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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,

v.

OWENS CORNING CORPORATION,

Defendant.

Civil No.: 04-CV-1727-JE

PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS

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INTRODUCTION

The federal Clean Air Act (“CAA”) prohibits the construction of a facility that has the potential to emit more than 250 tons per year of any air pollutant unless such construction is first authorized by and consistent with a permit. On or about August 3, 2004, before it had received a required CAA permit, Owens Corning unlawfully began constructing an extruded polystyrene foam board insulation manufacturing facility in Gresham, Oregon. First Amended Complaint (“FAC”) ¶ 56. From that time through approximately December 31, 2004,¹ Owens Corning engaged in a continuous process of construction on the facility. On each day that Owens Corning performed construction on its facility, Owens Corning did not have a permit to construct. FAC ¶ 64. To this day, Owens Corning has still not received a permit to construct its facility. *Id.*

At the time that Owens Corning first began constructing its facility, it had repeatedly stated, in signed documents submitted to the Oregon Department of Environmental Quality (“DEQ”), that the facility had the potential to emit 283 tons per year of HCFC-142b, a potent greenhouse gas and ozone-depleting substance regulated under the CAA. FAC ¶¶ 50, 52. From that time until December 6, 2004, Owens Corning continued to state that its potential to emit HCFC-142b was 283 tons per year. On December 6, 2004, shortly after Plaintiffs filed this suit, Owens Corning submitted a two-page letter to DEQ claiming that the facility’s potential to emit HCFC-142b was 245 tons per year, not 283 tons per year. FAC ¶ 58. On January 24, 2005, Owens Corning again revised its

¹ Owens Corning has temporarily stopped construction pursuant to a Stipulated Injunction that Plaintiffs negotiated with Owens Corning. FAC ¶ 57. Contrary to any suggestion that its decision to temporarily halt construction was driven by altruism, the Stipulated Injunction makes clear that Owens Corning temporarily stopped its construction to avoid a court-imposed temporary restraining order or preliminary injunction. Moreover, as Owens Corning itself acknowledges, Owens Corning plans to resume construction in the future.

potential to emit to an even lower figure, 234 tons per year. FAC ¶ 61. On May 16, 2005, Owens Corning yet again revised its potential to emit to a lower figure, 225 tons per year. FAC ¶ 63. On each occasion that Owens Corning has revised its stated potential to emit, it has cited “errors” in its previous calculations. Based, among other things, on these systematic errors and the lack of credible evidence supporting Owens Corning’s revised estimates, Plaintiffs continue to allege that the Owens Corning facility has the potential to emit more than 250 tons annually of HCFC-142b. FAC ¶ 64.

Owens Corning plans to resume construction, and begin operating its facility, once it receives a permit from the Oregon DEQ. FAC ¶ 64. Plaintiffs claim that such construction, and any future operation, will continue to violate the clear requirements of the CAA. As a result, Plaintiffs continue to suffer health, aesthetic, recreational, and procedural injuries. Plaintiffs have stated claims for relief, this case clearly presents a justiciable controversy, and Owens Corning’s motion to dismiss must fail.

OVERVIEW OF THE CLEAN AIR ACT AND REGULATIONS

The Clean Air Act and State Implementation Plans

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.” 42 U.S.C. § 7401(b)(2). Congress directed the Administrator of the United States Environmental Protection Agency (“EPA”) to publish a list of pollutants that cause air pollution and endanger public health or welfare, and to promulgate national ambient air quality standards (“NAAQS”) for such pollutants. 42 U.S.C. §§ 7408(a), 7409(a).

States are primarily responsible for the air quality within the geographic area comprising each state. 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 pollutant, or where the air quality cannot be classified due to insufficient data. 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.

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. 42 U.S.C. § 7410(a). This section, 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. 42 U.S.C. § 7410(a)(2).

Prevention of Significant Deterioration and New Source Review

Part C of Subchapter I of the CAA, 42 U.S.C. §§ 7470-7492, establishes the requirements for the prevention of significant deterioration (“PSD”) of air quality in those areas attaining the NAAQS.² The PSD program is designed to protect public health and welfare from the effects of air pollution, notwithstanding attainment with NAAQS; to ensure that economic growth will occur in

² The area at issue in this case is subject to PSD requirements under Part C of Subchapter I because the area is in attainment with the NAAQS (except that it is considered a “maintenance” area for ozone because it was formerly a nonattainment area for that pollutant). Part D of Subchapter I, 42 U.S.C. §§ 7501- 7515, addresses nonattainment areas. The permitting provisions for new sources in attainment areas and nonattainment areas are collectively referred to as the New Source Review Program (“NSR”). Separately, the permitting provisions applicable to new sources in attainment areas are often referred to as PSD requirements; the permitting provisions applicable in nonattainment areas are often referred to as nonattainment new source review (“NA NSR”). Both sets of requirements are some of the most stringent under the CAA, though NA NSR requirements are typically considered more stringent than PSD requirements because they apply to areas where the air quality has already become unsafe.

a manner consistent with the preservation of existing air resources; to protect and enhance the air quality in areas such as national parks, national wilderness areas, and national monuments; 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 process. 42 U.S.C. § 7470 (emphases added).

CAA § 165(a) prohibits the construction of a “major emitting facility” unless the facility receives a PSD permit and meets several other requirements. 42 U.S.C. § 7475(a). Among these requirements, the facility must be subject to best available control technology (“BACT”), the owner or operator of the facility must demonstrate that “emissions from construction or operation” of the new or modified facility will not cause or contribute to an exceedance of the NAAQS, and the permit must go through agency and public review and analysis. 42 U.S.C. § 7475(a)(2) - (4).

A “major emitting facility” is defined in the CAA to include any stationary source with the potential to emit 250 tons or more per year of any air pollutant. 42 U.S.C. § 7479(1). 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 facility with the potential to emit more than 250 tons per year of a pollutant may not do *any* construction without first having received a permit and complied with the other PSD requirements.

Oregon’s SIP

Each state’s SIP must contain PSD regulations for attainment areas. 42 U.S.C. § 7471. A state may comply with this requirement by promulgating its own PSD regulations that must be at least as stringent as those set forth at 40 C.F.R. § 51.166. Oregon has promulgated PSD and NSR

regulations as part of its SIP, which has been approved by EPA. See OAR Chapter 340, Division 224. Oregon's SIP also contains several other provisions that prohibit facilities, even those under the 250 tons per year threshold, from constructing without a permit. See OAR 340-216-0020(1) and (2); OAR 340-210-0240(1).

ARGUMENT

I. Plaintiffs Have Standing To Sue Owens Corning

An association has standing to sue on behalf of its members when: a) at least one of its members would otherwise have standing to sue in his or her own right; b) the interests the association seeks to protect are germane to its organizational purposes; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001), (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977)). Plaintiffs seek injunctive and declaratory relief, as well as civil penalties, none of which requires the participation of individual members. *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 799 (9th Cir. 2001); *Oregon State PIRG, Inc. v. Pac. Coast Seafoods Co.*, 361 F. Supp. 2d 1232, 1240 (D. Or. 2003). Accordingly, Plaintiffs must show that at least one of their members has standing to sue and that the interests the Plaintiffs seek to protect are germane to their purposes.³

An individual member has constitutional standing to sue where he or she “1) 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

³ Plaintiffs' purposes include protection of the health and environment of the Pacific Northwest. FAC ¶¶ 8-10. Plaintiffs' members' asserted injuries are clearly germane to these purposes.

likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Natural Res. Def. Council v. Southwest Marine*, 236 F.3d 985, 994 (9th Cir. 2000), (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167, 180-181 (2000)). “At the pleading stage, general factual allegations of injury resulting from the defendant’s conduct may suffice[,] for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” *Nat’l Org. of Women v. Scheidler*, 510 U.S. 249, 256 (1994). Plaintiffs have met this minimal burden.

A. Plaintiffs’ General Allegations Of Standing Are Adequate At the Pleading Stage

Many of Owens Corning’s arguments are based on an inaccurate perception that Plaintiffs’ general allegations of standing are insufficient at this stage of the litigation. Relying on several cases that discuss standing at the summary judgment stage, Owens Corning suggests incorrectly that Plaintiffs must in fact prove standing through their complaint. Def.’s Memo. at 6-11, discussing *Laidlaw*, 528 U.S. 167; *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871 (1990) (hereinafter *Lujan v. NWF*); and *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004). At this stage of the litigation, however, Plaintiffs do not need to prove, through affidavits and other evidence, that they have met the elements of standing. *Lujan v. NWF*, 497 U.S. at 889 (A “Rule 12(b) motion to dismiss on the pleadings . . . presumes that general allegations embrace those specific facts that are necessary to support the claim.”). “For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.” *Graham v. FEMA*, 149, F.3d 997, 1001 (9th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Plaintiffs have adequately alleged that they are injured by Owens Corning’s conduct; that is all they need to do.

Owens Corning nonetheless complains that Plaintiffs “have failed to make [a] showing in this case by anything other than general averments.” Def.’s Memo. at 9 n.2. Similarly, Owens Corning complains that “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,” Def.’s Memo. at 12 (emphases in original), and that “[w]hile plaintiffs have made a general averment that the early construction may have ‘made it more likely’ that the plant will emit HCFC-142b . . . , 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.” Def.’s Memo. at 13-14. General averments are, however, adequate to demonstrate standing at this stage of the litigation. *Scheidler*, 510 U.S. at 256. Plaintiffs need not allege more.

B. Plaintiffs Have Adequately Alleged Health, Aesthetic, and Recreational Injuries That Are Traceable to Owens Corning’s Violations

Plaintiffs have adequately alleged injuries in fact that are traceable to Owens Corning’s conduct. “[E]nvironmental 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.” *Laidlaw*, 538 U.S. at 705 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972)). “[E]vidence of a credible threat to the plaintiff’s physical well being from airborne pollutants’ is sufficient to satisfy the injury requirement.” *Covington*, 358 F.3d at 638 (internal quotations omitted); *see also Pub. Citizen v. Dept. of Transp.*, 316 F.3d 1002, 1016 (9th Cir. 2003) (finding that Public Citizen’s allegations of injury resulting from increased air pollution “satisfy the injury-in-fact requirements”), *rev’d on other grounds, Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004). Similarly, at the pleading stage, Plaintiffs need only allege that their injuries

are caused by Defendant's conduct. *Scheidler*, 510 U.S. at 256 (“[Petitioners] alleged in their complaint that respondents conspired to use force Petitioners claimed that this conspiracy ‘has injured [their] business and/or property interests’ Nothing more is needed to confer standing.”).

Plaintiffs have adequately alleged that they suffer injury as a result of Owens Corning's conduct. Plaintiffs allege that they are affected by the ongoing construction of the Owens Corning facility. FAC ¶ 12. Plaintiffs state that their members live, work, and recreate near the facility and are concerned about the impacts of the ongoing construction on “human health and the natural resources Plaintiffs use and enjoy.” *Id.* Plaintiffs further allege that Owens Corning's unpermitted construction “diminishes Plaintiffs' members' enjoyment of activities conducted in the vicinity of the Owens Corning facility.” *Id.* Plaintiffs have thus adequately alleged injuries resulting from Owens Corning's construction and have met their burden to allege an injury-in-fact that is fairly traceable to Owens Corning's conduct.

Plaintiffs also allege that they are concerned about the imminent emissions from the facility and the impacts that these emissions will have on their members' health and their members aesthetic and recreational values. FAC ¶¶ 13, 14, 15. Specifically, Plaintiffs state that they are concerned about the health risks that Owens Corning's emissions of ozone-depleting substances will present to Plaintiffs' members, particularly those who are already at greater risk of harm associated with ozone depletion. FAC ¶ 13. Plaintiffs also note that they use areas in Oregon that will be harmed by global warming, and they are concerned about the detrimental impacts that Owens Corning's emissions of greenhouse gases will have on these at-risk areas, and thus on Plaintiffs' aesthetic and recreational interests. FAC ¶ 14. Plaintiffs also express concerns about the immediate and localized impacts of the Owens Corning facility's emissions of particulate matter and other pollutants. FAC

¶ 15. Last, Plaintiffs allege that Owens Corning’s premature construction has made it more likely that Owens Corning “will emit HCFC-142b and other pollutants from the facility.” FAC ¶ 16. Each of these allegations is adequate to demonstrate that Plaintiffs are injured by Owens Corning’s unlawful construction of its facility.

In response to these allegations, Owens Corning raises three main arguments. First, as noted above, Owens Corning objects that Plaintiffs have only made “general allegations” of injury and traceability. This objection is without merit, because such “general allegations” are precisely what the Supreme Court and Ninth Circuit have held are adequate to show standing at the pleading stage. *Lujan v. NWF*, 497 U.S. at 889; *Scheidler*, 510 U.S. at 256; *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002). Second, Owens Corning argues that Plaintiffs cannot allege injuries related to the facility’s emissions. Third, Owens Corning argues that Plaintiffs cannot allege injuries that involve “global harms.” As discussed below, each of these arguments must fail.

1. Plaintiffs May Allege Injuries Related to Owens Corning’s Emissions

Owens Corning argues that Plaintiffs’ concerns about emissions from the facility are irrelevant because Owens Corning’s facility is not yet operational. Owens Corning also claims that Plaintiffs cannot allege injuries related to pollutants that will be emitted in smaller amounts than HCFC-142b, because the HCFC-142b emissions are the trigger for the PSD requirements. These arguments misapprehend the nature of the PSD program and how Owens Corning’s construction has affected Plaintiffs’ rights under that program.

As explained in greater detail above, the PSD component of the CAA includes several substantive and procedural requirements designed to protect air quality in areas that meet the NAAQS. A facility that triggers the PSD requirements, by emitting threshold levels of any one

regulated air pollutant, is subject to procedural and substantive requirements that apply to the facility's construction and operation as a whole. 42 U.S.C. § 7475(a). Thus, when it proposed to construct, and then in fact constructed, a facility with a potential to emit more than 250 tons per year, Owens Corning was required to implement technology-based treatment requirements for each pollutant emitted, demonstrate that "emissions from construction or operation" of the new or modified facility will not cause or contribute to an exceedance of the NAAQS, and analyze the air quality impacts of the facility's operations as a whole. *Id.* Oregon's SIP similarly regulates both construction and operation of the facility under a single permit scheme. Thus, under the PSD program and Oregon's SIP, construction and emissions are indeed related. Plaintiffs' alleged injuries related to Owens Corning's imminent emissions are well within the scope of this lawsuit.

Moreover, at the time Plaintiffs filed their complaint, they were reasonably concerned that Owens Corning, which had already performed a substantial amount of construction on the facility, would both complete that construction and begin operating without complying with the PSD requirements. Plaintiffs' concerns about Owens Corning's emissions are thus "fairly traceable" to Owens Corning's construction.

Further, at the time Plaintiffs filed their amended complaint, Plaintiffs continued to have reasonable fears that Owens Corning would resume construction and initiate operation in violation of the PSD program. Although Owens Corning has revised its emissions estimates and sought a new permit based on these estimates,⁴ Plaintiffs allege that Owens Corning's potential to emit

⁴ By lowering its emissions estimates, Owens Corning claims that it qualifies for a permit authorizing construction and operation under Oregon's "minor new source review" program. The minor NSR program does not afford Plaintiffs the same procedural and substantive protections as the PSD program of the CAA and Oregon's SIP. Therefore, Plaintiffs will continue to be injured by Owens Corning's construction and operation.

exceeds the threshold triggering the PSD requirements of the CAA. FAC ¶ 46. Plaintiffs continue to reasonably fear that Owens Corning will resume construction and operation without the necessary permit, in violation of the PSD program, and thus emit pollutants about which Plaintiffs are concerned.⁵ See *Weiler v. Chatham Forest Prod., Inc.*, 370 F.3d 339 (2d. Cir. 2004) (state permitting agency's conclusion that facility did not require a major source permit did not foreclose citizens from suing private defendant for constructing without a major source permit).

Plaintiffs' allegations of injuries resulting from Owens Corning's emissions of particulate matter and pollutants other than HCFC-142b are also proper. To the extent Owens Corning argues that other pollutants are irrelevant because "[t]he requirements at issue . . . relate [solely] to HCFC-142b," this suggestion reveals a fundamental misconception about the purposes and scope of the PSD program. As noted above, the impacts of all pollutants emitted from a facility are relevant under the PSD program. 42 U.S.C. § 7470(1) (One of the purposes of the PSD program is "to protect public health and welfare from *any* actual or potential adverse effect which . . . may reasonably be anticipated to occur from air pollution or from exposure to pollutants in other media.") (emphasis added). To the extent Owens Corning believes that Plaintiffs' concerns about these other pollutants are not sufficiently substantial, *see* Def.'s Memo. at 14, case law is clear that Plaintiffs' alleged injuries "need not be large, an identifiable trifle will suffice." *Sierra Club v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 557 (5th Cir. 1996); *NWF v. Burford*, 871 F.2d 849, 854 (9th Cir. 1989) ("Plaintiff need only demonstrate the threats or potential of injury; the injury itself need be nothing

⁵ Indeed, immediately after Owens Corning filed its motion to dismiss, DEQ issued a public notice announcing its intent to issue Owens Corning a minor new source review permit. Plaintiffs' injuries have thus become even more imminent since the date on which Plaintiffs filed their amended complaint.

more than a trifle.”); *see also LaFleur v. Whitman*, 300 F.3d 256, 269-70 (2d Cir. 2002).

2. Plaintiffs Can Allege Injuries Resulting from Owens Corning’s Contributions to Global Harms

Owens Corning appears to argue that Plaintiffs cannot prove, under any circumstances, that they are injured as a result of the localized effects of Owens Corning’s contribution to global warming and ozone depletion. That is simply not the law. *See Fed. Election Comm’n v. Akins*, 524 U.S. 11, 24 (1998) (“[A]n injury . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an ‘injury in fact.’”); *Covington*, 358 F.3d at 652 (Gould, J., concurring) (“After *Akins*, the superordinate question about the injury requirement here is whether the injury suffered by the [Plaintiffs] is concrete rather than ‘abstract and indefinite.’ I believe that it is . . . [I]f ozone is lost, more radiation makes it through the atmosphere to create a risk of higher incidence of skin cancer, cataracts, and/or a depressed immune system. . . . These are deadly serious maladies . . .”).

Owens Corning argues that Plaintiffs “raise only general grievances and seek relief that no more directly and tangibly benefits [P]laintiffs than the public at large.” Def.’s Memo. at 12. This is not so. Plaintiffs specifically allege that their members will suffer particular harms as a result of Owens Corning’s actions. In relation to ozone depletion, Plaintiffs note that “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.” FAC ¶ 13. Plaintiffs also explain that ozone depletion results in “higher incidence of certain skin cancers [and] ailments such as lupus,” and that depletion of the ozone layer is specifically documented “at latitudes

in which Plaintiffs' members live and recreate." FAC ¶ 47. Similarly, Plaintiffs make clear that they are concerned about the localized impacts of global warming. As they note,

Plaintiffs' members use Oregon's waterways, enjoy the diverse plant and animal life in Oregon, recreated 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.

FAC ¶ 14; *see also* FAC ¶ 48 (discussing impacts of global warming on the Pacific Northwest).

Plaintiffs thus allege that their members will suffer particularized harm as a result of Owens Corning's activities. That is all that is necessary.

Owens Corning erroneously avers that the Supreme Court's decision in *Lujan v. NWF* prohibits Plaintiffs from challenging discrete actions that have both global and local harms. In *Lujan v. NWF*, NWF challenged the federal government's implementation and administration of certain sections of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, which govern the manner in which the government allows public lands to be open to mining activities. 497 U.S. at 875-78. NWF challenged this "land withdrawal review program," in its entirety, as it applied to all public lands in the United States. *Id.* at 875. To demonstrate its standing, NWF submitted affidavits from two of its members who claimed to use, respectively, a 2 million acre area in Wyoming and a 5.5 million acre area in Arizona. *Id.* at 887. The Court found these affidavits insufficient to establish NWF's standing for two main reasons. *Id.* at 889. First, the affidavits themselves failed to identify specific lands and resources that the members used and that were affected by the challenged program. *Id.* at 887-888. Second, the Court rejected the idea that these two affidavits (along with four others that were not timely filed with the district court) could provide NWF standing to challenge the "land withdrawal review program" as a whole, where the

program was not a “final agency action” subject to judicial review. *Id.* at 890. The Court did not hold that plaintiffs can never challenge discrete actions (such as Owens Corning’s construction) that may exacerbate existing harms.

Indeed, it is well established that citizen plaintiffs suffer redressable injuries when they allege that a defendant’s conduct will contribute to existing environmental harms to which plaintiffs are exposed. *Laidlaw*, 528 U.S. at 181 (relevant showing for standing is injury to the plaintiff, not injury to the environment); *PIRG of NJ v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 72-73 (3d Cir. 1990) (Plaintiffs “[need not] show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs...[or] that the waterway will be returned to a pristine condition”).

C. Plaintiffs’ Injuries Are Redressable

The relief that Plaintiffs have requested includes: declarations that Owens Corning has violated Section 165(a) of the CAA and several provisions of Oregon’s SIP; injunctive relief; and an assessment of civil penalties. FAC at pp. 30-31, ¶¶ 1-11. Each form of requested relief will redress, at least in part, Plaintiffs’ injuries. *Southwest Marine*, 236 F.3d at 995 (“A plaintiff who seeks injunctive relief satisfies the requirement of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard.”); *Laidlaw*, 528 U.S. at 186 (“Civil penalties . . . afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.”); *Societe de Conditionement en Aluminium v. Hunter Eng. Co., Inc.*, 655 F.2d 938, 943 (9th Cir. 1981) (declaratory judgment provides redress).

D. Plaintiffs Have Adequately Alleged That They Have Suffered and Will Suffer Redressable Procedural Harms As a Result of Owens Corning’s Conduct

Plaintiffs have adequately alleged that they will suffer procedural injuries as a result of Owens Corning's violations, and that these injuries are redressable.

“To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.” Furthermore, he or she “need[s] [t]o establish ‘the reasonable probability of the challenged action’s threat to [his or her] concrete interest.’” Thus, to show a cognizable injury in fact, [Plaintiffs] must allege (and on summary judgment adduce sufficient facts to show) that (1) the [defendant] violated certain procedural rules; (2) these rules protect [Plaintiffs’] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests.

Citizens for Better Forestry v. USDA, 341 F.3d 961, 969-70 (9th Cir. 2003) (“*CBF*”) (internal citations omitted). Plaintiffs have satisfied this test. They have alleged that Owens Corning violated the CAA’s and Oregon SIP’s preconstruction review requirements, FAC ¶ 17; they have alleged that these rules, if followed, would have prevented Owens Corning “from beginning construction until the environmental impacts of the facility are fully evaluated and, where necessary, mitigated,” *id.*; and they have alleged that Owens Corning’s failure to comply with the procedural requirements of the PSD program has made it more likely and more imminent that the facility will emit the pollutants about which Plaintiffs are concerned. FAC ¶¶ 17, 13-15. Plaintiffs thus adequately allege standing to challenge Owens Corning’s procedural violations, and Owens Corning’s arguments to the contrary should be rejected.

Plaintiffs’ procedural injuries are also redressable. In *CBF*, the court noted that procedural violations by the government were redressable where the court has “the ability to remedy the harm that a petitioner asserts.” 341 F.3d at 975-76. The Court expressly rejected the argument that plaintiffs must show that the analysis “would result in a different conclusion. It suffices that . . . the [] decision *could be influenced by*” the considerations that the statute requires an agency to study.”

Id. at 976 (internal citations omitted). Here, as in *CBF*, the statute specifically requires Owens Corning and DEQ to consider and analyze the environmental impacts of the facility’s construction and operation and to allow citizens to participate in the decisionmaking process. *See id.*; 42 U.S.C. § 7475(a). That is all that is necessary for Plaintiffs to meet the “relatively easy burden” of showing that adequate procedures “could have influenced” the permitting process in this case. *Id.* As the Second Circuit noted,

[I]n complaining that the requirements of the PSD program should have been applied to the Masada facility, petitioner Cohen has alleged that type of procedural injury that may confer Article III standing on certain plaintiffs. As petitioner Cohen notes, the PSD program contains provisions for additional environmental impact studies and further public commentary, over and above what is otherwise required under the CAA. The determination that the PSD program does not apply to the Masada facility means that petitioner Cohen will not have the benefit of these additional procedures.

LaFleur, 300 F.3d at 271. A determination here that the PSD requirements continue to apply to Owens Corning will similarly provide Plaintiffs with remedy for some of their injuries.

II. Plaintiffs’ First Claim Adequately States a Claim for Relief Under Federal Law Notwithstanding EPA’s Approval of Oregon’s SIP

Owens Corning moves to dismiss Plaintiffs’ first claim for relief, which alleges that Owens Corning violated CAA § 165(a) by constructing a major emitting facility without a PSD permit. Owens Corning contends that because EPA has approved Oregon’s SIP, federal law is no longer applicable. Owens Corning then asks the Court to dismiss Plaintiffs’ claim for failure to state a claim and because it will cause confusion with respect to applicable state and federal requirements.

When ruling on a Rule 12(b)(6) motion, the court must accept as true all factual allegations in the complaint and construe the pleadings in the light most favorable to the nonmoving party. *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir. 2003). A complaint cannot be dismissed

“unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

This Court should not dismiss Plaintiffs’ first claim because Plaintiffs have adequately pleaded a claim under federal law, Plaintiffs’ right of action is unchanged by EPA’s approval of Oregon’s SIP, and Plaintiffs’ claim will not cause confusion as to the relevant sources of law.

A. Plaintiffs Have Stated a Claim Against Owens Corning Under CAA § 304(a)(3) for Violating CAA § 165(a)

Section 165(a) of the CAA prohibits the construction of a “major emitting facility” unless, among other requirements, the facility receives a PSD permit. 42 U.S.C. § 7475(a). A major emitting facility is a facility with the potential to emit more than 250 tons per year of any one pollutant. Congress provided citizens a right of action under CAA § 304(a)(3) to enforce CAA § 165’s ban on major facilities constructing without a permit:

[A]ny person may commence a civil action on his own behalf--
(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment)[.]

42 U.S.C. § 7604(a)(3)⁶. A recent decision in a similar case explained the minimal burden required to state a claim under this section. *Chatham*, 392 F.3d at 536. In reversing the district court’s decision to dismiss the case for failure to state a claim, the Second Circuit easily concluded:

The plaintiffs have alleged that the proposed factory will be a major emitting facility within the meaning of the Act and that [defendant] has not obtained the permits required by Part D for major emitting facilities At this stage of the litigation, the district court was required to accept these allegations as true. It is therefore difficult to see in what respect the plaintiffs

⁶ Plaintiffs’ first claim for relief alleges that Owens Corning’s illegal construction violates section §165(a), which is within Part C of subchapter I of the CAA, 42 U.S.C. §§ 7470-7479, relating to prevention of significant deterioration of air quality.

have failed to state a cause of action.

Id. (internal citations omitted). Likewise, Plaintiffs have alleged that Owens Corning's Gresham plant is a major emitting facility constructing without a permit, in violation the PSD program. These allegations must be taken as true. Plaintiffs have therefore adequately stated a claim for relief.

B. The Fact That EPA Has Approved Oregon's SIP Does Not Affect Plaintiffs' Right to Sue for Violations of § 165

Plaintiffs may bring a claim pursuant to the § 304(a)(3) citizen suit provision for a violation of § 165 whether or not Oregon has an EPA-approved SIP. Owens Corning's argument to the contrary should be rejected because it is unsupported by the plain language of § 304(a)(3) and existing case law, and it would undermine the legislative scheme of the CAA's PSD requirements and enforcement provisions.

1. Owens Corning Is Incorrect Under the Plain Language of the CAA

First, the plain language of § 304(a)(3) shows that Plaintiffs' cause of action for PSD violations is unaffected by the fact that Oregon has an EPA-approved SIP. Analyzing the meaning of a statutory provision begins with the statute's express language. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Section 304(a)(3) nowhere states that it only applies in states without EPA-approved SIPs. Nor does it contain any language to even suggest Congress meant to limit the cause of action to citizens suing in states without approved SIPs. Thus, based on the plain meaning of the statute, Plaintiffs may bring a claim under § 304(a)(3).

2. Owen's Corning's Interpretation of the CAA Violates Fundamental Canons of Statutory Construction

Second, Owens Corning's position, inasmuch as it suggests that a citizen may *never* bring a claim under § 304(a)(3) once a state has an approved SIP, would produce an absurd result and

render meaningless CAA provisions. Section 304(a) provides for three types of citizen suits. Plaintiffs' first claim against Owens Corning is brought under the third enumerated citizen suit provision, § 304(a)(3), for constructing a major emitting facility without a PSD permit. Plaintiffs have also brought claims under § 304(a)(1),⁷ which authorizes an action against any person alleged to have violated or to be in violation of an emission standard or limitation under the CAA. 42 U.S.C. § 7604(a)(1). Emission standard or limitation is defined to include any "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." 42 U.S.C. § 7604(f)(4). Thus, as Owens Corning concedes (Def.'s Memo. at 19-20), citizens may bring suit against any person for violating conditions of a state SIP. Plaintiffs' second through sixth claims allege violations of Oregon SIP provisions and were brought under § 304(a)(1).

The fact that citizens can bring SIP enforcement claims, however, does not mean they cannot also bring claims to enforce the CAA's PSD permit provisions. Congress mandated that each state adopt a SIP and submit it to EPA for approval. 42 U.S.C. § 7410(a). It makes no sense that Congress would set up a scheme directed at getting *all states* to have approved SIPs, while also creating a right of action (§ 304(a)(3)) to enforce an illegal construction ban *that would only be available in states without SIPs*. Owens Corning's interpretation is inconsistent with principles of statutory construction. Statutory interpretations that would lead to an absurd result should be avoided when there exist alternative interpretations consistent with the purpose of the statute.

⁷ Section 304(a)(2) allows suit against the EPA Administrator for failing to perform a mandatory duty and is not at issue here.

Griffen v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982). Additionally, statutes should be construed to give effect to all provisions, so that no part will be superfluous. *Hibbs v. Winn*, 124 S. Ct. 2276, 2286 (2004). Owens Corning's interpretation would render § 304(a)(3) superfluous and § 165 meaningless in any state with an approved SIP, which cannot have been Congress's intention.

3. Existing Case Law Supports the Conclusion That Citizens May Bring Suit Under § 304(a)(3) in States With Approved SIPs

Finally, Owens Corning's argument is undermined by the numerous cases in which citizens or regulators have proceeded against violators under § 304(a)(3) in states with EPA-approved SIPs. Owens Corning does not cite a single case in support of its argument, and Plaintiffs have been unable to locate any cases under § 304(a)(3) in which this argument has been advanced in this manner. However, numerous cases directly or by analogy support Plaintiffs' position that they may proceed under § 304(a)(3) irrespective of SIP approval.

First, courts have held that a state SIP does not insulate a private defendant from a suit brought under § 304(a)(3). In *Chatham*, the state of New York (which had an EPA-approved SIP) had determined that a company proposing to build a new facility needed only a "synthetic minor" permit and did not need to obtain a major permit or otherwise comply with the NA NSR program. *Chatham*, 392 F.3d at 535. Plaintiffs brought suit under § 304(a)(3) to halt the construction, arguing that the facility was a major emitting facility subject to NA NSR. *Id.* The Second Circuit flatly rejected each of the defendant's arguments as to why the plaintiffs should not be allowed to bring an action under § 304(a)(3), including the defendant's argument that it was insulated from suit because EPA had approved New York's SIP. *Id.* at 539. We urge this Court to follow the Second Circuit and reject Owens Corning's opposing position.

Further, though the body of case law analyzing § 304(a)(3) is relatively small, a quick review of the cases shows that courts routinely adjudicate 1) claims under subsection (a)(3) in states with approved SIPs, and 2) claims under both subsections (a)(1) and (a)(3) in the same case. For example, in *New York v. Niagara Mohawk Power Corp.*, a case cited by Owens Corning in support of a different argument, the state of New York brought suit against alleged violators by using the CAA's citizen suit provisions. 263 F. Supp. 2d 650 (W.D.N.Y. 2003). The state brought suit under § 304(a)(3) to enforce violations of § 165(a), and the state brought suit under § 304(a)(1) to enforce violations of the related requirements of its own SIP. *Id.* at 658-660, 666. Thus, although New York had an approved SIP, it used both of the pertinent federal CAA citizen suit provisions and sued in federal court for violations of federal law. That is precisely what Plaintiffs are doing in this case.

C. This Court Must Apply Federal Law to Plaintiffs' First Claim

First, Owens Corning's argument that federal law becomes irrelevant once a state has an approved SIP suggests a misunderstanding about the nature of a SIP. Several courts have explained that once approved by EPA, state SIPs have the force and effect of federal law. *See e.g., Trustees of Alaska v. Fink*, 17 F.3d 1209, 1210 n. 3, 1211 (9th Cir. 1994). Thus, while Owens Corning is correct that states adopt SIPs by promulgating state regulations, the regulations effectively become federal law once approved by EPA.

Second, the citizen suits discussed above show that federal law is still the applicable law when bringing suit under § 304(a)(3). For example, the court in *Niagara Mohawk* addressed only the *federal* PSD requirements when analyzing the § 165(a) claims, even though New York had in place an EPA-approved SIP with related PSD provisions. *Niagara Mohawk*, 263 F. Supp. 2d at 663-

65. Owens Corning cites no cases suggesting the opposite conclusion.⁸

Finally, this “cooperative federalism” approach exists in many other federal environmental statutes, yet those statutes remain binding on the entities regulated by the states. For example, the Clean Water Act (“CWA”) allows EPA to delegate authority to states to implement the National Pollutant Discharge Elimination System (“NPDES”) permit program. *See* 33 U.S.C. § 1342(b). States issue NPDES permits which control the discharge of pollutants. *See* 33 U.S.C. § 1342(a). These permits must result in compliance with state water quality standards which are set by the states and approved by EPA. *See* 33 U.S.C. §§ 1313(a) - (c), 1311(b)(1)(C); 40 C.F.R. § 122.4(d).

The CWA prohibits the discharge of pollutants except in compliance with a permit. 33 U.S.C. § 1311(a). Importantly, the CWA also provides citizens a right to sue in federal court for the discharge of pollutants without a permit, for violations of permit limits, and to ensure compliance with state water quality standards. *See* 33 U.S.C. 1365(a)(1); *Northwest Environmental Advocates v. City of Portland*, 56 F.3d 979, 990 (9th Cir. 1995). Citizens may bring these suits for violations of *federal* law even though the permit being violated was issued by a *state*, or the person discharging without a permit should have received one from a *state*, pursuant to a delegated program. This state/federal scheme is not unlike the structure Congress developed under the CAA. Here, simply because Oregon has an approved state SIP does not mean Owens Corning does not have to comply

⁸ Indeed, the only support Owens Corning offers for this entire section of its brief is a document issued by Oregon DEQ in response to public comments on a draft permit for the Owens Corning Gresham plant. In that document, DEQ states categorically, with no legal authority, that once a SIP is adopted federal law no longer applies. To the extent Owens Corning asks this Court to defer to DEQ’s interpretation of its SIP, that proposition has been rejected by a number of courts. *See, e.g., Oregon Environmental Council v. Oregon DEQ*, 1992 WL 252123 (D. Or. 1992) (affording DEQ no deference in interpreting SIP requirements). If Owens Corning is suggesting that this Court should defer to DEQ’s interpretation of the interaction between state and federal law, Plaintiffs are aware of no authority whatsoever for that proposition.

with the prohibitions and requirements of § 165 of the federal CAA.

D. The Court Should Not Dismiss Plaintiffs' First Claim for Relief Simply Because it Would Require the Application of Different Law

Owens Corning asks the Court to dismiss Plaintiffs' first claim because dismissal would "reduce confusion by limiting the issues and the relevant sources of law for this case." Def.s Memo. at 20.⁹ Plaintiffs do not understand what confusion would be created by, or conversely, what clarity would come, from dismissing Plaintiffs' first claim. The CAA is a complicated statute, but Plaintiffs' claim that Owens Corning violated the law by constructing without a PSD permit is a relatively straight-forward claim. The Court will have to look to both EPA regulations and Oregon's SIP regulations in resolving Plaintiffs' case, but Owens Corning has presented no authority, nor have Plaintiffs found any, to support the proposition that the Court should dismiss a claim to avoid having to apply more than one statute or regulation. Therefore, the court should deny Owens Corning's request to dismiss Plaintiffs' first claim in order to avoid confusion.

III. Owens Corning is in Violation of the CAA and the Oregon SIP

Owens Corning is in a state of violation of the prohibitions on construction found in CAA § 165 and the Oregon SIP. Violations began on the day Owens Corning broke ground, and those violations will continue until a valid permit issues or the corporation abandons plans to build and operate the facility. Plaintiffs have alleged that actual on-site construction activities, including site

⁹ The last paragraph of Owens Corning's argument (Def.'s Memo. at 19-20) is particularly confusing. It would appear that Owens Corning makes this argument as an alternative to its argument that Plaintiffs have failed to state a claim upon which relief can be granted. It is also possible that Owens Corning means to present this as another grounds for dismissal even if the Court finds that it must apply both federal and state law. In either case, Plaintiffs maintain that this argument presents no grounds for dismissal.

clearing, erecting walls, and laying foundations for equipment, were continuing at the time Plaintiffs filed their complaint. Plaintiffs have also alleged that Owens Corning will continue construction in violation of the CAA, notwithstanding the fact that Owens Corning has yet to obtain a valid permit. *See* FAC ¶ 64. These allegations are clearly sufficient to state a valid claim that Owens Corning is in violation of the CAA, and Owens Corning’s arguments to the contrary must fail.

A. The Clean Air Act Does Not Require Proof of Ongoing Violations to State a Valid Claim

Nothing in the CAA requires Plaintiffs to allege or prove ongoing violations to maintain a citizen suit alleging violations of the PSD program or the Oregon SIP. Plaintiffs’ actions arise under § 304(a)(3) and § 304(a)(1) of the CAA. 42 U.S.C. § 7604(a)(1) and (3). Section 304(a)(1) authorizes citizens to sue any person “alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter.” 42 U.S.C. § 7604(a)(1). Section 304(a)(3) authorizes citizens to sue any person

who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) . . . or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit

42 U.S.C. § 7604(a)(3). By their plain terms, neither of these citizen suit provisions demands ongoing violations as a prerequisite for a valid claim.¹⁰

Owens Corning nonetheless argues that Plaintiffs’ claims must be dismissed because

¹⁰ Owens Corning does not specifically argue that Plaintiffs must prove ongoing or intermittent violations to state valid claims under the CAA. Plaintiffs presume that this is Owens Corning’s point; however, the precise meaning of Owens Corning’s argument is unclear because it is unhinged from any legal standard, reference to the CAA, or explanation of how the alleged lack of “ongoing violations” would justify dismissal for failure to state a claim under Rule 12(b)(6).

Plaintiffs have not shown ongoing violations. The “ongoing violation” requirement, however, is a creature of statute; absent a statutory requirement, Plaintiffs need not demonstrate ongoing violations. *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64 (1987). In *Gwaltney*, the Supreme Court held that the citizen suit provision in § 505 of the CWA, 33 U.S.C. § 1365, authorizes suit for continuous or intermittent violations only. *Id.* at 63-64. This holding turned, in part, on the language of the CWA and its statutory structure. *Id.* at 56-63. Partially in response to this decision, Congress amended the CAA in 1990 to allow citizens to commence suits for wholly past violations. CAA, Amendments of 1990, Pub. L. No. 101-549, sec. 707(g), § 304(a), 104 Stat. at 2683. Courts have held that these amendments overruled *Gwaltney* as it could apply to citizen suits under Section 304(a)(1), and that such suits require repeated, but not ongoing, violations. *Atlantic States Legal Found., Inc., v. United Musical Instruments, U.S.A., Inc.*, 61 F.3d 473, 477 (6th Cir. 1995) (noting that the 1990 amendments allow citizen suits for wholly past violations). Courts have similarly held that § 304(a)(3) of the CAA does not require proof of ongoing violations. *Niagara Mohawk*, 263 F. Supp. 2d at 659. There is thus no statutory basis under which Plaintiffs are required to demonstrate ongoing violations. Owens Corning’s motion to dismiss Plaintiffs’ claims, based on an unspecified “continuing violations” theory, must fail.

B. Plaintiffs Have Adequately Alleged Ongoing Violations

Even if Plaintiffs were required to satisfy the *Gwaltney* ongoing violation requirement, Plaintiffs have met that burden here. Courts assess whether violations are ongoing or likely to be ongoing at the time that the complaint is filed. *Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy*, 305 F.3d 943, 953 (9th Cir. 2002). To survive a motion to dismiss, Plaintiffs need only make a good faith allegation that violations are ongoing. *Gwaltney*, 484 U.S. at 64-65;

Southwest Marine, Inc., 236 F.3d at 998. To prevail on their claims, Plaintiffs must, at trial or on summary judgment, prove ongoing violations either (1) by proving post-complaint violations, or (2) by “adducing evidence from which a reasonable trier of fact could find a continuing likelihood of a recurrence in intermittent or sporadic violations.” *Sierra Club v. Union Oil Co.*, 853 F.2d 667 (9th Cir. 1988) (quoting *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171-72 (4th Cir. 1988)); *see also Southwest Marine*, 236 F.3d at 998. Under this test, Plaintiffs need only make good faith allegations of ongoing violations at the motion to dismiss stage.

Plaintiffs’ allegations are clearly adequate to satisfy the *Gwaltney* test. Plaintiffs have made good faith allegations that Owens Corning “has violated and is violating” the CAA by constructing an unpermitted source of air pollution on the day Plaintiffs filed their complaint, November 24, 2004, and by continuing construction after the complaint was filed. *See, e.g.*, FAC ¶¶ 2-3, 56, 57, 64, 73, 84, 98, 109, 120, & 135. Plaintiffs also allege, upon information and belief, that Owens Corning will continue to construct this facility without a valid permit. *See, e.g.*, FAC ¶ 64. If this Court holds that plaintiff must prove ongoing violations at summary judgment or at trial, Plaintiffs will produce evidence of post-complaint violations or other facts that will demonstrate a continuing likelihood of recurrence.¹¹ For now, Plaintiffs’ good faith allegations of ongoing violations are sufficient to defeat Owens Corning’s motion to dismiss.

C. Owens Corning’s Unpermitted Construction Constitutes An Ongoing Violation

¹¹ Documents submitted with the Court demonstrate that Owens Corning continued constructing after the date that Plaintiffs filed their complaint. *See* Stipulation and Order Enjoining Construction of Owens Corning Facility ¶ 1 (“Owens Corning *is constructing* a polystyrene foam insulation manufacturing plant”), ¶ 4 (allowing Owens Corning to perform certain construction activities until December 10, 2004, and other construction activities until December 31, 2004).

of CAA § 165 and Oregon’s SIP.

Plaintiffs have clearly alleged that Owens Corning is in ongoing violation of the CAA. Owens Corning nonetheless argues that Plaintiffs cannot demonstrate ongoing violations because “beginning construction” without a permit . . . is a one-time violation.” Def.’s Memo. at 3. Owens Corning argues, in effect, that the violation at issue is Owens Corning’s failure to obtain a permit, and that such a violation can occur only once. Owens Corning also argues that once it has started construction without a permit, it cannot be held liable for continuing that unlawful construction. These arguments, however, ignore the plain language of the CAA and Oregon’s SIP, both of which make clear that continued unpermitted construction constitute ongoing violations of the procedural and substantive requirements of these laws. The arguments also ignore the structure and purpose of these laws. Moreover, Owens Corning’s argument, if adopted, would present a perverse incentive for industry to construct without complying with the PSD requirements, because violators would always be subject to only one penalty, no matter how long-standing or egregious the violations. Owens Corning’s arguments regarding continuing violations are flatly inconsistent with the language, purpose, and structure of the CAA and Oregon’s SIP, and these arguments should thus be rejected.

1. The Plain Language of the CAA and Oregon’s SIP Makes Clear That Unlawful Construction Is the Prohibited Act

It is axiomatic that any examination of the meaning of a statute must begin with the express language, giving each word its plain and ordinary meaning. *Engine Mfrs. Ass’n*, 541 U.S. at 252. The plain language of the PSD program demonstrates that unpermitted construction of a facility is an ongoing violation that continues until the subject entity either receives a permit that complies with

the applicable standards in the CAA or permanently stops its construction without any intent to resume. To the extent that Owens Corning argues that the violation at issue is solely its failure to obtain a permit, the language of the CAA and SIP show otherwise.

Section 165 of the CAA states that "[n]o major emitting facility . . . may be *constructed*" without a permit and without meeting several substantive and procedural requirements. 42 U.S.C. § 7475(a) (emphasis added). Under the plain language of the CAA, it is the construction that constitutes illegal act. 42 U.S.C. § 7475(a) Accordingly, a violation of the CAA occurs each time construction takes place without meeting the permitting and substantive requirements of § 165.¹²

A number of Oregon's SIP provisions also prohibit the construction, installation, establishment and operation of a facility without a required permit. OAR 340-216-0020(1) states, "[n]o person may construct, install, establish, develop or operate any air contaminant source which is referred to in Table 1" without an ACDP from Oregon DEQ. FAC ¶ 29. OAR 340-216-0020(2) states, "[n]o person may construct, install, establish or develop any source that will be subject to the Oregon Title V Operating Permit" without an ACDP. FAC ¶ 30. Oregon's SIP also states, "[n]o

¹² Federal regulations implementing the PSD program state that "[n]o new major stationary source or major modification . . . shall begin actual construction without" meeting PSD requirements. 40 C.F.R. § 52.21. EPA's use of "shall begin actual construction" does not indicate that a source can violate the PSD construction prohibition on only a single day. On the contrary, in rulemaking, SIP revision approvals, and other guidance, EPA has indicated that the term "begin actual construction" is necessary to allow EPA to establish a date certain from which other determinations can be made. For example, application of PSD to a modification may depend on baseline emissions determined by emissions for a number of years leading up to the day that actual construction begins. *See* 67 Fed. Reg. 80186, 80195. Also, the date actual construction begins on a source is used to determine which iteration of PSD rules apply. 67 Fed. Reg. at 80190. The position that EPA's use of "begin actual construction" suggests that any violation of § 165 is necessarily a singular event is without merit.

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 in writing,” OAR 340-210-0215; FAC ¶ 32, and “[n]o owner or operator may begin construction of a major source or major modification of an air contaminant source without having received an [ACDP] from the Department and having satisfied the requirements of this division.” OAR 340-224-0010(2); FAC ¶ 28. Similar provisions require the facility to obtain a permit before “proceeding with the construction or modification.” OAR 340-210-0240(1)(d); FAC ¶ 33. Each of these SIP provisions makes clear that the prohibited conduct includes construction, installation, establishment, and operation. Each day of unauthorized construction is thus a repeated, ongoing violation of Oregon SIP requirements.

Indeed, a comparison between the language in the CAA and Oregon’s SIP with the better-known discharge prohibition language of the CWA undermines any argument that the only actionable conduct here is Owens Corning’s one-time failure to obtain a permit before beginning construction. The CAA states, “[n]o major emitting facility . . . may be constructed” except as in compliance with the requirements of § 165. 42 U.S.C. § 7475(a); OAR 340-216-0020(2) (containing similar language). Section 301 of the CWA states, “[e]xcept as in compliance with this section and sections [402 and 404], the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a)(1). Sections 402 and 404 establish the permitting schemes for the CWA. 33 U.S.C. §§ 1342, 1344. Thus, while courts regularly (and properly) interpret Section 301 to require a permit before any person may discharge pollutants, *Headwaters v. Talent Irrigation Dist.*, 243 F.3d 526, 530 (9th Cir. 2001), the violations for which defendants are held liable are the unpermitted *discharges* and not the one-time failure to obtain a permit prior to discharging. *Id.* at 529. As with the CWA, under the plain language of § 165 and the Oregon SIP, each day of unauthorized, unlawful

construction is a separate, ongoing day of violation.

2. The Structure of the CAA's Citizen Suit Provisions Also Demonstrates That Unpermitted Construction Is An Ongoing Violation Subject to Penalties For Every Day of Violation

The language of § 304(a)(1) and § 304(a)(3) also undermines Owens Corning's argument that a construction violation can only occur on one day. Section 304(a)(1), which authorizes citizens to sue for violations of Oregon's SIP, authorizes such suits against any person "alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation." 42 U.S.C. § 7604(a)(1)(A). Under this provision, citizens may bring suit for wholly past violations (if the violation occurred more than once) or for ongoing violations. *Covington*, 358 F.3d at 1632 n.10 (interpreting a similar citizen suit provision to allow for citizen enforcement against wholly past violations). Under Owens Corning's construction of the statute, however, citizens could never bring suit where unpermitted construction violates PSD. First, citizens would be unable to show that a violation had been "repeated" if Owens Corning were correct that construction violations occur only once and are never recur. Second, citizens would be unable to show a present construction violation because, under Owens Corning's theory, once construction had commenced, the violation would be complete. Even if citizens were somehow able to discover unlawful construction activities and file a complaint on the very day construction began, Owens Corning's interpretation would mean that citizens would still be unable to state a valid claim because, once the first shovel had hit the ground, the violation would be complete and not capable of repetition. A similar dynamic could result under Section 304(a)(3).

Owens Corning's interpretation would void Congress's express authorization, in two parts of the statute, of citizen suits against violators of PSD requirements. Judicial statutory construction

should not ignore Congressional intent or create absurd results. *U.S. v. Aguilar*, 21 F.3d 1475, 1480 (9th Cir. 1994) (en banc), *aff'd in part, rev'd in part, and remanded*, 515 U.S. 593 (1995). Moreover, the Ninth Circuit cautioned strongly against construing a statute such that any part of it is made superfluous. *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991). Owens Corning's argument violates both canons.

The civil penalty provisions also express Congress's intent that violators pay penalties for each day in which a facility remains in violation of the PSD requirements. Section 113(e)(2) of the CAA specifically authorizes penalties for "every day of violation, including the date of notice to the violator, until continuous compliance has been achieved" when the challenge arises under § 304(a)(1) and § 304(a)(3). 42 U.S.C. § 7413(e)(2); 42 U.S.C. § 7604. Section 113 authorizes civil penalties of \$32,500 "per day" for each violation. 42 U.S.C. 7413(a)(5)-(b)(3). To escape penalties for any particular day, an alleged violator must prove by a preponderance of the evidence that the violation is not "continuing in nature." 42 U.S.C. § 7413(e)(2). Owens Corning's arguments would render the "per day" language in § 113 a nullity, foreclose the applicability of citizen suits to construction violations, and thwart Congress's intent that construction be prohibited unless it complies with the strict requirements for such construction. This position is plainly unreasonable, and should not be accepted.

3. Adoption of Owens Corning's Ongoing Violations Arguments Would Create a Perverse Incentive for Industries to Begin and Continue Construction in Violation of the CAA.

On each day a company constructs its facility, that company has the choice to either violate the law or comply with it. If Owens Corning's position - that only the first day of construction is actionable - were adopted, facilities would have tremendous incentives to begin and continue

construction in violation of the PSD program, because a single penalty of \$32,500 is woefully inadequate to outweigh the financial benefit of avoiding PSD. This cannot be the result Congress intended.

Indeed, several district courts have held that, in the context of construction that fills wetlands without the required CWA § 404 permit, each day that work is completed constitutes a separate violation, and each day that fill material remains in the wetlands is a day of violation. *See, e.g., United States v. Cumberland Farms*, 647 F. Supp. 1166 (D. Mass. 1986). In *Borden Ranch Partnership v. United States Army Corps of Eng'rs*, the Ninth Circuit rejected the defendant's request to assess penalties on a "per day" basis, and instead held that each pass across a swale with a deep ripper constituted a violation of the CWA, because any other result would create perverse incentives. 261 F.3d 810, 818 (9th Cir. 2001). The court stated, "[o]nce a wetland violation has occurred in part of a swale, [the defendant's] proposed rule would allow the landowner to rip away at the rest of the swale with impunity from that point forward, because no additional penalty could be imposed." *Id.*¹³

These same incentive problems would plague a system in which violations of construction permit requirements in the CAA and state SIPs were considered discrete and singular violations occurring only on the day that construction began. Owens Corning encourages this court to adopt

¹³ The Ninth Circuit would thus apparently disagree that a one-time fine, coupled with remedial injunctive relief, would be sufficient to deter corporations from unlawful construction, particularly where, as here, the corporation's multi-million dollar project budget can easily absorb \$32,500. *Compare United States v. Murphy Oil U.S.A., Inc.*, 143 F. Supp. 2d 1054, 1087 (W.D. Wis. 2001); *with U.S. v. Chevron U.S.A., Inc.*, 639 F. Supp. 770 (W.D. Tex. 1985) (oil company liable for \$2,000 per day penalty for 522 days for its violation of PSD prohibition on construction).

a rule that would allow the corporation to avoid essentially all liability for its illegal conduct. Plaintiffs ask this court to reject that unreasonable request.

D. None of Plaintiffs Claims Is Time Barred

In its Memorandum, Owens Corning relies on a handful of cases addressing unlawful construction activities that were begun *and completed* outside the applicable statute of limitations period. Def.'s Memo. at 20-21, n.6. These cases simply do not apply to the present situation, both because there can be no doubt that Plaintiffs filed their action well within the five-year statute of limitations, and because Owens Corning, by its own admission, has yet to complete construction. Indeed, Owens Corning fails to note that, in several of the cases it cites, construction violations that occurred within the applicable statute of limitations were not dismissed, but instead were resolved for significant penalties assessed for several days of violation. There is simply no relevant authority that suggests that a claim for relief does not exist where 1) plaintiffs filed their action when construction was underway, 2) defendant continued construction after the complaint was filed, and 3) defendant intends to resume construction, and operation, in the future.

The cases cited by Owens Corning all involve alleged illegal construction that began and ended more than five years before the plaintiffs filed suit. *See Niagara Mohawk*, 263 F. Supp. 2d at 660-662 (violations based solely on construction that was complete prior to November 28, 1996 were barred by statute of limitations); *see also* Def.'s Memo. at 20-21, n.6 . Here, in contrast, Plaintiffs initiated their suit within months of the date on which Owens Corning first initiated its construction activities. Unlike in the cases cited by Owens Corning, construction is not complete. *See e.g., United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 444 (D. Md. 2001). Owens Corning has merely temporarily suspended construction, pursuant to an injunction filed with this Court, until

it receives a permit. Owens Corning itself acknowledges that it has more work to do before the facility is operational. The statute of limitations is clearly not an issue in this case.

Indeed, in several of the cases cited, construction violations that occurred within the five-year statute of limitations were not dismissed, and, in fact, were subject to civil penalties for multiple days of violation. *See, e.g., United States v. Brotech Corp.*, No. Civ.A 00-2428, 2000 WL 1368023 *3 (E.D. Pa. Sept. 19, 2000) (refusing to dismiss three of EPA's claims where alleged unlawful modifications occurred within the statute of limitations); *Westvaco*, 144 F. Supp. 2d at 445 (allowing claims for violations occurring within five years of suit). In *Westvaco*, the court explained that a continuing violation is one that is "occasioned by continual unlawful acts." 144 F. Supp. 2d at 442 (citations omitted). Similarly, Owens Corning's construction is incomplete, the statute of limitations has not yet begun to run, and the violations are thus ongoing within the meaning of these cases.

Moreover, the cases cited by Owens Corning rely on a distinction between construction and operation permits which does not exist under Oregon's SIP and federal law. The PSD program requires not only a preconstruction permit, but ongoing compliance with § 165 standards before construction, during construction, and during operation. In Oregon, construction, and subsequent operation, of new facilities must be authorized by a single permit, which serves as both a construction permit and an operating permit for one year. As one court noted, construction violations remain ongoing under such permit schemes because a defendant's failure to submit to the PSD program continues to have a detrimental effect on the public while yielding advantage to the defendant, no matter how long ago construction was completed. *United States v. Duke Energy*, 278 F. Supp. 2d 619, 651 (M.D. N.C. 2003) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975)). The court also recognized that the "crucial" distinction between permits to

construct or operate does not exist in many states, and held that construction violations were ongoing because the process of applying for and receiving a construction permit yields limitations on future operations that would not otherwise exist. *Id.* Each day a facility that avoided PSD review operates, “it may be in violation of the requirement to comply with the operation conditions, *i.e.* the emissions limitations, that would have been contained within a PSD permit.” *Id.* This analysis applies with equal force to Oregon’s permitting scheme.

At the heart of Owens Corning’s motion to dismiss is an argument that it should not have to pay penalties for each day on which it constructed and on each day in which its facility remained in place in violation of federal law. While Plaintiffs dispute this position,¹⁴ this issue is one to address at the penalty phase of the proceedings. *See Grand Canyon Trust v. Tucson Electric Power Co.*, 391 F.3d 979 (9th Cir. 2004). Plaintiffs have clearly stated a claim for which this Court can grant relief, and nothing in Owens Corning’s argument shows otherwise.

IV Conclusion

Plaintiffs respectfully request that the court deny Owens Corning’s motion to dismiss.

DATED this 29th day of July, 2005.

Respectfully submitted,

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¹⁴ Since at least the early 1980's, EPA has assessed civil penalties per day of violation from the date unlawful construction begins until the facility is granted a valid permit or abandons the project. *See, e.g.*, Michael S. Alushin & Edward E. Reich, *Guidance on Enforcement of Prevention of Significant Deterioration Requirements Under the Clean Air Act 6* (Dec. 14, 1983).

