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 promulgating its own PSD regulations that must be at least as stringent as those set forth at 40 C.F.R. § 51.166, which would then be approved by EPA as part of the state’s SIP.

28. Oregon has promulgated PSD/NSR regulations as part of its SIP, which has been approved by EPA. Oregon’s SIP provides that “No owner or operator may begin construction of a major source or major modification of an air contaminant source without having received an air contaminant discharge permit (ACDP) from the Department [of Environmental Quality] and having satisfied the requirements of this division.” OAR 340-224-0100(2). A proposed new

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

29. Other provisions of Oregon’s SIP also mandate preconstruction permits. Oregon’s SIP sets forth the procedures and requirements for obtaining Air Contaminant Discharge Permits (“ACDPs”). “No person may construct, install, establish, develop or operate any air contaminant source which is referred to in Table 1 without first obtaining an Air Contaminant Discharge Permit (ACDP) from the Department or Regional Authority.” OAR 340-216-0020(1). Table 1 requires all facilities that will emit more than 100 tons per year of a regulated air pollutant to obtain a permit before constructing. OAR 340-216-0020, Table 1, Part C.5.

30. Oregon’s SIP further states that “No person may construct, install, establish or develop any source that will be subject to the Oregon Title V Operating Permit program without first obtaining an ACDP from the Department or Regional Authority.” OAR 340-216-0020(2). Owens Corning’s facility will be subject to the Oregon Title V Operating Permit because it is a “major source.” *See* OAR 340-218-0020(1)(a) (Title V applies to “any major source.”); OAR 340-200-0020(67)(b)(B) (major source means any stationary source of air pollutants “that directly emits or has the potential to emit 100 tons per year or more of any regulated air pollutant”).

31. Oregon's SIP also contains preconstruction notification and approval requirements that apply to all stationary sources. "Stationary source" is defined in the Oregon SIP as "any building, structure, facility, or installation at a source that emits or may emit any regulated air pollutant." OAR 340-200-0020(131).

32. First, "[n]o person is allowed to construct, install, or establish a new stationary source that will cause an increase in any regulated pollutant emissions without first notifying the Department [of Environmental Quality] in writing." OAR 340-210-0215.

33. Second, for "Type 4 changes," the owner or operator must first obtain a new or modified Standard ACDP before proceeding with the construction or modification. OAR 340-210-0240(1)(d). Type 4 changes include "construction or modification of stationary sources or air pollution control equipment where such a change would increase emissions above the [Plant Site Emission Limit] or Netting Basis of the source by more than the significant emission rate." OAR 340-210-0225(4). "Plant Site Emission Limit" means "the total mass emissions per unit time of an individual air pollutant specified in a permit for a source." OAR 340-200-0020(88). For a new source without an ACDP, such as the Owens Corning facility, the Plant Site Emission Limit should be deemed zero. The significant emission rate for HCFC-142b is zero. *See* OAR 340-200-0020(124)(b) and Table 2. Therefore, an increase of any amount in the emission of HCFC-142b would qualify the construction of a new source of HCFC-142b as a Type 4 change.

Ozone-Depleting Substances and CAA Title VI

34. 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). The Protocol

was signed by the United States and twenty-three other nations on September 16, 1987, in response to scientific concerns and findings on ozone depletion. The original agreement set forth a timetable for reducing the production and consumption of specific substances, including certain chlorofluorocarbons (“CFCs”).

35. In 1990, the parties to the Montreal Protocol met to consider amendments to the Protocol. The parties agreed to accelerate the phaseout of certain substances already listed under the Protocol, and they added phaseout requirements for other ozone-depleting substances, including HCFCs such as HCFC-142b. Shortly thereafter, Congress amended the CAA. Among other changes, Congress added Title VI, which codified the amendments to the Montreal Protocol just agreed upon by the parties, but with even more stringent interim reductions.

36. Congress also sought to ensure the availability of replacements for these widely used substances through the CAA § 612 safe alternatives policy. Congress provided that “[t]o the maximum extent practicable, class I and class II substances shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment.” CAA § 612(a); 42 U.S.C. §7671k(a). CFCs are referred to in CAA Title VI as class I substances and HCFCs are referred to as class II substances.

37. The Administrator of EPA was directed to take steps promoting this transition, such as recommending research efforts to identify and develop alternatives for class I and class II substances. CAA § 612(b); 42 U.S.C. § 7671k(b). Congress also required the Administrator to promulgate rules making it unlawful to replace any class I or class II substance with a substitute substance “which the Administrator determines may present adverse effects to human health or

the environment, where the Administrator has identified an alternative to such replacement that – (1) reduces the overall risk to human health and the environment; and (2) is currently or potentially available.” CAA § 612(c); 42 U.S.C. § 7671k(c).

38. In 1994, EPA established the program for evaluating and regulating the ozone-depleting substances being phased out under the CAA. *See* 59 Fed. Reg. 13044 (March 18, 1994). The program is referred to as the Significant New Alternatives Policy (“SNAP”) program and is codified at 40 C.F.R. §§ 82.170 - 82.184. The SNAP program has approved several substitutes for HCFC-142b. *See* http://www.epa.gov/ozone/snap/foams/FOAMS_01_01_05.pdf.

39. EPA has also accelerated the phaseout of HCFC-142b to require its production banned, with limited exceptions, by January 1, 2010, and completely phased out by January 1, 2020. 40 C.F.R. § 82.16(c) and (e).

Enforcement Provisions

40. Under CAA § 304(a)(3), 42 U.S.C. § 7604(a)(3), any person may file suit in federal district court against any person who proposes to construct or who constructs a major emitting facility without a PSD permit.

41. CAA § 304(a)(1), 42 U.S.C. 7604(a)(1), authorizes an action against any person alleged to have violated or be in violation of an emission standard or limitation under the CAA. An emission standard or limitation is defined to include “any condition or requirement of a permit under part C of subchapter I of this chapter,” CAA § 304(f)(3), 42 U.S.C. § 7604(f)(3), and “any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any

requirement to obtain a permit as a condition of operations . . . which is in effect under this chapter . . . or under an applicable implementation plan.” CAA § 304(f)(4); 42 U.S.C. § 7604(f)(4). Thus, citizens may bring suit against any person who has violated or is violating relevant conditions of a state SIP.

42. Citizen suits under CAA § 304(a)(1) for violations of emission standards or limitations, including state SIP requirements, may be brought only after the plaintiffs have given sixty days notice to the defendant and others of the alleged violations. CAA § 304(b)(1); 42 U.S.C. § 7604(b)(1). The statute does not, however, mandate the same sixty-day notice of intent to sue prior to actions brought under CAA § 304(a)(3) against a defendant alleged to be constructing a major emitting facility without a PSD permit. *Id.*

43. CAA § 304(a)(1) and (3) both authorize suit against any person “alleged to have violated (if there is evidence that the alleged violation has been repeated)” certain requirements. 42 U.S.C. § 7604(a)(1) and (3). Thus, in addition to suits for ongoing violations, citizens may bring suits under the CAA for wholly past violations. *See Atlantic States Legal Foundation, Inc. v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 477 (6th Cir. 1995) (noting that Congress amended the CAA “explicitly to allow citizen suits for purely historical violations”).

44. 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).

45. 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.

FACTUAL AND PROCEDURAL BACKGROUND

46. Owens Corning has proposed to construct a polystyrene foam insulation board manufacturing plant in Portland, Oregon. If constructed, the facility will have the potential to emit more than 250 tons per year of HCFC-142b, an ozone-depleting substance and significant greenhouse gas.

47. 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, 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” in the Southern Hemisphere, ozone depletion is also documented in the Northern Hemisphere, at latitudes in which Plaintiffs’ members live and recreate.

48. 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).

49. 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).

50. 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. In its application, Owens Corning stated that the facility's potential to emit HCFC-142b was 283 tons per year.

51. This November 2003 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.

52. On or about August 11, 2004, Owens Corning submitted a revised permit application to DEQ requesting an ACDP to construct and operate its facility. In this August 2004 revised permit application, Owens Corning again stated that the facility's potential to emit HCFC-142b was 283 tons per year.

53. On October 14, 2004, DEQ held an information meeting on the proposed permit. 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.

54. 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 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 more than 100,000 cars annually, not 100 cars annually.

55. 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 until December 10, 2004. 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.”

56. On November 24, 2004, Plaintiffs filed this action against Owens Corning for continuing violations of § 165(a) of the CAA, 42 U.S.C. § 7475(a), for beginning construction of a major emitting facility without the required preconstruction permit. Based on information and belief, this construction began on or before August 3, 2004. At the time the action was filed,

Owens Corning had installed the roof, and the construction of the outer walls was nearly complete. 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.

57. On December 3, 2004, Plaintiffs entered into a stipulation in this case providing that Plaintiffs would not immediately seek a temporary restraining order or a preliminary injunction against Owens Corning in exchange for the corporation limiting its construction activities to those necessary for the security of the facility against the weather and potential trespassers. By its terms, the stipulation expires 20 days after the date on which DEQ notifies Owens Corning that DEQ has issued an ACDP for the facility. Plaintiffs reserved the right to seek injunctive relief thereafter if necessary.

58. Following the filing of this suit and entry into the stipulated injunction, Owens Corning submitted a two-page letter to DEQ on December 6, 2004, seeking to revise its permit application. The “revision” changed the plant’s potential to emit from 283 tons per year to 245 tons per year, which would put the plant just below the level qualifying it as a “major emitting facility” subject to the PSD/NSR requirements. Based on information and belief, the Owens Corning facility’s potential to emit HCFC-142b remains greater than 250 tons per year, despite this December 2004 submission to DEQ.

59. On December 15, 2004, plaintiffs sent a sixty-day notice letter to Owens Corning as required by CAA § 304(b)(1); 42 U.S.C. § 7604(b)(1). The notice letter set forth the Oregon SIP preconstruction requirements and informed Owens Corning of Plaintiffs’ intent to file suit against the corporation in federal district court for violations of these provisions.

60. Oregon DEQ adopted Owens Corning's revised permit parameters and issued a revised draft ACDP for construction and operation of the new facility on December 10, 2004. DEQ held meetings for public comment on the permit on January 5, 2005 and January 18, 2005, and accepted comments on the revised draft ACDP until January 24, 2005. Plaintiffs submitted extensive written and oral comments to DEQ regarding the permit. Plaintiffs objected that the permit application was incomplete and requested that DEQ require Owens Corning to submit a complete permit application that fully addresses substantial unresolved concerns. Plaintiffs also asked DEQ to provide Plaintiffs the opportunity to comment on the permit application once it was complete.

61. On January 24, 2005, ostensibly as part of the public comment process, Owens Corning submitted a "Technical Justification" wherein it again revised its potential to emit calculation. In this Technical Justification document, Owens Corning concluded that the facility's potential to emit HCFC-142b was approximately 234 tons per year.

62. Neither the December 7, 2004, submission nor the January 24, 2005, submission were signed by Owens Corning with a certification that the information contained in those documents was true and correct. On March 8, 2005, plaintiffs sent a letter to DEQ bringing this to the agency's attention, and again requesting that the agency require Owens Corning to submit a complete and accurate permit application and make it available for public review and comment.

63. On May 16, 2005, Owens Corning submitted a revised permit application to DEQ. Owens Corning again made revisions to its prior calculations of the facility's potential to emit

HCFC-142b. The May 2005 permit application states that the facility's potential to emit HCFC-142b is approximately 225 tons per year.

64. DEQ has taken no final action on Owens Corning's permit application. Upon information and belief, without the stipulated stay of construction precipitated by this action, Owens Corning would continue to construct the facility, despite the fact that it has not yet obtained a required preconstruction permit. Upon information and belief, the facility will, when operational, have the potential to emit more than 250 tons annually of HCFC-142b.

FIRST CLAIM FOR RELIEF

(Failure to Obtain Permit in Violation of Clean Air Act PSD/NSR Requirements)

65. Plaintiffs hereby incorporate all preceding paragraphs.

66. Section 165(a) of the CAA, 42 U.S.C. § 7475(a), prohibits the construction of a major emitting facility without a PSD permit.

67. Section 169(1) of the CAA, 42 U.S.C. § 7479(1), defines major emitting facility to include a stationary source with the potential to emit 250 tons per year or more of any air pollutant.

68. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

69. The facility will, when operational, have the potential to emit more than 250 tons annually of HCFC-142b.

70. HCFC-142b is an air pollutant regulated under the Clean Air Act. CAA § 302(g); 42 U.S.C. § 7602(g).

71. Owens Corning therefore constructed and is constructing a major emitting facility within the meaning of CAA § 169(1), 42 U.S.C. § 7479(1).

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

73. Therefore, Owens Corning is and has been, since it began construction, in violation of 42 U.S.C. 7475(a).

74. 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, for each day that the facility remains in place, and for each day Owens Corning remains in violation of the CAA.

SECOND CLAIM FOR RELIEF

(Failure to Obtain Air Contaminant Discharge Permit in Violation of Oregon SIP New Source Review Requirements)

75. Plaintiffs hereby incorporate all preceding paragraphs.

76. Oregon's SIP states that "No owner or operator may begin construction of a major source or major modification of an air contaminant source without having received an air contaminant discharge permit (ACDP) from the Department [of Environmental Quality] and having satisfied the requirements of this division [New Source Review]." OAR 340-224-0100(2).

77. The Oregon SIP's NSR regulations require that a proposed new "federal major source" 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.

78. A “major source” includes any stationary source of air pollutants that directly emits or has the potential to emit 100 tons per year of any regulated air pollutant. OAR 340-200-0020(67)(b)(B).

79. A “federal major source” is any source that is a “major emitting facility” under the CAA. OAR 340-200-0020(52).

80. A “major emitting facility” under the CAA includes a stationary source with the potential to emit 250 tons per year or more of any air pollutant. 42 U.S.C. § 7479(1).

81. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

82. The facility will, when operational, directly emit or have the potential to emit more than 250 tons annually of HCFC-142b.

83. HCFC-142b is a regulated air pollutant under the CAA and Oregon’s SIP.

84. Owens Corning therefore constructed and is constructing a “major source” within the meaning of OAR 340-200-0020(67)(b)(B).

85. Owens Corning also therefore constructed and is constructing a “federal major source” within the meaning of OAR 340-200-0020(52).

86. Although Owens Corning has applied for a Standard ACDP from Oregon DEQ, it has not yet received any preconstruction permit.

87. Owens Corning has also failed to demonstrate compliance with the NSR requirements set forth in OAR 340-224-0050 to 340-224-0070.

88. Therefore, Owens Corning is and has been, since it began construction, in violation of OAR 340-224-0100(2).

89. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required Standard ACDP, for each day the facility remains in place, and for each day Owens Corning remains in violation of Oregon's SIP.

THIRD CLAIM FOR RELIEF

(Failure to Obtain Standard ACDP in Violation of Oregon SIP ACDP Permitting Requirements)

90. Plaintiffs hereby incorporate all preceding paragraphs.

91. Oregon's SIP provides that "no person may construct, install, establish, develop or operate any air contaminant source which is referred to in Table 1 without first obtaining an Air Contaminant Discharge Permit (ACDP) from the Department or Regional Authority." OAR 340-216-0020(1).

92. Table 1 requires all facilities that will emit more than 100 tons per year of a regulated air pollutant to obtain a permit before constructing. OAR 340-216-0020, Table 1, Part C.5.

93. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

94. The facility will, when operational, have the potential to emit more than 100 tons annually of HCFC-142b.

95. HCFC-142b is a regulated air pollutant under the CAA and Oregon's SIP.

96. Owens Corning therefore constructed and is constructing an "air contaminant source" within the meaning of OAR 340-216-0020, Table 1, Part C.5.

97. Although Owens Corning has applied for a Standard ACDP from Oregon DEQ, it has not yet received any preconstruction permit.

98. Therefore, Owens Corning is and has been, since it began construction, in violation of OAR 340-216-0020(1).

99. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required Standard ACDP, for each day the facility remains in place, and for each day Owens Corning remains in violation of Oregon's SIP.

FOURTH CLAIM FOR RELIEF

(Failure to Obtain Standard ACDP in Violation of Oregon SIP ACDP Permitting Requirements)

100. Plaintiffs hereby incorporate all preceding paragraphs.

101. Oregon's SIP states that "No person may construct, install, establish or develop any source that will be subject to the Oregon Title V Operating Permit program without first obtaining an ACDP from the Department or Regional Authority." OAR 340-216-0020(2).

102. The Oregon Title V Operating Permit Program applies to "major sources." OAR 340-218-0020(1)(a).

103. A “major source” includes any stationary source of air pollutants that directly emits or has the potential to emit 100 tons per year of any regulated air pollutant. OAR 340-200-0020(67)(b)(B).

104. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

105. The facility will, when operational, have the potential to emit more than 100 tons annually of HCFC-142b.

106. HCFC-142b is a regulated air pollutant under the CAA and Oregon’s SIP.

107. Owens Corning’s facility will therefore be subject to the Oregon Title V Operating Permit because it is a “major source” within the meaning of OAR 340-218-0020(1)(a).

108. Although Owens Corning has applied for a Standard ACDP from Oregon DEQ, it has not yet received any preconstruction permit.

109. Therefore, Owens Corning is and has been, since it began construction, in violation of OAR 340-216-0020(2).

110. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required Standard ACDP, for each day the facility remains in place, and for each day Owens Corning remains in violation of Oregon’s SIP.

FIFTH CLAIM FOR RELIEF

(Failure to Provide Written Notice of Construction in Violation of Oregon SIP Stationary Source Notification Requirements)

111. Plaintiffs hereby incorporate all preceding paragraphs.

112. Oregon's SIP contains preconstruction notification and approval requirements that apply to all stationary sources.

113. A "stationary source" is "any building, structure, facility, or installation at a source that emits or may emit any regulated air pollutant." OAR 340-200-0020(131).

114. Oregon's SIP states "No person is allowed to construct, install, or establish a new stationary source that will cause an increase in any regulated pollutant emissions without first notifying the Department [of Environmental Quality] in writing." OAR 340-210-0215.

115. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

116. When complete, the facility will emit HCFC-142b, which is a regulated air pollutant under the CAA and Oregon's SIP.

117. Owens Corning therefore constructed and is constructing a "stationary source" within the meaning of OAR 340-200-0020(131).

118. Because the Owens Corning facility is a new source, the construction will result in an "increase" in emissions of a regulated air pollutant within the meaning of OAR 340-210-0215.

119. Owens Corning did not provide written notice to DEQ that it was commencing construction of a new source of air contaminants prior to beginning construction on the manufacturing plant.

120. Therefore, Owens Corning is and has been, since it began construction, in violation of OAR 340-210-0215.

121. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without completing the required notification and for each day that Owens Corning fails to notify DEQ.

SIXTH CLAIM FOR RELIEF

(Failure to Comply with Oregon SIP Stationary Source Notification and Approval Requirements)

122. Plaintiffs hereby incorporate all preceding paragraphs.

123. Oregon's SIP contains preconstruction notification and approval requirements that apply to all stationary sources.

124. A "stationary source" is "any building, structure, facility, or installation at a source that emits or may emit any regulated air pollutant." OAR 340-200-0020(131).

125. Oregon's SIP divides into four categories the changes that involve new construction or modification of stationary sources or air pollution control equipment. OAR 340-210-0225.

126. Type 4 changes include "construction or modification of stationary sources or air pollution control equipment where such a change would increase emissions above the [Plant Site Emission Limit] or Netting Basis of the source by more than the significant emission rate." OAR 340-210-0225(4).

127. For a Type 4 change, the owner or operator must first obtain a new or modified Standard ACDP before proceeding with the construction or modification. OAR 340-210-0240(1)(d).

128. Owens Corning has begun construction on a polystyrene foam board manufacturing plant at 18456 NE Wilkes Road, Portland, Oregon 97230.

129. When complete, the facility will emit HCFC-142b, which is a regulated air pollutant under the CAA and Oregon's SIP.

130. Owens Corning therefore constructed and is constructing a "stationary source" within the meaning of OAR 340-200-0020(131).

131. Owens Corning had no permit to emit air contaminants for the facility, and therefore had a Plant Site Emission Limit ("PSEL") of zero for the facility.

132. The Significant Emission Rate ("SER") for HCFC-142b is zero. OAR 340-200-0020(124)(b) and Table 2.

133. Therefore, construction of the new source would increase HCFC-142b emissions above the PSEL by more than the SER, which is a Type 4 change under OAR 340-210-0225.

134. Owens Corning did not obtain a Standard ACDP before proceeding with construction of the facility.

135. Therefore, Owens Corning is and has been, since it began construction, in violation of Oregon's construction approval requirements at OAR 340-210-0240(1)(d).

136. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens Corning to injunctive relief and penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required Standard ACDP, for each day the facility remains in place, and for each day Owens Corning remains in violation of Oregon's SIP.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court

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

2. Declare that Owens Corning has violated and is violating Oregon's SIP New Source Review requirements, OAR 340-224-0100(2);

3. Declare that Owens Corning has violated and is violating Oregon's SIP Air Contaminant Discharge Permit provisions, OAR 340-216-0020(1);

4. Declare that Owens Corning has violated and is violating Oregon's SIP Air Contaminant Discharge Permit provisions, OAR 340-216-0020(2);

5. Declare that Owens Corning has violated and is violating Oregon's SIP Stationary Source Notification Requirements, OAR 340-210-0215;

6. Declare that Owens Corning has violated and is violating Oregon's SIP construction approval requirements, OAR 340-210-0240;

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

8. Assess civil penalties against Owens Corning of \$32,500 per day per each violation;

9. 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);

10. Award the Plaintiffs their costs of this action and attorneys' fees; and
11. Grant such other relief as the Court deems just and proper.

DATED this 7th day of June, 2005.

/s/ Allison LaPlante
Melissa Powers, OSB No. 02118
Allison LaPlante, OSB No. 02361
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6727, (503) 768-6894
(503) 768-6642 (fax)
powers@lclark.edu, laplante@lclark.edu

Attorneys for Plaintiffs