



August 10, 2005

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Stephanie Hallock, Director
Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204

Re: Sixty-day notice of violations of Clean Air Act and Oregon State Implementation Plan

Dear Ms. Hallock:

We are writing to inform you that the Northwest Environmental Defense Center (“NEDC”), Oregon Center for Environmental Health (“OCEH”) and Sierra Club (collectively, “Notifiers”) intend to file suit against the Oregon Department of Environmental Quality and you in your official capacity as the Director (collectively, “DEQ”) under Section 304(a)(1) of the Clean Air Act (“CAA”), 42 U.S.C. § 7604(a)(1), for violating the CAA and the State Implementation Plan (“SIP”) for the State of Oregon. On or about the sixtieth day following delivery of this letter, Notifiers intend to file suit against DEQ in federal district court and plan to seek declaratory and injunctive relief.

DEQ is violating Oregon’s SIP, the CAA and implementing regulations, and Oregon law by failing to require Owens Corning Corporation (“Owens Corning”) to submit a complete permit application, including all information underlying Owens Corning’s emissions estimates, for the construction and operation of a new polystyrene foam insulation board manufacturing plant located at 18456 NE Wilkes Road in Gresham, Oregon, by failing to release this information to the public for review, and by acting on an incomplete permit application.

DEQ is also violating the CAA and Oregon’s SIP by failing to properly implement the major and minor new source review provisions contained in the SIP approved by the Environmental Protection Agency (“EPA”) and by failing to properly implement the SIP’s permitting requirements. DEQ’s actions with respect to Owens Corning’s construction violate CAA and SIP requirements and demonstrate that DEQ’s interpretation and implementation of the Oregon SIP are inconsistent with federal law.

I. Background

Owens Corning initially applied to DEQ on or about November 4, 2003, to obtain an Air Contaminant Discharge Permit (“ACDP”) for its proposed polystyrene foam insulation board

manufacturing plant. In its initial permit application, Owens Corning stated that it planned to emit 283 tons per year of HCFC-142b, a potent greenhouse gas and ozone-depleting substance regulated under the CAA. On or about August 3, 2004, before it had received the required permit, Owens Corning began constructing the facility, in violation of the CAA and Oregon's SIP. DEQ compounded these violations by erroneously informing Owens Corning that it could begin construction prior to having a permit and complying with New Source Review ("NSR") requirements. At the time that Owens Corning first began constructing its facility, it had repeatedly stated in signed documents submitted to DEQ that the facility had the potential to emit 283 tons per year of HCFC-142b.

On or about December 6, 2004, Owens Corning submitted a two-page letter to DEQ claiming that the facility's potential to emit was 245 tons per year, not 283 tons per year. On January 24, 2005, Owens Corning again revised its potential to emit to an even lower figure, 234 tons per year. On May 17, 2005, Owens Corning withdrew its prior permit application and revisions, and it submitted a new application. Owens Corning yet again revised its potential to emit to a lower figure, 225 tons per year. On each occasion that Owens Corning has revised its stated potential to emit, it has cited "errors" in its previous calculations.

The May 17, 2005 permit application states that the new estimated potential to emit is based on a "statistical analysis" of data from Owens Corning's other polystyrene foam insulation board plants. The permit application does not contain this statistical analysis, however. Owens Corning has not submitted this statistical analysis or underlying data to DEQ, asserting a claim of trade secret protection. On May 23, 2005, DEQ stated that it nonetheless considers Owens Corning's permit application complete. On July 11, 2005, DEQ issued a draft ACDP dated July 1, 2005, for the Owens Corning Gresham plant.

Also on July 11, 2005, the Pacific Environmental Advocacy Center ("PEAC"), on behalf of PEAC and NEDC, requested documents underlying Owens Corning's May 17, 2005 permit application and specifically asked DEQ to provide PEAC and NEDC a copy of the statistical analysis. On July 18, 2005, DEQ permit writer George Davis responded that "[t]he specific trade secret information you requested is not in our possession." On July 27, 2005, PEAC sent DEQ a letter explaining why DEQ was required to make the statistical analysis and other data underlying the permit publicly available. On August 1, 2005, George Davis wrote a letter to PEAC attorneys stating that DEQ had "reviewed the statistical methodology used," and it was "*upon this review* that the Department concluded that Owens Corning's methodology and results form a reasonable basis for that portion of the PTE calculation." (emphasis added). DEQ has thus acknowledged that the information upon which DEQ relied is the very information that DEQ will not make publicly available.

On August 2, 2005, NEDC again requested that DEQ require Owens Corning to turn over the data underlying the Owens Corning permit application and NEDC again requested that DEQ release it to the public. NEDC explained that the Owens Corning permit application is incomplete and the public participation process should not begin to run until DEQ has obtained and released this pertinent information. NEDC also requested an extension of the public comment period in light of these deficiencies. On August 4, 2005, DEQ responded stating that it

considered the Owens Corning permit application complete and that it would not extend the public comment period.

DEQ will not require Owens Corning to submit the very data Owens Corning relies on to calculate its potential to emit, DEQ will not release the required information to the public for review, and DEQ is issuing the final permit having never obtained or allowed public review of this information.

II. Authority to Bring Suit Under the Clean Air Act Citizen Suit Provision

Notifiers are entitled to file suit against DEQ in federal court for its violations of the CAA and the Oregon SIP. CAA § 304(a)(1) authorizes citizens to commence a civil action against any person, including a “governmental instrumentality or agency,” who is 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). An emission standard or limitation is defined to include “any condition or requirement of a permit under part C of subchapter I of this chapter,” 42 U.S.C. § 7604(f)(3), and “any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations . . . which is in effect under this chapter or any applicable implementation plan.” 42 U.S.C. § 7604(f)(4). *See also Trustees of Alaska v. Fink*, 17 F.3d 1209, 1210 n. 3, 1211 (9th Cir. 1994) (finding that a state SIP, “having the force and effect of federal law,” was enforceable in federal court and holding that court had jurisdiction over CAA citizen suit against municipality for SIP violations) (internal quotation omitted). Thus, citizens may bring suit against a state agency or officer who violates requirements of the CAA or the SIP.

III. DEQ is Violating Oregon SIP and Federal and State Requirements Regarding Permit Applications, Public Participation, and Release of Public Information

By failing to require the submission of information underlying Owens Corning’s permit application, by deeming the application complete without the information, by failing to release the information to the public, and by acting on an incomplete permit application, DEQ has violated and is violating OAR 340-216-0040(1), OAR 340-216-0040(5), OAR 340-216-0040(10), OAR 340-216-0040(11), OAR 340-216-0040(12), OAR 340-209-0030(3), OAR 340-214-0110, 40 C.F.R. § 51.166(q), 42 U.S.C. § 7414(c), 40 C.F.R. § 2.301(a)(2), and O.R.S. § 192.501.

Notifiers alleged that these violations have occurred 1) on each and every day that DEQ has acted upon incomplete permit applications; 2) on each and every day that DEQ has failed to require Owens Corning to submit a complete permit application; 3) on each and every day that DEQ has determined and stated that the Owens Corning permit application is complete; 4) on

each and every day that DEQ has failed to require Owens Corning to submit data underlying Owens Corning's permit applications (and most particularly data that DEQ stated "formed the basis" for DEQ's assessment of Owens Corning's May 17 permit application); and 5) on each and every day that DEQ has failed to make data underlying the Owens Corning permit applications available to the public. DEQ is in the best position to know the exact dates on which the violations occurred, and Notifiers intend to obtain this information through discovery. Notifiers further allege that these violations are ongoing and will remain ongoing unless and until DEQ complies in full with the permitting and public participation requirements of the CAA and implementing regulations, Oregon's SIP, and Oregon law.

A. DEQ Is Violating SIP Requirements Regarding Complete Permit Applications and Public Participation in the Permitting Process

First, OAR Chapter 340, Division 216, which is a part of Oregon's SIP, establishes the application requirements applicable to all sources of air pollutants. Under this Division, DEQ is required to obtain a complete permit application. An applicant must submit eleven enumerated categories of information, including "[a]n estimate of the amount and type of each air contaminant source in terms of hourly, daily, or monthly and yearly rates, *showing calculation procedures*" and "[a]ny other information requested by the Department." OAR 340-216-0040(1)(a) - (l) (emphasis added). Division 216 also states: "[t]he application must be *completed in full* and signed by the applicant or the applicant's legally authorized representative." OAR 340-216-0040(5) (emphasis added). This section further specifies that "[a]pplications that are obviously incomplete, unsigned, improperly signed, or lacking the required exhibits or fees will be rejected by the Department and returned to the applicant for completion." OAR 340-216-0040(10). These rules clearly require the permittee to submit a complete permit application.

Division 216 also places an affirmative duty on DEQ to ensure that an application is complete and to make such a determination. DEQ must make an initial completeness determination within 15 days after it receives an application. OAR 340-216-0040(11). DEQ then retains a continuing obligation to ensure that it has a complete application. OAR 340-216-0040(12). Thus, it is clear that DEQ has both an initial and an ongoing duty to ensure that it has all necessary information before it processes an application for an ACDP. This duty applies whether or not the facility is a federal major new source.

Second, OAR Chapter 340, Division 209, which is also a part of Oregon's SIP, sets forth the requirements for notifying the public of permit actions and providing an opportunity for the public to participate in those permit actions. Only after DEQ has a complete permit application may it move forward with processing the permit and providing for public participation. DEQ has stated that the Owens Corning permit is subject to Category IV public participation requirements. *See* OAR 340-209-0030(3)(d). Under these Category IV requirements, DEQ must provide public

notice of the completed application and requested permit action, schedule an informational meeting with the public to discuss the completed application and requested permit application, provide additional public notice of the proposed permit once the draft permit is complete, and schedule a public hearing to allow for submission of oral or written comments. OAR 340-209-0030(3)(d)(A-D). By their very terms, Category IV public participation processes cannot begin unless and until DEQ has a completed application.

Finally, OAR Chapter 340, Division 214 sets forth reporting requirements applicable to all stationary sources in the state.

All stationary sources must provide in a reasonably timely manner any and all information that the Department reasonably requires for the purpose of regulating stationary sources. Such information may be required on a one-time, periodic, or continuous basis and may include, but is not limited to, information necessary to:

- (1) Issue a permit and ascertain compliance or noncompliance with the permit terms and conditions;
- (2) Ascertain applicability of any requirement;
- (3) Ascertain compliance or noncompliance with any applicable requirement; and
- (4) Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into a permit.

OAR 340-214-0110. Under this provision DEQ must require information reasonably necessary for regulating a source, including information necessary to issue a permit and ascertain whether a particular requirement applies.

DEQ has violated and is violating the SIP provisions by failing to require the submission of information underlying Owens Corning's permit application, by deeming the application complete without the information, by failing to release the information to the public for review, and by acting on an incomplete permit application.

B. DEQ Is Violating Federal Regulations Regarding Complete Permit Applications and Public Participation in the Permitting Process

EPA has promulgated regulations setting forth the public participation requirements for permits issued under the CAA's PSD/NSR program. *See* 40 C.F.R. § 51.166(q). For Oregon's SIP to have obtained EPA's approval, DEQ was required to adopt a SIP that contains the requirements set forth in 40 C.F.R. § 51.166(q). This provision states that Oregon's SIP must provide that "[t]he reviewing authority shall notify all applicants within a specified time period as to the completeness of the application." 40 C.F.R. § 51.166(q)(1). The regulation also states that "the date of receipt of the application shall be the date on which the reviewing authority

received all required information.” *Id.* Only after the agency has received a complete application may it process the submitted application materials. 40 C.F.R. § 51.166(q)(2). In processing the application, the agency must allow for public notice and comment on the proposed permit. *Id.* DEQ’s SIP was approved based on the assumption that DEQ intended to adhere to these clear requirements.

Federal regulations also require DEQ to adopt procedures governing minor new source review. 40 C.F.R. § 51.160 and 51.161. The regulations require Oregon’s SIP to include legally enforceable procedures that require DEQ to provide for opportunity for public comment on information submitted by permit applicants. 40 C.F.R. § 51.161(a). The information available to the public must include the agency’s analysis of the effect of construction on ambient air quality, as well as the information submitted by the permit applicant. 40 C.F.R. § 51.161(a) and (b). Oregon has chosen to adhere to these requirements by adopting a single set of rules governing all ACDP permits. Thus, all permit applications are subject to the completeness requirements of OAR Chapter 340, Division 216.

DEQ has violated and is violating federal regulations by failing to require the submission of information underlying Owens Corning’s permit application, by deeming the application complete without the information, by failing to release the information to the public for review, and by acting on an incomplete permit application.

C. DEQ Is Violating Federal and State Law by Not Releasing “Emission Data”

CAA § 114(c) requires public disclosure of information submitted to the permitting authority with the exception of any information which “would divulge methods or processes entitled to protection as trade secrets.” 42 U.S.C. § 7414(c). However, the statute explicitly exempts from trade secret protection, and therefore requires the disclosure of, “emission data.” *Id.* Emission data are defined by regulation to include information necessary to determine the amount and type of pollution emitted or authorized to be emitted from a facility and information about methods, devices and installations necessary to determine if a facility is in compliance with applicable standards or limitations. 40 C.F.R. § 2.301(a)(2)(I)-(ii). DEQ is withholding from the public documents relevant to the new facility’s processes, design, production and emissions estimation methods, and compliance with applicable standards, which constitute emission data under the CAA and EPA’s implementing regulations.

Oregon’s Public Records Act requires disclosure of trade secret information if disclosure is in the public interest. O.R.S. § 192.501. Because of the level of public concern about the Owens Corning Gresham plant, and potential effects on the environment and public health from the plant, release of the information is clearly in the public interest.

DEQ is therefore violating federal and state law by withholding from public release information underlying Owens Corning's permit application, including but not limited to emission data.

IV. DEQ Is Violating Major and Minor New Source Review and Permitting Requirements of the CAA and Oregon's SIP

DEQ is violating the Oregon SIP and the CAA by failing to properly implement major and minor new source review programs and Oregon's construction permitting requirements. DEQ's actions with respect to Owens Corning's construction violate CAA and SIP requirements and demonstrate that DEQ's interpretation and implementation of the Oregon SIP are inconsistent with federal law.

Notifiers allege that these violations have occurred: 1) on each and every day that DEQ has relied on its guidance documents; 2) on each and every occasion that DEQ has informed a permit applicant that it could commence construction activities in violation of the CAA and implementing regulations and Oregon's SIP; and 3) on the day that DEQ notified Owens Corning that it could construct its facility and on each day thereafter that DEQ allowed Owens Corning to continue construction in violation of the CAA and implementing regulations and Oregon's SIP. DEQ is in the best position to know the dates on which these violations occurred, and Notifiers intend to obtain this information through discovery. Notifiers also intend to obtain through discovery the names of all other facilities for which DEQ has unlawfully authorized construction in violation of the CAA and implementing regulations and Oregon's SIP. Notifiers further allege that these violations are ongoing.

A. CAA PSD/NSR Requirements

Section 165(a) of the CAA establishes prevention of significant deterioration/new source review ("PSD/NSR") requirements, which prohibit the construction of a "major emitting facility" unless the facility has received a permit, and among other things, employs the best available control technology ("BACT") to control its emissions. 42 U.S.C. § 7475(a).

A "major emitting facility" is defined to include any 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 further define "potential to emit," for purposes of determining whether the construction of a stationary source will trigger the preconstruction review requirements. Potential to emit means "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design." 40 C.F.R. § 52.24(f)(3).

CAA § 161 provides that each state's SIP must contain emissions limitations and other measures, as determined under federal regulations, to prevent significant deterioration of air quality in attainment areas. 42 U.S.C. § 7471. Oregon has promulgated PSD/NSR regulations as part of its SIP. Oregon's SIP has been approved by EPA, and therefore DEQ is bound as a matter of federal law to follow its provisions. *See Friends of the Earth v. Carey*, 535 F.2d 165, 169 (2d Cir. 1976).

B. Oregon SIP New Source Review and Construction Permit Requirements

Oregon's SIP provides that "No owner or operator may begin construction of a major source or major modification of an air contaminant source without having received an [ACDP] from the Department [of Environmental Quality] and having satisfied the requirements of this division." OAR 340-224-0010(2). A proposed new federal major source must demonstrate, before it obtains a permit to construct in an attainment area, that it will meet technology-based treatment requirements; perform required air quality monitoring; and provide an analysis of the air quality impacts from the proposed source. OAR 340-224-0050 to 340-224-0070. The SIP defines a "federal major source" as any source that is a "major emitting facility" under the CAA. OAR 340-200-0020(52).

In addition to the new source review provisions of Oregon's SIP, other provisions of Oregon's SIP also mandate construction permits. The SIP requires all facilities that will emit more than 100 tons per year of a regulated air pollutant to obtain a permit before constructing. OAR 340-216-0020(1); Table 1, Part C.5. The SIP also requires all facilities that will be subject to the Oregon Title V Operating Permit program to obtain a permit before constructing. OAR 340-216-0020(2). Title V applies to any "major source," which is defined as any stationary source of air pollutants "that directly emits or has the potential to emit 100 tons per year or more of any regulated air pollutant" OAR 340-218-0020(1)(a); OAR 340-200-0020(67)(b)(B).

Oregon's SIP also contains preconstruction notification and approval requirements that apply to all stationary sources. "No person is allowed to construct, install, or establish a new stationary source that will cause an increase in any regulated pollutant emissions without first notifying the Department [of Environmental Quality] in writing." OAR 340-210-0215. For Type 3 changes, "the owner or operator must obtain either a Construction ACDP or a new or modified Standard ACDP . . . before proceeding with the construction or modification." OAR 340-210-0240(1)(c). For Type 4 changes, "the owner or operator must obtain a new or modified Standard ACDP before proceeding with the construction or modification." OAR 340-210-0240(1)(d).

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C. The Meaning of “Construction”

Each of the above requirements is triggered by the “construction” of a new source. 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). EPA’s regulations setting forth the PSD requirements for state SIPs contain the identical definition of construction. *See* 40 CFR § 51.166(b)(8).

EPA guidance explains that prior to issuance of a PSD permit, only very limited activities are allowed, including “planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials.” Memorandum from Director Division of Stationary Source Enforcement, Dec. 18, 1979, at 2. Prohibited activities include “installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and other activities of a similar nature.” *Id.* Thus, a major emitting facility may not begin *any* construction without having first received a permit and complied with the other PSD/NSR requirements.

EPA’s regulations applicable to minor sources also require states to adopt rules that would allow the state to prevent the construction of a source that would not comply with applicable requirements. *See* 40 C.F.R. § 51.160.

The Oregon SIP defines “construction” as follows:

(a) Except as provided in subsection (b) of this section means any physical change including, but not limited to, fabrication, erection, installation, demolition, or modification of a source or part of a source;

(b) As used in OAR 340 division 224 means any physical change including, but not limited to, fabrication, erection, installation, demolition, or modification of an emissions unit, or change in the method of operation of a source which would result in a change in actual emissions.

OAR 340-200-0020(25).

For a state SIP to be approved by EPA, the SIP must use the definitions provided by EPA’s regulations, or a definition that is “at least as stringent.” 40 C.F.R. § 51.166(b). EPA thus approved Oregon’s SIP based on the assumption that Oregon would apply new source review and other construction permitting requirements consistent with EPA’s interpretation of construction.

DEQ applies these provisions, however, based on an interpretation of construction that is inconsistent with the meaning of the term under federal law. For construction that triggers PSD/NSR review, DEQ states that prior to receiving a permit,

Ground moving is permissible and auxiliary structures, such as office space, can be constructed. This construction is done at the applicant's risk. No construction or foundation work can be done for the actual source of emissions.

November 15, 1993 DEQ Air Quality Source Guidance at V-1. For sources that do not trigger PSD/NSR review, in DEQ's view, "more leniency is allowed." *Id.* For these sources, DEQ states that prior to the source receiving a permit,

The Department allows owners or operators to do ground moving and construct the building shell. Construction of the equipment that will cause the air pollution or the emission control devices is not allowed.

Id.

D. DEQ Is Violating Oregon SIP's New Source Review and Permitting Provisions

Owens Corning stated that the facility had the potential to emit more than 250 tons per year of HCFC-142b, a regulated air pollutant. Owens Corning was and is a major emitting facility. Under federal law and under Oregon SIP's new source review requirements, Owens Corning was and is required to obtain a permit and comply with PSD/NSR requirements prior to beginning construction. Under the permitting provisions of the Oregon SIP which are triggered by a 100 tons per year threshold, Owens Corning was and is also required to obtain a permit prior to beginning construction.

DEQ authorized Owens Corning to begin constructing prior to obtaining a preconstruction permit. This is a clear failure to require compliance with 42 U.S.C. § 7475(a), and EPA's implementing regulations, 40 C.F.R. § 52.21, 40 C.F.R. § 51.160; 40 C.F.R. § 51.166; the corresponding NSR provisions of the SIP, OAR 340-224-0010 and OAR 340-224-0050 to 340-224-0070; and with the other SIP requirements to obtain construction ACDPs, OAR 340-216-0020(1), OAR 340-216-0020(2), OAR 340-210-0215, OAR 340-210-0240(1).

DEQ's failure to properly implement these federal and SIP provisions stems at least in part from DEQ's illegal interpretation of the term "construction," as reflected in its guidance documents and its actions relating to Owens Corning. DEQ's interpretation is entirely inconsistent with the CAA, EPA's interpretation of construction, and the premise upon which

EPA approved Oregon's SIP. The fact that DEQ authored the SIP cannot save DEQ from its failure to implement the aforementioned SIP requirements. *See, e.g., American Lung Ass'n of New Jersey v. Kean*, 670 F. Supp. 1285, 1291 (D.N.J. 1987), *aff'd* 871 F.2d 319 (3rd Cir. 1989) (affording state no deference in interpreting SIP and noting that state cannot use a SIP to write around the mandatory requirements imposed by the CAA and regulations); *Oregon Environmental Council v. Oregon DEQ*, 1992 WL 252123 (D. Or. 1992) (affording DEQ no deference in interpreting SIP requirements and holding that DEQ violated Oregon's SIP by, *inter alia*, failing to require compliance with the new source review provisions of the SIP).

DEQ has violated and is violating the CAA and implementing regulations and the Oregon SIP by failing to properly implement major and minor new source review requirements and by failing to implement construction permitting requirements. DEQ violated and is violating the CAA and implementing regulations and the Oregon SIP by authorizing Owens Corning to build its facility prior to receiving the required permit, and by issuing a permit to Owens Corning which fails to require Owens Corning to meet the applicable NSR requirements.

V. Persons Giving Notice

The full names, addresses, and telephone numbers of the parties providing this notice are:

Northwest Environmental Defense Center
10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6673

Oregon Center for Environmental Health
516 SE Morrison Street
Portland, OR 97214
(503) 233-1510

Sierra Club
2950 SE Stark, Suite 110
Portland, OR 97214
503-238-0442

The attorneys representing the parties in this notice are:

Melissa Powers
Allison LaPlante
Pacific Environmental Advocacy Center

Ms. Stephanie Hallock
Sixty-Day Notice
Page 12 of 13

10015 S.W. Terwilliger Blvd.
Portland, OR 97219
(503) 768-6727, (503) 768-6894

During the sixty (60) day notice period, we will be available to discuss the contents of this notice. If you wish to discuss any aspect of this notice or to discuss settlement of this matter prior to commencement of suit, please contact us.

Sincerely,

Allison LaPlante
Melissa Powers
Pacific Environmental Advocacy Center

COPIES TO:

Tom Lindley
Lynne Paretchan
Jeff Dobbins
Perkins Coie, LLP
1120 N.W. Couch Street, Tenth Floor
Portland, OR 97209-4128

Cory Ann Wind, Supervisor
Oregon Department of Environmental Quality
Northwest Region, Air Quality
2020 SW 4th Avenue, Suite 400
Portland, OR 97201

George Davis
Oregon Department of Environmental Quality
Northwest Region, Air Quality
2020 SW 4th Avenue, Suite 400
Portland, OR 97201

Paul S. Lewandowski
Owens Corning Corporation
One Owens Corning Parkway 3G
Toledo, OH 43659

(by certified mail)
Andy Ginsburg
Air Quality Division Administrator
Oregon Department of Environmental Quality
811 SW Sixth Ave.
Portland, OR 97204

Governor Ted Kulongoski
160 State Capitol
900 Court Street
Salem, OR 97301-4047

Ms. Stephanie Hallock
Sixty-Day Notice
Page 13 of 13

Ron Kreizenbeck
Acting Regional Administrator
Region 10 of the United States Environmental
Protection Agency
1200 Sixth Avenue (RA-140)
Seattle, WA 98101

(by certified mail)
Steve Johnson, Administrator
United States EPA
Ariel Rios Building
1200 Pennsylvania Ave. NW
Washington, D.C. 20460

Alberto Gonzales, Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001