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UNITED STATES DISTRICT COURT

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,
an Ohio corporation

Defendant.

No. CV04-1727 JE

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS**

Pursuant to Fed. R. Civ. P. 12(b)

I. FACTS AND SUMMARY OF ARGUMENT

Pending before the Oregon Department of Environmental Quality is Owens Corning's application for an Air Contaminant Discharge Permit ("ACDP") for the construction and operation of a facility in Gresham, Oregon, that will manufacture

polystyrene foam. As indicated in the application, the operations of the facility under the permit will result in the emission of certain pollutants.¹ While the amounts emitted for most pollutants will be very small, HCFC-142b, which is used to "blow" the raw polystyrene into foam, will be emitted in larger amounts than the other pollutants at issue.

In late 2004, this suit was filed by the plaintiffs in an effort to halt the construction and permitting of the facility. Plaintiffs' primary allegation is that Owens Corning improperly began construction of the plant without first obtaining an ACDP permit. Owens Corning halted construction of the plant in December 2004, and does not currently plan to restart construction until DEQ issues the ADCP.

Plaintiff's first amended complaint ("Complaint") alleges several violations of the CAA and accompanying federal and state standards. In this motion to dismiss, Owens Corning asks the Court to dismiss the complaint altogether for lack of standing because plaintiffs' *members* do not demonstrate the characteristics necessary to meet the Article III requirements for demonstrating a "case or controversy." Specifically, the plaintiff's alleged injuries need to be concrete or particularized, and fairly

¹ The pending application is actually a *second* application for an ACDP for the facility. It was filed on May 17, 2005, at which time Owens Corning withdrew its initial application (filed in October 2003 and subsequently revised) that prompted the litigation at issue. *See generally* Exhibit 1 (DEQ responses to comments, May 31, 2005), at 2. While that fact may later prompt other motions from Owens Corning, we offer it here for information only, and it is not critical to the Court's resolution of the pending motion to dismiss.

traceable to the challenged activity. Here, they are not, and the entire complaint should therefore be dismissed.

Alternatively, Owens Corning asks the Court to dismiss Count I of the complaint, which alleges a violation of substantive federal law governing pre-permit construction of certain facilities. As described more fully below, the U.S. Environmental Protection Agency ("EPA") has approved Oregon's "State Implementation Plan" ("SIP"), which is required under the CAA to implement and enforce the federal requirements. Having been approved by EPA, the state law requirements of the SIP, *not* federal law, provide the substantive law that must be followed by regulated parties. Thus, while plaintiffs can maintain their allegations of violation of state law that is part of the SIP, they cannot maintain a claim for violations of substantive federal law, and Count I should be dismissed for failure to state a claim upon which relief can be granted.

Finally, pointing to the construction that already occurred on the facility in 2004, plaintiffs allege that there has been a continuing, daily violation, and under each count, they seek the maximum statutory penalties for (apparently) every day that the construction took place and remains in place. As case law makes clear, however, "beginning construction" without a permit (even if required here) is a one-time violation, not one that is repeated every day of the violation (let alone not one that is repeated once the construction stops). As a result, plaintiff's claims for relief for

multiple days of violations for this plant that has not yet been built, and that is not yet in operation, should be rejected.

When considering these motions to dismiss, this Court takes the allegations in the plaintiffs' complaint as true. *See Cain v. Tigard-Tualatin School Dist.* 23J, 262 F. Supp. 2d 1120, 1134 (D. Or. 2003). As long as there is no combination of those facts that would permit this Court to find standing, or to grant relief, the motion to dismiss should be granted and the claim (or claims) dismissed. *Id.*

II. ARGUMENT

A. Plaintiffs' Claims Should Be Dismissed for Lack of Article III Standing

Article III of the U.S. Constitution limits the judicial power to authority over "cases and controversies." Over many years of decisions, the Supreme Court has refined that requirement to impose on plaintiffs an obligation to show their standing to sue, and, in particular, "an individual plaintiff must show that (1) he or she has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 161, 180-181 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)) (hereinafter *FOE*). An association has standing to bring suit on behalf of its members when its members

would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). A plaintiff must satisfy each element of standing. *See FOE* at 181.

Here, plaintiffs have failed to meet any of the relevant prongs of the standing requirement. They have not alleged a concrete or particularized injury that is fairly traceable to the challenged activity, and they have failed to demonstrate that the injury can be redressed through the relief they have requested from the Court in this matter. The plaintiffs allege that Owens Corning failed to comply with bars on pre-permit construction under the CAA. Their only alleged injuries, however, are generalized *global* injuries flowing from the emissions of hydrochlorofluorocarbon compounds ("HCFCs") once the plant begins operation. This generalized injury is insufficient to justify Article III standing. In addition, it would not be redressed by requiring Owens Corning to receive a permit prior to construction. While the plaintiffs also allege that they may suffer harm from the emission of particulates from the plant, the challenged actions do not relate to emission of particulates, so their claims of injury are not "traceable" to the challenged action, and cannot serve as a basis for Article III standing.

Finally, Plaintiffs also allege that they will suffer some form of "procedural" injury as the result of the violations alleged in the first amended complaint, see Amended Complaint ¶17, this alleged procedural injury also does not suffice for Article III purposes. As the U.S. Supreme Court noted in *Lujan v. Defenders of Wildlife*, 504 U.S. at 572 n.7, even those alleging procedural injuries must claim some level of concrete and particularized injury associated with the challenged activity. Here, the challenged activity is pre-permit construction of the facility, while the alleged injuries – exposure to HCFCs and particulates – are either so generalized as to be non-cognizable, or so far removed from the alleged violation as to fail to establish Article III injury in fact.

Because there is no standing, the plaintiffs' complaint should be dismissed.

1. Article III Standing Is Met By Alleging a Concrete Or Particularized Injury Traceable To The Challenged Action, and Injury to Global Interests is Insufficient

In environmental cases, the relevant inquiry regarding 'injury in fact' is whether there is harm to the plaintiff, not whether there is harm to the environment, from the defendant's challenged activity. *FOE* at 181. The leading case involving the obligation of plaintiffs in environmental cases to demonstrate a concrete or particularized injury traceable to the challenged action is *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). In *Lujan*, an environmental organization challenged the Bureau of Land Management's land withdrawal review program covering millions of acres under the Administrative Procedures Act, 5 U.S.C. § 702, based on an

avertment that one member used an unspecified portion of area of an immense tract of the affected territory. *See id.* at 888-89. The Supreme Court concluded that even though the alleged error was procedural in nature (thereby relieving the plaintiffs of some of the requirements of immediacy and redressibility), *see id.* at 572 n.7, the plaintiffs still had to demonstrate particularized injury-in-fact traceable to the challenged actions.

The Court emphasized the historical basis for this requirement, noting that it had long held that despite the nature of alleged procedural or substantive flaws in the actions of private parties or government agencies, the Constitution still required that plaintiffs demonstrate some harm *to them* that was directly traceable to the alleged violations. Thus, the Court noted,

a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

504 U.S. at 574. To allow standing for generalized environmental harms, the Court noted, would fundamentally alter the Court's standing jurisprudence, as well as the balance of power between the three branches of government. "Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* at 576.

In support, *Lujan* cited a long history of cases rejecting the rule that "generalized injury" is insufficient for Article III standing. *See id.* at 574-76. In particular, the Court looked to *United States v. Richardson*, 418 U.S. 166 (1974). There, a taxpayer alleged that the Government had failed to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement to publish expenditures of public money. The Court concluded that the plaintiff's standing rested upon an impermissible "generalized grievance," and was inconsistent with "the framework of Article III" because the impact on plaintiff was plainly undifferentiated and common to all members of the public. *Id.* at 171, 176-77. *See also Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (citizen-taxpayer suit dismissed for lack of standing where taxpayer contended that it was a violation of the Constitution for Members of Congress to hold commissions in the military Reserves because the challenged action, "standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance").

The most recent decisions on standing in the Supreme Court and in the Ninth Circuit reinforce the requirement of a particularized injury, fairly traceable to the challenged action. In *FOE*, for instance, the Court found standing. There, plaintiffs had alleged that their members' activities in specifically designated areas of the North Tyger River were restrained because of defendant's allegedly ongoing violation of the mercury discharge limits of the Clean Water Act. *Id.* at 181-82. The Court held that those allegations amounted to the kind of particularized injury to *those plaintiffs*,

traceable to the challenged conduct, that established Article III injury. *Id.* at 183-85.² The Court further reinforced the importance of tracing injury to the behavior brought into question by the complaint, noting that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the *challenged* activity." *Id.* at 183 (internal citations and quotations omitted).

Injury in fact was also demonstrated in a recent environmental case in the Ninth Circuit. *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2003). The *Covington* court held the Covingtons had standing to advance a claim under the CAA where they alleged defendant violated CAA by not following federal procedures to account for removal or recapture of HCFCs and other ozone-depleting substances before disposal or recycling at a landfill that was directly adjacent to their property.

The court found that

The Covingtons have observed liquids leaking from the white goods and they fear that this liquid will contaminate their property. From this, the Covingtons' enjoyment of their property is diminished by the attested leaks. . . . A credible threat of risks to their home yields a loss of enjoyment of property. That is enough for injury in fact for the CAA claims.

² This holding is consistent with the recognition that a plaintiff can always allege injury in fact by showing that it has a member "for whom the aesthetic and recreational values of the area will be lessened" by the activity challenged by plaintiffs. *See Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). Plaintiffs, however, have failed to make that showing in this case by anything other than general averments.

Id. at 641. Because the challenged activity was defendant's actual disposal and recycling of white goods containing HCFCs and other ozone-depleting substances, the court found the Covington's allegations of injury traceable to the challenged activity, and therefore, sufficient to allege injury in fact.

In *Covington*, plaintiffs also alleged standing based on actual emissions of CFC's released in violation of 42 U.S.C. 7671g(c)(1) of the CAA. (Notably, in this case, there are as yet no actual emissions.) They alleged that emissions at the landfill had increased the Covingtons' risk of UV-B related health maladies. In a concurring opinion not joined by the other two panel members, Judge Gould wrote that he thought that this averment might be sufficient to demonstrate standing. *See id.* at 649. He recognized, however, that the question was "very challenging" in light of "apparent shifts in direction or emphasis from the Supreme Court's precedent" in this area over time. *Id.* at 650-51. Thus, while Judge Gould believed that *FEC v. Akins*, 524 U.S. 11, 23-24 (1998), provided a basis upon which standing of the sort alleged here could rest, 358 F.3d at 651-52, he also recognized that the Supreme Court's precedents trend the opposite direction (though, he believes, they "*may*" never actually hold that "injury to all is injury to none," see *id.* at 655). He also noted that "a respectable counterpoint [to his own theory of standing based on global injury] would be the theory that injury to all does not justify private litigation and may be redressed only by the political branches, or the federal government's institution of litigation." *Id.* at 655 n.12.

The counterpoint is not only a better argument, but we believe it to be the only argument consistent with both the holding and the spirit of the Supreme Court's precedents. It is also the only argument that can ensure the appropriate balance between the authority of the judiciary and the political branches of government, and appropriately prevent Courts from issuing advisory opinions or inviting parties to become "professional litigators" in cases in which they have no particularized interest. Thus, while Judge Gould's theory is an interesting one, it ultimately runs too far against the grain of the Supreme Court's past decisions, and it has no binding authority, and should have no precedential authority.

2. Plaintiffs Fail to Allege A Concrete Or Particularized Injury Traceable To Their Challenged Action Of Construction Without A Permit

Plaintiffs' claims in this case turn on what they allege to be the impermissible act of construction without an air permit. This is, therefore, the "challenged action" to which their claims must be traced. But Plaintiff's general claims of injury, each of which are addressed in turn below, are not fairly traceable to the gravamen of the complaint: the act of initiating construction of a facility without an ACDP permit. *See* Complaint at 4-5.

Plaintiffs' first claim is that by beginning construction without first receiving an ACDP, Owens Corning "diminishes plaintiffs' members' enjoyment of activities conducted in the vicinity of the Owens Corning facility." Complaint at ¶ 12. But plaintiffs do not demonstrate in their pleadings *which* specific activities have been

interfered with, nor do they describe with any particularity *where* those activities take place. *Id.* Plaintiffs further fail to allege the manner in which their diminished enjoyment is connected to the defendants challenged activity of starting construction without an ACDP permit. Nothing in the complaint alleges that the construction, in itself, has reduced a particular aesthetic, recreational or economic value of a particular area plaintiffs' members use or own. Therefore, Plaintiffs' ¶ 12 claims are no more than general averments and conclusory allegations, which, as the Court held in *NWF*, do not meet establish an injury in fact necessary to establish standing. Consequently, plaintiffs' general averments in ¶ 12 are much closer to the "general averments" of injury that were rejected in *Lujan* than the very specific allegations found sufficient for standing in *FOE* and the Court's opinion in *Covington*.

In ¶ 13, plaintiffs allege its members are concerned about the imminent emissions from the defendant'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.

Complaint at 4. The same kinds of arguments are raised in ¶ 14. These claims, however, raise only general grievances and seek relief that no more directly and tangibly benefits plaintiffs than the public at large. *See* generally complaint at 4-6. These claims for relief from *global* harms are insufficiently specific to the plaintiffs,

and would not serve to protect the separation of powers that is represented by the Constitutional limitation of the judicial power to "cases and controversies." As *Lujan* noted, "[v]indicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive." *Id.* at 576. For these reasons, all plaintiffs' allegations of injuries due to globalized atmospheric conditions are insufficient for Article III standing.

Plaintiffs further fail in their allegations, like ¶ 13, to allege an injury that can be traced from the activity challenged by plaintiffs -- that of the construction, not operation, of the facility. Plaintiffs do not allege that in and of itself, the construction of the facility without a permit did or would result in air emissions. However, plaintiffs must allege that the harm they allege can be traced to the activity they challenge.

For example in *Covington*, the plaintiffs alleged a credible threat under the CAA to their real property that was directly traceable to the action of defendants they challenged -- improper disposal in the adjacent landfill. *Id.* at 640-641. Concrete harm was alleged to a particular piece of real property, directly linked to defendant's challenged action of not recapturing certain substances before disposal adjacent to the particular piece of real property.

However, in the case at bar, alleged injuries due to air emissions have no direct link to the pre-permit construction of this facility. While plaintiffs have made a general averment that the early construction may have "made it more likely" that the

plant will emit HCFC-142b, *see* Complaint ¶ 16, there is no remotely plausible path averred by plaintiffs through which the mere act of construction of a facility without a required permit would result in or alleviate the alleged injuries.

The plaintiffs allege in ¶ 15 more localized injuries relating to emissions from the plant, but these injuries are again not traceable to the alleged violations of law. In that paragraph, they allege that

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.

This claim of injury, however, relates not to the emissions of HCFC-142b that trigger the alleged bar on pre-permit construction. Rather, it relates to emissions of particulates (and emissions at an extremely minimal level, less than 4 tons per year) that, notably, are not mentioned again in the entire complaint. The requirements at issue, and the ones that have allegedly been violated, relate to HCFC-142b, not to the emissions of particulates. The complaint makes no allegations of violations associated with the emissions of particulates, and makes no allegations of how those emissions might have been affected, even in theory, by compliance with the law.

3. Plaintiffs Cannot Demonstrate That Their Alleged Claims Can Be Redressed by the Court in this Litigation

Under *Lujan*, Plaintiffs' obligations to demonstrate redressibility are diminished by their allegations of a procedural injury in ¶ 17 (that allegation of procedural injury is addressed below). Nevertheless, the lack of redressibility in this case is worth mentioning simply in order to narrow the possible bases upon which the plaintiffs can allege standing. Setting aside the allegations of procedural injury, even if the plaintiffs had alleged injuries that were sufficiently particularized and traceable to the challenged activity in this case, they cannot demonstrate that those injuries can be redressed by this Court through this litigation.

At the core of plaintiffs' complaint is their allegation that "jumped the gun" by beginning construction of this facility before receiving a necessary permit from the Oregon DEQ. Assuming, as we must in this motion, that the plaintiffs' allegations are accurate, this Court cannot redress any injuries that allegedly flow from that violation.

There is no dispute that Owens Corning would have had to receive a permit before *operating* the facility; indeed, Owens Corning had applied for such a permit, even if it hadn't been received before it began construction. Nothing in the plaintiffs' amended complaint alleges that Owens Corning's ultimate permit would have looked any different as a result of receiving the permit pre-construction than it will look once it is received after construction. Plaintiffs have not alleged that the plant with a pre-construction permit would be configured any differently, that the plant with a pre-construction permit would include air pollution controls any different than those that

will be in place with the existence of the pre-construction permit, or any other difference between what the plant will ultimately emit as a result of the pre-permit construction and what the plant would look like if there had been no such construction. While they allege that they "believe" that early construction has made the emissions of HCFC-142b "more likely," see Complaint ¶ 16, this conclusory allegation is insufficient to establish redressibility.

The only actual injuries alleged by the plaintiffs with any specificity at all are the general injuries flowing from emissions of HCFCs and particulates. Since nothing in plaintiffs' complaint alleges that those emissions would be any different had the law (according to them) been followed to the letter, they cannot demonstrate that their alleged injuries can be redressed through this lawsuit. As a result, they cannot demonstrate Article III standing, and their complaint should be dismissed outright.

4. Plaintiffs' Allegations of Procedural Injury are Meaningless Without A Showing of a Particularized Injury Traceable to the Challenged Conduct.

Plaintiffs allege a "procedural" injury associated with the alleged violation of the bar on pre-permit construction. *See* Complaint ¶ 17. While an allegation of procedural injury diminishes the requirements of "redressability and immediacy," it does not free the plaintiffs of their obligation to allege a concrete injury traceable to the challenged conduct. Here, for all the reasons addressed above, there are no adequate underlying allegations of injury. Plaintiffs' claims include (1) an unspecified injury resulting from the early construction itself (although, again, there is no

statement of what that injury is, so it cannot serve to prove plaintiffs' standing), (2) an allegation flowing from HCFC emissions, the harms from which are so generalized as to amount to no harm at all, and (3) a very general allegation relating to the limited emissions of particulates from the facility that has nothing to do with the bar on pre-permit construction. Because the alleged procedural injuries are not tied to a showing of a particularized injury in fact fairly traceable to the challenged actions, they amount to little more than the procedural injuries alleged in *Lujan*, and rejected there as insufficient for Article III purposes.

B. Oregon's State Implementation Plan, As Approved By EPA, Applies In Oregon Instead of Federal Law, so Plaintiff's First Claim for Relief Based on Violation of Federal Law Should Be Dismissed for Failure to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' first claim for relief alleges that Owens Corning violated 42 U.S.C. § 7475(a). Under that federal statute, pre-permit construction of a "major emitting facility" is prohibited in certain areas (like the one in which the Owens Corning facility is going to be constructed). *Id.* This is, however, not the law relevant to the construction at issue here. As the Plaintiffs implicitly acknowledge, it is state law (in the form of the State Implementation Plan), not federal law, that governs Owens Corning's construction activities at issue in this case.

Under the CAA, every state is required to adopt, with EPA's approval, a "SIP" or "State Implementation Plan." *See* 42 U.S.C. § 7410. In the SIP, a state sets forth those state statutes and regulations it relies upon for the "implementation,

maintenance and enforcement" of the federal CAA within the state. *See id.* at § 7410(a)(1). Over the three decades since the initial adoption of the CAA, Oregon has submitted its SIP and its multiple revisions to EPA. After review and (occasionally) comment, EPA has approved those changes; Oregon's SIP is memorialized in 40 C.F.R. Part 52, Subpart MM (listing Oregon's submissions, EPA approval thereof, and itemizing the content of Oregon's SIP).

The CAA requires SIPs to include provisions "to prevent significant deterioration of air quality" in certain regions designated under the statute. Under the statute, the portion of Multnomah County at issue in this case is subject to those "PSD" rules. EPA has approved those portions of Oregon's SIP relating to the prevention of significant deterioration of air quality. *See* 40 C.F.R. § 52.1987. Among those "PSD" requirements is the rule regarding pre-permit construction. 42 U.S.C. § 7475(a). As approved by EPA, the Oregon SIP specifically addresses that requirement. *See* OAR 340-224-0010(2) ("No owner or operator may begin construction of a major source or a major modification of an air contaminant discharge source without having received an air contaminant discharge permit from the Department and having satisfied the requirements of this division."); *see* 40 C.F.R. § 52.1987(c)(139)(i)(A) (memorializing adoption OAR 340-224-0010 as part of Oregon's SIP).

As adopted, then, OAR 340-224-0010 is the controlling legal mandate with which the Owens Corning facility must comply in order to ensure that it is acting in a

manner consistent with all relevant law. As Oregon DEQ stated in its response to comments made by plaintiffs' counsel in opposition to the initial permit, "Oregon's permitting and PSD administrative rules apply in Oregon *instead of* the federal regulations, not *in addition to* the federal regulations." See Exhibit 1 (Attachment I, page 1, to June 2, 2005, Oregon DEQ Response to Comments on the Draft Owens Corning Air Contaminant Discharge Permit); see also Complaint ¶¶ 26-27. Thus, even assuming that the plaintiffs are correct, and that the Owens Corning plant was a "major emitter" and therefore subject to a bar on pre-permit construction requirements, the relevant law imposing that requirement was Oregon law, and specifically OAR 340-224-0010, *not* 42 U.S.C. § 7475(a), as the plaintiffs allege in their first claim for relief.³

Defendant notes that dismissing this first cause of action would not, in itself, prevent plaintiffs from alleging a violation of the underlying provision, or from seeking relief for that alleged violation. The plaintiffs' second claim for relief, for instance, alleges that Owens Corning specifically will not prevent plaintiffs from alleging the plaintiffs do allege violations of this provision of the Oregon SIP. See,

³ The plaintiffs effectively recognize this distinction in their discussion about the legal background of the case. See Complaint at ¶ 37 ("Thus, citizens may bring suit against any person who has violated or is violating relevant conditions of a state SIP.").

e.g., Second Claim for Relief.⁴ Dismissing this cause of action would, however, reduce confusion by limiting the issues and the relevant sources of law for this case.⁵

C. Violations Of Preconstruction Permitting Requirements Do Not Occur On A Continuing Basis, So All Plaintiffs' Claims Alleging Continuing Violations For Such Violations Should Be Dismissed

"Violations of the preconstruction permitting requirements [of the CAA] occur at the time of construction, not on a continuing basis." *New York v. Niagra Mohawk Power Corporation*, 263 F. Supp. 2d 650, 661 (W.D.N.Y. 2003). In reaching this conclusion, the *New York* court followed the majority of courts that have addressed the continuing violations theory.⁶ In *New York*, the state brought suit against the prior

⁴ In their second claim for relief, plaintiffs twice cite OAR 340-224-0100(2) as prohibiting pre-permit construction or a major emitting facility. Defendants assume this is a repeated typographical error, since OAR 340-224-0010(2) is the Oregon state administrative provision that actually articulates that prohibition, and section -0100 deals solely with fugitive emissions, not construction of facilities.

Dismissing the first claim would result in eliminating the only purely federal claim for relief in plaintiffs' complaint. Nevertheless, our initial conclusion is that plaintiffs would not lose their basis for federal jurisdiction as a result, since the relevant provision of the CAA (42 U.S.C. § 7604) confers federal jurisdiction on those seeking to enforce provisions of an EPA-approved SIP, even if the substance of that SIP and the underlying violations is state law.

⁵ Importantly, this is not a motion about whether there is federal *authority* to enforce the provisions of the CAA. Compare *Elias v. United States*, 269 F.3d 1003 (9th Cir. 2001) (noting that federal government retained criminal enforcement authority under Resource Conservation and Recovery Act even though EPA had approved State hazardous waste program). Nor is it about whether plaintiffs have the ability to allege violations of the SIP under federal law. Rather, this issue is about the *substance* of the relevant statute being enforced. After EPA's approval of the Oregon SIP, that substance is found in Oregon law, not the CAA.

⁶ See, *e.g.*, *United States v. Illinois Power* 245 F. Supp. 2d 951, 954-57 (S.D.Ill.2003) (barring preconstruction permit violation as untimely because violation was "discrete" and complete at the time of construction); *United States v. Southern Indiana Gas and Elec. Co.*, No. IP 99-1692-C-M/F, 2002 WL 1760752, at *5 (S.D. Ind. July 26, 2002) (violations under 42 U.S.C. § 7475 and 40

owner of major emitting facilities alleging that failure to obtain pre-construction permits violated the CAA and related state laws, and put forth a continuing violations theory which alleged continuing violations every day while the facility operated without a pre-construction permit. *Id.* at 660. Rejecting the state's theory, the *New York* court pointed out that the "requirement to secure a preconstruction permit applies *prior* to construction or modification," and since a regulated party can only "get a permit once," "a violation of the Clean Air Act's preconstruction permit requirement is singular in nature, and does not constitute an ongoing violation." *Id.* at 661.

The court also evaluated the pre-construction permitting provisions of 42 U.S.C. § 7475, which focus on requirements that must be fulfilled *prior to* construction or modification of a facility,⁷ and the "applicability" provisions of the

C.F.R. § 52.21 accrue at the time of modification and do not continue past the completion of construction); *U.S. v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1083-84 (W.D. Wis. 2001) ("the statute of limitations for a violation of the pre-construction permit requirements under 42 U.S.C. § 7475 begins to run at the time of construction and does not continue through the operational life of the modified source"); *United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 443-44 (D. Md. 2001) ("a violation for failure to obtain a construction permit does not continue once the unpermitted construction is completed"); *United States v. Brotech Corp.*, No. Civ.A. 00-2428, 2000 WL 1368023, *3-4 (E.D. Pa. Sept. 19, 2000) (dismissing claim for civil penalties based on failure to obtain construction permits as time barred; "[v]iolations of the various requirements to obtain construction permits or plan approvals occur at the time of the construction, modification, or installation of the equipment or facility"); *United States v. Campbell Soup Co.*, No. CIV-S-95-1854 DFL, 1997 WL 258894, at *1-2 (E.D. Cal. Mar. 11, 1997) (altering a machine without a permit is not a violation that continues as long as the machine still exists or is operated).

⁷ See, e.g., 42 U.S.C. § 7475(a) ("no major emitting facility . . . may be constructed . . ."); 42 U.S.C. § 7475(a)(1) ("a permit has been issued for such *proposed* facility . . ."); 42 U.S.C. § 7475(a)(3) (the owner or operator of the *proposed* facility must demonstrate that emissions resulting from construction or operation of the facility "will not cause, or contribute to, air pollution . . ."); 42

Environmental Protection Agency's own implementing regulations at 40 C.F.R. § 52.21⁸, which demonstrate that the preconstruction requirements apply only at the time of construction or modification, to verify that pre-permitting provisions are specific to the pre-operating period of the permitted facility. *Id.* Furthermore, "[o]perating a facility after it was modified without first obtaining the necessary construction permit may constitute a continuing violation of the relevant *operating permit*, but it does not constitute a continuing violation of the relevant *construction permit*." *Southern Indiana Gas*, 2002 WL 1760752, at 5 (emphasis in original). Continuing violations are more appropriately enforced through the operating permit requirements. *Illinois Power*, 2003 WL 367214, at 5 (noting that "[p]reconstruction permits have a finite existence while operational permits can be ongoing violations").

In this case, plaintiffs seek penalties for continuing violations on every count they allege, where each count is founded on Owens Corning's failure to secure the (allegedly required) pre-construction permit. While the relevant substantive law for purposes of these violations is state law, not federal law, the Oregon rule is rooted in the principles of the federal program, and they therefore reflect the underlying

U.S.C. § 7475(a)(4) ("the *proposed facility* is subject to [BACT] . . ."); OAR 340-224-0010 ("No owner or operator may *begin* construction of a major source . . ."; OAR 340-224-0040 (owner or operator of a *proposed* major source or major modification must demonstrate the ability of the proposed source or modification to comply with all applicable air quality requirements of the Department"); OAR 340-224-0070 (" *Proposed* new federal major sources or major modifications at federal major sources locating in areas designated attainment or unclassifiable must meet the following requirements: [best available control technology] . . .").

principles that held true in *New York, Illinois Power*, and *Southern Indiana Gas*. One can only violate *once* the rule against *starting* construction without a permit. As a result, Plaintiffs' claims for continuing violations claim should be dismissed because the pre-construction permit requirement is singular in nature, and cannot constitute the basis for claims for ongoing violation.

IV. CONCLUSION

For the above reasons, the plaintiffs' complaint should be dismissed in full.

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⁸ See 40 C.F.R. § 52.21(a)(2)(i)-(iii). Section 7475(a) therefore applies to the construction (including modification) of stationary sources, not to their operation.