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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.

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Civil No.:

COMPLAINT FOR INJUNCTIVE AND  
DECLARATORY RELIEF AND CIVIL  
PENALTIES

(Violation of Clean Air Act, 42 U.S.C. §  
7604(a)(3))

**I. INTRODUCTION.**

1. This is a complaint for injunctive and declaratory relief and civil penalties under the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q. The Northwest Environmental Defense Center, Oregon Center for Environmental Health, and Sierra Club (collectively, “Plaintiffs”) bring this citizen suit under § 304(a)(3) of the Clean Air Act (the “Act” or “CAA”), 42 U.S.C. § 7604(a)(3), against Owens Corning Corporation (“Owens Corning” or “Defendant”) for past and

continuing violations of Section 165(a) of the CAA, 42 U.S.C. § 7475(a) and the State of Oregon's State Implementation Plan ("SIP") implementing the federal CAA, OAR 340-224-0010(2). Defendant Owens Corning is constructing a major emitting facility without a required preconstruction permit, in violation of CAA § 165(a), 42 U.S.C. § 7475(a). Plaintiffs allege that this unpermitted construction has violated and is violating Part C of Title I of the Act, 42 U.S.C. §§ 7470-7479, and implementing regulations, 40 C.F.R. § 52.21 (collectively, the "Prevention of Significant Deterioration" or "PSD" law) and related Oregon State law provisions, OAR 340-224-0010 to OAR 340-224-0070. These violations are ongoing as of the date of this complaint.

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

## **II. JURISDICTION AND VENUE.**

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

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

### **III. PARTIES.**

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

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

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

8. Defendant OWENS CORNING CORPORATION is in the process of building a

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

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

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

11. Plaintiffs' members are also concerned about the potential "greenhouse" effects of emissions from the Owens Corning facility. Plaintiffs' members use Oregon's waterways, enjoy the diverse plant and animal life in Oregon, recreate along Oregon's coast, and otherwise appreciate Oregon's natural resources. Plaintiffs members are aware of scientific studies that

predict that global warming will cause harm to the areas that Plaintiffs use and species that Plaintiffs enjoy. Plaintiffs therefore reasonably fear that Owens Corning's emissions of HCFC-142b will contribute to and exacerbate these environmental injuries, and thereby diminish Plaintiffs' enjoyment of Oregon's natural resources and environment.

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

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

14. Plaintiffs' members also suffer procedural harm as a result of Owens Corning's failure to comply with the CAA's preconstruction review requirements. Plaintiffs believe that their concerns about the facility's construction and operations should have been addressed, as the CAA requires, before Owens Corning began constructing its facility. Plaintiffs are concerned that the construction, which is proceeding without the required preconstruction review, will foreclose an adequate review of Owens Corning's proposal seeking authorization to construct

and operate its facilities. The purpose of the preconstruction permit requirement is to prevent any facility from beginning construction until the environmental impacts of the facility are fully evaluated and, where necessary, mitigated. Plaintiffs believe that they have been denied the procedural rights afforded under the CAA's preconstruction permit requirements. Plaintiffs believe that, without this Court's intervention, they will be unable to adequately participate in the Owens Corning permit process.

#### **IV. LEGAL BACKGROUND.**

##### **The Clean Air Act**

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

16. Pursuant to 42 U.S.C. § 7409, the Administrator of the United States Environmental Protection Agency ("EPA") has promulgated regulations establishing primary and secondary national ambient air quality standards ("NAAQS") for certain criteria air pollutants, including ozone, SO<sub>2</sub>, NO<sub>2</sub>, and particulate matter ("PM"). The primary NAAQS must adequately protect the public health, and the secondary NAAQS are to be sufficiently protective to safeguard the public welfare from any known or anticipated adverse effects associated with the presence of air pollutants in the ambient air.

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

18. Pursuant to 42 U.S.C. § 7407(d), each State must designate those areas within its

boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an “attainment” area; an area that does not meet the NAAQS is a “nonattainment” area.

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

#### **Title VI of the CAA**

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

21. Congress also gave EPA authority under Title VI to establish a more expedited phase-out schedule for Class II substances. CAA § 606(a); 42 U.S.C. § 7671e(a). EPA has exercised this authority by promulgating an expedited phase-out schedule for HCFC-142b. 40 C.F.R. Part 82. Under this schedule, no person may produce HCFC-142b after January 1, 2010,

unless the HCFC-142b is to be used in equipment manufactured before January 1, 2010. 40 C.F.R. § 82.16(c). If the HCFC-142b is used in equipment manufactured before 2010, the prohibition against its production takes effect in 2015. 40 C.F.R. § 82.16(d).

### **Prevention of Significant Deterioration and New Source Review**

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

23. Section 165(a) of the Act establishes New Source Review (“NSR”) requirements, which prohibit the construction of a “major emitting facility” unless the facility has received a PSD permit and the facility employs the best available control technology (“BACT”) to control its emissions. 42 U.S.C. §§ 7475(a)(1)&(a)(4). A “major emitting facility” is defined as either 1) any one of a category of listed stationary sources that emits, or has the potential to emit, 100 tons per year or more of any air pollutant; or 2) any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. CAA § 169(1); 42 U.S.C. § 7479(1).

A “stationary source” is any “building, structure, facility, or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(3). An “air pollutant” is any “air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.” CAA § 302(g); 42 U.S.C. § 7602(g).

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

25. Pursuant to Part C of the CAA, Oregon’s SIP prohibits the construction of a major source without a required air contaminant discharge permit from the Oregon Department of Environmental Quality (“DEQ”). OAR 340-224-0100(2). A proposed new federal major source<sup>1</sup> must demonstrate, before it obtains a permit to construct in an attainment area, that it will meet required technology-based treatment requirements; perform required air quality monitoring; and provide an analysis of the air quality impacts from the proposed source. OAR 340-224-0050 to 340-224-0070.

### **Enforcement Provisions**

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

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<sup>1</sup> Oregon defines a “federal major source” as any source that is a major emitting facility under the CAA. OAR 340-200-0020(52).

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

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

### **FACTUAL BACKGROUND.**

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

30. HCFC-142b is a known ozone-depleting substance. The stratospheric ozone layer protects the earth from dangerous ultraviolet-B (“UV-B”) radiation. Depletion of stratospheric ozone allows more UV-B radiation to penetrate to the earth's surface. Increased radiation, in turn, has been linked to higher incidence of certain skin cancers, skin ailments such as lupus, cataracts, suppression of the human immune system, damage to crops and aquatic organisms, and increased formation of ground-level ozone. Although depletion of the ozone layer is most commonly associated with creation of the “ozone hole,” ozone depletion is also documented in the Northern Hemisphere, at latitudes in which Plaintiffs’ members live and recreate.

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

32. HCFC-142b is also a strong greenhouse gas, with a global warming potential approximately 2,000 times as potent as carbon dioxide. A recent report from the State of Oregon estimates that global warming will have the following impacts in the Pacific Northwest: increased regional temperatures leading to an increased elevation in the upper tree line, prolonged allergy season, earlier breeding by animals and plants, and an increased fire season; rising sea levels, leading to increased erosion and a loss of land along the coastline; a decline in snowpack, which will lead to an increase in spring runoff, followed by decreased water levels in streams in the summer and fall; and a change in ocean circulation which will cause increased stress on estuarine species. *See* Governor's Advisory Report on Global Warming, State of Oregon, Oregon Strategy for Greenhouse Gas Reductions, Appendix D, Scientific Consensus Statement on the Likely Impacts of Climate Change on the Pacific Northwest (Oct. 13, 2004).

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

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

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

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

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

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

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

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

41. Based on personal observation and photographs, Plaintiffs estimate that between one-third and one-half of the necessary construction is complete. Specifically, Owens Corning

has installed the roof, and the construction of the outer walls is nearly complete. The cement floor inside the building has been poured, beams and structural supports are up inside the building, and an outside swale has been constructed and landscaped.

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

**CLAIM FOR RELIEF.**

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

43. Plaintiffs hereby incorporate all preceding paragraphs.

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

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

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

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

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

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

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

51. As provided in 42 U.S.C. § 7604(a), the violations set forth above subject Owens

Coming to injunctive relief and civil penalties of up to \$32,500 per day for each day on which Owens Corning performed construction without the required PSD permit.

**PRAYER FOR RELIEF.**

WHEREFORE, Plaintiffs respectfully request that this Court

1. Declare that Owens Corning has violated Section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a) and Oregon's SIP by constructing a major emitting facility without first obtaining a preconstruction permit;
2. Permanently enjoin Owens Corning from constructing its facility except in accordance with the federal Clean Air Act and Oregon SIP;
3. Assess civil penalties against Defendants of \$32,500 per day for each day of unpermitted construction in violation of the CAA's PSD requirements and Oregon's SIP.
4. Allocate \$100,000 of the civil penalties assessed to a beneficial mitigation project that will provide a local environmental and public health benefit to Plaintiffs' members and other residents of Oregon, pursuant to 42 U.S.C. § 7604(g).
5. Award the Plaintiffs their costs of this action and attorneys' fees; and
6. Grant such other relief as the Court deems just and proper.

DATED this 24th day of November, 2004,

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