AUBREY BALDWIN, OSB No. 060414
abaldwin@lclark.edu
ALLISON LAPLANTE, OSB No. 02361
laplante@lclark.edu
TOM BUCHELE, OSB No. 081560
tbuchele@lclark.edu
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
(503) 768-6929, (503) 768-6894, (503) 768-6736
(503) 768-6642 (fax)

GEORGE E. HAYS*, pro hac vice* (CA Bar No. 119904)
georgehays@mindspring.com
Attorney at Law
236 West Portal Avenue #110, San Francisco, CA 94127
(415) 566-5414

Attorneys for All Plaintiffs

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SIERRA CLUB, a non-profit corporation, **NORTHWEST ENVIRONMENTAL DEFENSE CENTER**, a non-profit corporation, **FRIENDS OF THE COLUMBIA GORGE**, a non-profit corporation, **COLUMBIA RIVERKEEPER**, a non-profit corporation, and **HELLS CANYON PRESERVATION COUNCIL**, a non-profit corporation,

Plaintiffs,

v.

PORTLAND GENERAL ELECTRIC COMPANY, an Oregon Corporation,

Defendant.

Civil No.: 08-1136-HA

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY ON CLAIMS FIVE AND SIX

(Oral Argument Requested)

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

I. INTRODUCTION

Between 2003 and 2007, Portland General Electric's ("PGE") Boardman power plant emitted, on average, over 12,000 tons per year of sulfur dioxide. *See* Declaration of Allison LaPlante in Support of Plaintiffs' Motion for Partial Summary Judgment on Liability on Claims Five and Six, Plaintiffs' Exhibit ("P. Ex.") 066 at 1.[1] Had Boardman been equipped with a sulfur dioxide scrubbing device, its annual sulfur dioxide emissions would have been at most 3600 tons per year, and more likely less than 1200 tons per year.[2] Similarly, during the same period, the average nitrogen oxides emissions from the plant were over 8500 tons per year. P. Ex. 066 at 1. If the plant were equipped with selective catalytic reduction technology, those emissions would be less than 1700 tons per year. *See* 74 Fed. Reg. 44,313 (Aug. 28, 2009).

PGE Boardman would be operating with these technologies if it complied with EPA's prevention of significant deterioration ("PSD") program. As the Court is aware, Plaintiffs allege that PGE triggered PSD applicability when it initially constructed the plant. Opinion and Order, Doc. 49, at 9 and Complaint, Doc. 1, ¶ 206. Plaintiffs now seek to resolve this "applicability via construction" issue through this motion. Of course, Plaintiffs have alleged several other violations in this case that are not the subject of this Motion. Opinion and Order, Doc. 49, at 9. For example, Plaintiffs will be able to show, as a matter of law and fact after the close of expert discovery in this case, that PGE began a massive major modification of Boardman in 1998 in violation of Oregon PSD requirements and in violation of federal New Source Performance

[1] For consistency, Plaintiffs are using an exhibit numbering system established for discovery and trial in this case. All exhibits referenced in this Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment are attached to the LaPlante Declaration as Plaintiffs' Exhibits, and are referred to herein as "P. Ex." followed by a document number.

[2] *See* 40 C.F.R. § 52.21(b)(12) (1980), Appendix at 38 (requiring Best Available Control Technology emission limits to be at least as stringent as the New Source Performance Standards) and 44 Fed. Reg. 33580, 33614 (June 11, 1979) (Section 60.43a(a)(2), the New Source Performance Standard Requirement for sulfur dioxide as of 1979, requiring at least 70 to 90% control).

Standards. *Id*. Nevertheless, Plaintiffs are bringing this motion for partial summary judgment on the applicability via construction issue now because they believe that establishing the applicability of the PSD program via the plant's initial construction will significantly shorten the length and complexity of this case, and because Plaintiffs do not want PGE to delay applying for a PSD permit any longer.

As Plaintiffs show below, the crux of this motion is that to avoid PSD, PGE should have obtained a final Air Contaminant Discharge Permit ("ACDP") from the State of Oregon before March 19, 1979. PGE, however, failed to obtain that permit until December 1979. Consequently, PGE did not "commence construction" by the "grandfathering" dates established by EPA, and Boardman is therefore subject to the PSD program. Through this motion, Plaintiffs seek an order from this Court that PGE is subject to PSD for sulfur dioxide, nitrogen oxides, and particulate matter, and that it is violating the law by operating without a PSD permit for those pollutants and without Best Available Control Technology emission limits for those pollutants. *See* Complaint, Doc. 1, Claims Five and Six. Plaintiffs also seek an order requiring PGE to immediately begin preparing an application for a PSD permit and to submit that application to the Oregon Department of Environmental Quality ("DEQ") within six months.

II. APPLICABLE LAW

A. The Purpose of the PSD Program is to Ensure that Air Quality in Clean Air Areas Does Not Degrade, and the Act Accomplishes this Purpose, in Part, by Ensuring that New Sources Operate with Emission Limits Reflective of Best Available Control Technology.

As the United States Supreme Court pointed out in *Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461, 470-72 (2004), Congress created the PSD program to ensure that air quality in areas that were meeting air quality standards would remain clean. The 1970 Amendments to the Act created the basic structure, requiring the United States

Environmental Protection Agency ("EPA") to develop air quality standards and requiring states to develop plans (State Implementation Plans or "SIPs") to assure that those air quality standards are met. *Id*. The 1970 Amendments did not specifically address, however, what should be done to protect areas meeting air quality standards from degradation. *Id.* In response to litigation to require the EPA to protect these areas, *Fri v. Sierra Club*, 412 U.S. 541 (1973) (affirming without opinion *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.C. Cir. 1972)), in 1974 EPA issued regulations requiring SIPs to include a PSD program. *Alaska*, 540 U.S. at 471. Three years later in 1977, Congress adopted the current PSD program. *Id*. That program requires, among other things, that major emitting facilities have emission limits reflective of Best Available Control Technology, or BACT. *Id.* at 472-73. The Act defines BACT as "an emission limitation based on the maximum degree of [pollutant] reduction . . . which the [state] permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility." 42 U.S.C. § 7479(3). PGE has never applied for or obtained Best Available Control Technology emission limits for any pollutant emitted by Boardman. Defendant's Amended Answer ¶ 136.

B. The Federal PSD Rules, Which Were In Effect During the Construction of the Boardman Plant, Were Revised Three Times Between 1974 and 1980.

Oregon did not obtain EPA approval of its PSD program as part of the State Implementation Plan until 1982. 47 Fed. Reg. 35191 (Aug. 13, 1982). Until then, EPA's program was incorporated into the Plan by operation of law. *See, e.g.*, 40 C.F.R. § 52.21(a) (1974) (superseded), Appendix[3] at 11. As mentioned above, EPA first promulgated PSD

[3] For the Court's convenience, Plaintiffs have provided an Appendix to this brief containing all superceded regulatory provisions at issue in this motion.

regulations in 1974. *See* 39 Fed. Reg. 42,510 (Dec. 5, 1974)[4], Appendix at 5 (hereinafter "the 1974 Rules"). Congress then added a statutory PSD program in 1977, *see Montana Power Co. v. Envtl. Protection Agency*, 608 F.2d 334, 342 (9th Cir. 1979), and EPA issued regulations conforming to the statute on June 19, 1978, 43 Fed. Reg. 26,388 (1978), Appendix at 18 (hereinafter "the 1978 Rules"). After litigation involving those 1978 Rules, EPA issued new PSD rule revisions on August 7, 1980. 45 Fed. Reg. 52676 (August 7, 1980), Appendix at 36 (hereinafter "the 1980 Rules").[5]

C. PSD Applicability for New Construction Under the 1974 Rules Depended on Whether a Facility Commenced Construction Before June 1, 1975.

Under the 1974 Rules, major sources such as power plants were subject to PSD requirements unless they "commenced construction" prior to June 1, 1975. *See* 40 C.F.R. § 52.21(d) (1975), Appendix at 13. The 1974 Rules defined "commenced" to mean that:

> [A]n owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

40 C.F.R. § 52.21(b)(7) (1975), Appendix at 12.

On December 18, 1975, EPA issued guidance interpreting this definition. That day, Roger Strelow, EPA's Assistant Administrator for Air and Waste Management wrote to EPA Regional Administrators to explain that under the definition, "commencement of construction…refers to on-site construction." P. Ex. 235 at 3. Strelow also added that with respect to the "construction by contract" test:

---

[4] All of the federal PSD rules herein cited were codified at 40 C.F.R. § 52.21 until superseded.
[5] As explained below, by this Motion, Plaintiffs seek a ruling that PGE was subject to the 1978 and 1980 Rules. At this time, Plaintiffs do not seek a ruling on the applicability of the 1974 Rules to PGE Boardman.

> The question of whether a contract represents a "contractual obligation" will depend upon the unavoidable loss that would be suffered by a source if it is required to cancel such contract. It is clearly beyond the intent of these regulations, for example, to permit a source which has only a contract revocable at will to escape review under these regulations. Correspondingly, where the contract may be cancelled or modified at an insubstantial loss to the plant operator, the proposed source should not be allowed to escape review under these regulations.

Id. at 5.

In addition, Strelow noted that "[f]ailure to obtain approval before commencing on-site construction of a source requiring such approval would, of course, violate the [state implementation] plan." *Id*. at 4. Therefore, sources that have not obtained approval under the plan should be subject to PSD review. *Id.* Strelow went on to note that some sources may have construed the "commencement" definition incorrectly, and may have commenced on-site construction in reliance on that mistaken interpretation:

> Because some sources may, in good faith, have construed § 52.2l(b)(7) differently before this guidance and have since entered into binding commitments on the assumption that they were exempt from review, it is necessary to provide for such cases. Therefore, where a source has, in good faith, begun on-site construction or entered into a contractual obligation to begin on-site construction after June l, 1975, on the good faith assumption that the source was exempt from the significant deterioration regulation, the source will not be subject to review. Reliance upon formal written statements by EPA personnel that the source in question would not be subject to new source review under these regulations would ordinarily be considered reasonable reliance in good faith on the assumption that the regulations do not apply to such sources. Conversely any source that is aware of this guidance at the time on-site construction commenced or a contractual obligation was undertaken could not be considered to have done so in good faith reliance that it did not need to be reviewed. Therefore you should review all major sources intending to construct in your Region and notify those - sources which are subject to review in accordance with this guidance.

Id. at 4-5. As shown below, when Congress amended the Act to add PSD requirements, it followed many of the concepts in this memo in writing definitions related to commencement of construction.

The Ninth Circuit relied heavily on the Strelow memorandum and a follow-up memo in upholding a formal, written EPA applicability determination that Montana Power had not commenced construction of the Colstrip plant before the grandfathering date. *See Montana Power Co.*, 608 F.2d 334 (9th Cir. 1979).[6]

D. The Clean Air Act Amendments of 1977, which Added a Statutory PSD Program, Also Contain Definitions Relating to the Commencement of Construction.

When Congress amended the Act in 1977, it provided that the amendments applied to facilities for which "construction is commenced" after August 7, 1977. Congress also enacted very particular definitions for what would be considered commencement:

> (A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained **all necessary preconstruction approvals or permits** required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.
>
> (B) The term "**necessary preconstruction approvals or permits**" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

42 U.S.C. § 7479(2) (emphasis added).

Importantly, in enacting these requirements, Congress fully intended that some sources which had previously obtained inapplicability determinations from EPA under the 1974 PSD Rules would nonetheless be subject to the statutory PSD program at that point:

> Where a source has received formal written statements from the Administrator of the Environmental Protection Agency . . . stating that the source in question would not be

[6] As is discussed more fully below, in litigating *Montana Power*, EPA admitted that EPA had erred in concluding, in 1975, that PGE had commenced construction on Boardman before the 1974 Rule applicability date of June 1, 1975. *Id*. at 347.

> subject to review because of contractual obligations entered into before June 1, 1975, **and where the source in reliance on such statements has subsequently (and before enactment of this act) qualified under the new definition of "commenced construction," that source could be exempt from review.**
>
> The committee intends that in order to qualify for this interpretation **the source must have received <u>all</u> appropriate preconstruction approval** or clearance from the state for the construction of the facility at a particular site, in accordance with State law. The test of reliance on that approval or clearance is whether the source has committed itself to that particular site for the particular facility in question. . . .

P.L. 95-95 Senate Report No. 95-127 (May 10, 1977) at 33 (emphases added).

As Plaintiffs demonstrate below, EPA's subsequent PSD regulations closely follow the statutory definitions. For purposes of this case, the key feature to note is that construction is not deemed to have "commenced" until "**all** necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations" have been obtained.

E. The 1978 PSD Rules Applied to Boardman if it Was Subject to the 1974 PSD Rule or if PGE Failed to Obtain All Final Federal, State, and Local Preconstruction Approvals or Permits for Boardman Before March 1, 1978.

EPA's first set of post-1977 amendment regulations provided that major stationary sources could not be constructed without complying with PSD requirements unless they were exempt. *See* 40 C.F.R. § 52.21(i)(1) (1978), Appendix at 22. Whether exemptions applied depended in large part on when construction "commenced," and the 1978 Rules defined "commence" in line with the statutory mandate:

> "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has **<u>all</u> necessary preconstruction approvals or permits** and either has:
>
> (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

> (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

40 C.F.R. § 52.21(b)(8) (1978) (emphasis added), Appendix at 20.

EPA defined the clause highlighted in bold above, "all necessary preconstruction approvals or permits," to mean:

> [T]hose permits or approvals required under Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

40 C.F.R. § 52.21(b)(9) (1978), Appendix at 20.

Under these definitions regarding commencement of construction, the 1978 Rule did not apply to any source that had been subject to the 1974 Rule if an application for a PSD permit under the 1974 Rule had been filed. 40 C.F.R. § 52.21(i)(4) (1978), Appendix at 22. PGE, of course, has never applied for a PSD permit for Boardman. Defendant's Amended Answer ¶ 136.

The 1978 Rule also did not apply to any source that (1) had not been subject to the 1974 Rule, (2) had obtained all final federal, state, and local preconstruction approvals or permits before March 1, 1978, and (3) commenced construction before March 19, 1979. 40 C.F.R. § 52.21 (i)(3)(1978), Appendix at 22.[7]

In summary, the 1978 Rule applied to Boardman if (1) it was subject to the 1974 Rule (since PGE has never filed an application for a PSD permit), (2) PGE failed to obtain all final federal, state, and local preconstruction approvals or permits for Boardman before March 1, 1978, or (3) failed to commence construction, as defined by the regulations, before March 19, 1979.

[7] The 1978 rules also had exemptions for health and educational institutions, 40 C.F.R. § 52.21(i)(6) (1978); and for portable sources, 40 C.F.R. § 52.21 (i)(7)(1978), *see* Appendix at 22, neither of which apply here.

F. The 1980 PSD Rules Apply to Major Sources Unless an Exemption Applies.

Like the 1978 Rules, the 1980 Rules require that all major sources in clean air areas, **no matter when they are constructed**, are subject to PSD requirements unless they are specifically exempt. *See* 40 C.F.R. § 52.21(i)(2) (1980), Appendix at 40-41. The 1980 Rules contain eight exemptions. *See* 40 C.F.R. § 52.21(i)(4) (1980), Appendix at 40-41. Three of the exemptions – for portable sources (52.21(i)(4)(viii) (1980)); for sources that are major because of fugitive emissions (52.21(i)(4)(vii) (1980)); and for health and educational institutions (52.21(i)(4)(vi)(1980)) – unquestionably have no application to a major coal-fired power plant like Boardman.

The remaining five exemptions, 40 C.F.R. § 52.21(i)(4)(i) to (i)(4)(v)(1980), Appendix 40-41, all depend, to some extent, on when construction "commenced." The definitions of "'commence' as applied to construction of a major stationary source" and "necessary preconstruction approvals or permits" did not change from the 1978 Rule. *Compare* 40 C.F.R. § 52.21(b)(8) and (9) (1978), Appendix at 20, *with* 40 C.F.R. § 52.21(b)(8) and (9) (1980), Appendix at 38. Under exemption (i), a facility is exempt if construction commenced, as defined by the regulations, prior to August 7, 1977. 40 C.F.R. § 52.21(i)(4)(i)(1980). Under exemption (ii), a unit is exempt if it is subject to the 1974 PSD Rule, obtained a PSD permit before March 1, 1978, and commenced construction prior to March 1979. This exemption does not apply, of course, because PGE never obtained a PSD permit. 40 C.F.R. § 52.21(i)(4)(ii)(1980). Exemption (iii) is similar to exemption (ii), but it applies if a PSD application was filed by a particular date. Again this exemption is inapplicable because PGE has never applied for a PSD permit. 40 C.F.R. § 52.21(i)(4)(iii)(1980).

It is important to note the implications of these first three exemptions. If a unit was subject to the 1974 Rule, then its owner had to have at least applied for a PSD permit by March of 1978. If no such application had been filed, then construction could not have commenced prior to August 7, 1977. Thus, if Boardman is subject to the 1974 Rule, it is also subject to the 1980 Rule because PGE never applied for a PSD permit.

Conversely, the remaining two exemptions apply only if the facility was not subject to the earlier PSD Rules. First, exemption (iv) applies if a facility was not subject to the 1974 PSD Rule, had obtained "all final federal, state, and local preconstruction approvals or permits" before March 1, 1978, and commenced construction before March 19, 1979. 40 C.F.R. § 52.21(i)(4)(iv)(1980). This exemption is the same as an exemption in the 1978 Rule. *See* 40 C.F.R. § 52.21 (i)(3)(1978). Second, exemption (v) applies if a facility was not subject to the 1978 PSD Rule, obtained "all final federal, state, and local preconstruction approvals or permits" before August 7, 1980, and commenced construction within 18 months of August 7, 1980. 40 C.F.R. § 52.21(i)(4)(v) (1980). Plaintiffs concede that Boardman did obtain the needed preconstruction approvals and did commence construction before August 7, 1980. Thus the key question with this exemption is whether the 1978 PSD Rule applied to Boardman.

The upshot of the five potentially applicable exemptions from PSD contained in the 1980 Rule is that PSD applies to Boardman if it was subject to the 1974 Rule or was subject to the 1978 Rule and did not commence construction prior to August 7, 1977. Again, in this Motion, Plaintiffs seek a ruling with regard to this latter construct, leaving the first for later resolution if this Motion should fail.

G. Oregon's Requirement that a Source Obtain an Air Contaminant Discharge Permit Before Construction or Operation Has Been in Place Since 1972.

As this Court pointed out in its Opinion and Order regarding PGE's Motion to Dismiss, Doc. 49, "'No person may construct, install, establish, develop, or operate any air contaminant source . . . without first obtaining an [Air Contaminant Discharge Permit].'" Doc. 49, *citing* OAR 340-216-0020(1). Oregon first adopted this requirement, with slightly different wording, in 1972. *See* Appendix at 53-54 (approved into the SIP at 42 Fed. Reg. 9965 (Feb. 17, 1977), Appendix at 44).

Also relevant to the issues here are the provisions related to "temporary" permits, which are permits that existed in the 1970s under the Oregon SIP, but do not exist now. Such permits came into effect forty-five days after a permit application was deemed complete. However, applications were not considered complete if additional information was needed from an applicant. The pertinent provisions of the rule are as follows:

> (4) Within 15 days after the filing, the Department will preliminarily review the application to determine the adequacy of the information submitted:
>
> > (a) If the Department determines that additional information is needed it will promptly request the needed information from the applicant. The application will not be considered complete for processing until the requested information is received. The application will be considered to be withdrawn if the applicant fails to submit the requested information within 90 days of the request;
> >
> > (b) If in the opinion of the Director, additional measures are necessary to gather facts regarding the application, the Director will notify the applicant of his intent to institute said measures and the timetable and procedures to be followed. The application will not be considered complete for processing until the necessary additional fact-finding measures are completed. When the information in the application is deemed adequate, the applicant will be notified that this application is complete for processing. Processing will be completed within 45 days after such notification.
>
> (5) In the event the Department is unable to complete action on an application within 45 days after notification that the application is complete for processing, the applicant shall

> be deemed to have received a temporary or conditional permit, **such permit to expire upon final action by the Department to grant or deny the original application**. Such temporary or conditional permit does not authorize any construction, activity, operation or discharge which will violate any of the laws, rules, or regulations of the State of Oregon or the Department of Environmental Quality.

OAR Chapter 340, Division 1, Subdivision 4(D) (1972), Appendix at 53-54 (emphasis added).

III. STATEMENT OF FACTS[8]

The Boardman coal-fired plant is now a 615-megawatt plant located in eastern Oregon in Morrow County. To build the plant, PGE applied for a "site certification agreement" from the state of Oregon in February 1973. P. Ex. 231 at 1. In December 1974, staff for the state's Nuclear and Thermal Energy Council ("the Council") wrote a brief expressing concern about the degradation to air quality that would be caused by a plant in the Boardman area, and asking the Council to consider requiring sulfur dioxide scrubbing. *See* P. Ex. 232. In March 1975, the Governor signed the site certification agreement, and although it did not require sulfur dioxide scrubbing, the agreement did provide that the plant had to be designed such that "sulfur dioxide emission control equipment may be installed with a minimum of additional cost and plant disruption" and that such control measures could be ordered "at any time." P. Ex. 230 at 14 & P. Ex. 233. The site certification agreement also provided that "construction or operation" of the plant was contingent on PGE obtaining an "air contaminant discharge permit for operation of the Boardman coal plant, P. Ex. 230 at 22 (Condition K(8)(e)), and prohibited the commencement of construction until the Council found that PGE met certain conditions, a finding that the Council did not make until November 12, 1975. *See* P. Ex. 233 at 1.

While it was working to obtain the site certification agreement, PGE was aware that EPA's PSD regulations would apply if construction did not commence at Boardman by June 1,

[8] The material facts necessary to prevail on this motion are set forth in the accompanying Concise Statement of Material Facts. Additional background information is provided here and supported by Plaintiffs' Exhibits attached to the LaPlante Declaration.

1975. In a March 25, 1975 memo, H. H. Philips, PGE's Vice President and Corporate Counsel, noted that EPA's regulations regarding "significant deterioration of air quality" require an emission limit set by EPA based on application of Best Available Control Technology and added that:

> It seems almost certain that our Boardman fossil plant will be affected if its construction is not commenced prior to June l, 1975 and if the State of Oregon fails to succeed in its reported attempt to have EPA cede its jurisdiction.

P. Ex. 220 at 1. Accordingly, PGE wrote to EPA three times in May 1975 asking whether, in EPA's view, PGE had commenced construction of the Boardman plant for purposes of EPA's regulations. *See* P. Ex. 228 at 22, 14, and 13. In a May 1, 1975, letter, PGE discusses Oregon law and notes that PGE had, "under the Oregon law," obtained a site certification agreement from the state. It also informs EPA that PGE had entered into a coal contract to supply the Boardman plant on October 1, 1974.[9] P. Ex. 228 at 22. In follow-up correspondence with EPA on May 6, 1975, PGE notes that as of that time PGE had spent $2,873,000 on what would become the Boardman plant. P. Ex. 228 at 14. The next day, PGE wrote to EPA noting that it entered into a contract with Westinghouse for a turbine generator, and the cancellation charge for that turbine generator as of May 31, 1975 would be $420,000. P. Ex. 228 at 13.

Nowhere in this correspondence with EPA, however, does PGE inform EPA that it had neither applied for nor obtained an air contaminant discharge permit. On May 15, 1975, EPA wrote to PGE finding that PGE had commenced construction of the Boardman plant for purposes of the PSD program. P. Ex. 228 at 12.

[9] A memo from the Oregon Attorney General's office to the Council in January 1975 shows that the coal contract allowed PGE to assign the contract "'to an entity operating a coal fire generating facility' for [PGE]." P. Ex. 228 at 28.

As this Court noted in its Opinion and Order, in the *Montana Power* case, EPA later acknowledged that it erred in making its May 15, 1975, finding that PGE had commenced construction on Boardman. Opinion and Order at 23, n.7. In *Montana Power*, Montana Power sued EPA because EPA determined that Montana Power had not commenced construction on its Colstrip Station before the applicability date for the PSD program – June 1, 1975. *Montana Power*, 608 F.2d at 339-41, 346. EPA based that determination on the Strelow memorandum discussed above. *See* P. Ex. 235. Montana Power argued, in part, that EPA's determination regarding Colstrip was inconsistent with its determination regarding Boardman. *Montana Power*, 608 F.2d at 346. In discussing the apparent inconsistency, the Ninth Circuit noted that:

> The Boardman decision was made before either of the Strelow Memoranda was issued. It did not represent a settled agency policy. **The EPA has since admitted it mistakenly exempted that plant from PSD review and permitting on the basis of a turbine generator contract.**

Id. at 347 (emphasis added).

After the June 1, 1975, PSD applicability date, PGE entered into a contract with Bechtel to provide engineering and construction management services for the construction of the plant on June 14, 1975. *See* P. Ex. 150. PGE commenced physical on-site construction on January 26, 1976. *See* P. Ex. 225 at 8.[10]

PGE did not apply for an air contaminant discharge permit until March 30, 1977. P. Ex. 241 at 7. Relatively recently, PGE began claiming that it received, by operation of law, a temporary air contaminant discharge permit in June 1977. *See* P. Ex. 225 at 8; *see also* Opinion

[10] As Plaintiffs discussed in their briefing in opposition to PGE's Motion to Dismiss, Plaintiffs believe that these facts show that PGE failed to commence construction prior to the grandfathering date for the 1974 Rule. *See* Opinion and Order at 22-23. However, as stated above, Plaintiffs are not basing the instant Motion on that theory, and are not seeking a ruling regarding this issue at this time. Rather, as Plaintiffs will show below, this Motion is based on PGE's failure to obtain all necessary preconstruction approvals prior to the grandfathering dates in the 1978 and 1980 Rules.

and Order at 24-25. PGE's new theory is that according to a letter it received from DEQ on April 6, 1977, if DEQ did not request any additional information from PGE within 15 days, then PGE's permit application would be "deemed complete." *See* P. Ex. 225 at 8 and P. Ex. 241 at 6. Forty-five days after that, according to the letter, PGE would obtain a "temporary permit." P. Ex. 241 at 6. Based on a letter PGE received from DEQ on August 26, 1977, P. Ex. 241 at 4, PGE argues that no requests for further information were forthcoming from DEQ after April 6, 1977, and that therefore, PGE obtained a temporary permit. *See* P. Ex. 225 at 8.

The record, however, belies PGE's contention regarding a temporary permit. A review of correspondence between DEQ and PGE shows that the development of the Air Contaminant Discharge Permit was an ongoing process from 1975 until permit issuance in 1979. In October 1975, DEQ wrote to PGE saying that it expected an application for the Air Contaminant Discharge Permit "within the next few months." P. Ex. 250. During 1976, DEQ and PGE continued to work through issues such as air monitoring. *See, e.g.,* P. Ex. 254. In January 1977, DEQ wrote to PGE and explained that, before it gave final approval to the plant, it expected to review following items:

1. Contractor Performance Specifications and Drawings for the Flue Gas Cleaning Device,
2. Ash Handling Plans,
3. Emission and Monitoring Specifications,
4. Coal Yard Dust Control Plans,
5. Boiler NOx Control Plans, and
6. Ash handling area fugitive dust control plans.

P. Ex. 252 at 2.

Two months later, when it submitted its permit application, P. Ex. 253, PGE acknowledged that it had yet to select the fly ash collector. P. Ex. 253 at 2. Accordingly, the application could not and did not include the "contractor performance specifications and drawings for the flue gas cleaning device" that had been specifically requested by DEQ in its January 1977 letter. P. Ex. 252 at 2. Rather, the application noted that the plant would be using either an electrostatic precipitator or a fabric filter baghouse to capture fly ash. P. Ex. 253 at 4 and 6. PGE's letter accompanying its application said that PGE expected to complete the selection process for this piece of control equipment "in the very near future," after which, PGE would be providing "plans, specifications, and expected performance data" to DEQ. P. Ex. 253 at 2. Given that PGE acknowledged it would be supplying more information regarding this critical piece of equipment (critical because without it, the plant would be emitting 40,000 pounds of particulate per hour -- over 175,000 tons per year[11]), it would have been an unnecessary and futile act for DEQ to notify PGE that the application was incomplete. *See* P. Ex. 241 at 10.

It is no surprise, then, that the record shows that DEQ never acted as though PGE had submitted a complete application in April 1977 or obtained a temporary permit. The August 1977 letter upon which PGE relies to prove that DEQ did not request more information in the fifteen days following PGE's April 1977 permit application, in fact, proves that PGE still had not supplied the missing specifications and drawings regarding the electrostatic precipitator, the fly ash control device ultimately chosen by PGE. P. Ex. 241 at 4. Further, the August letter identified other items still missing that were requested in the January 1977 letter, and also identified as missing: (1) a program to determine how the plant would impact regional visibility,

[11] 40,000 pounds per hour * 8760 hours in a year / 2000 pounds per ton = 175,200 tons per year.

(2) a method for determining how Boardman's particulate emissions could be differentiated from nearby sources, and (3) a quality assurance program. P. Ex. 241 at 4.

Moreover, on October 10, 1977, P. B. Bosserman of DEQ wrote an internal memo stating that: "[s]ince we are a little outside of our rules in allowing them to construct **without an ACDP**, I don't like to delay the ACDP past 1977." P. Ex. 242 at 4 (emphasis added). The delay, however, continued. In February 1978, Bosserman wrote another memo complaining that details about the project had been "dribbling in" and that the "dribbling must cease." *See* P. Ex. 255 at 1. Meanwhile, DEQ continued intensive work preparing Boardman's Air Contaminant Discharge Permit, including meetings with PGE engineers to discuss "serious problems" with the design of the plant being constructed, and a three-day airplane trip in September 1978 to study coal and ash handling at plants in Colorado and Texas. *See* P. Ex. 243; P. Ex. 256.

Ultimately, as PGE acknowledges, PGE did not receive a "permanent" Air Contaminant Discharge Permit for Boardman until December 6, 1979. P. Ex. 225, at 8*; see also* P. Ex. 239. Significantly, in 1981 PGE effectively acknowledged that it did not receive all necessary preconstruction approvals before the grandfathering date. P. Ex. 258. At that time, PGE was contemplating the construction of additional units at the Boardman plant site, and if it did, a critical issue was whether the unit it had just built would be included in the PSD baseline. If the plant was grandfathered, then its emissions would be in the baseline. If not, the plant's emissions would consume the PSD increment, meaning the amount of emissions new units could contribute to the air shed would be constrained. *Id.*; *see also* 45 Fed. Reg. at 52,678, Appendix at 30. In this noteworthy 1981 letter, PGE notes that "a case can be made" that PGE "commenced" construction of Boardman under the 1974 PSD rule before the grandfathering date. P. Ex. 258. However, PGE goes on to say it may have a problem because with the PSD

increment baseline issue because the "EPA definition of 'commenced construction' was amended some time after the Boardman site certificate was executed to require that an owner or operator of a source have in hand 'all necessary preconstruction approvals'" *Id.* The implication, of course, is that PGE did not have all those preconstruction approvals in hand by the grandfathering date, and PGE's failure to obtain those approvals on time is why Plaintiffs should prevail on this motion.[12]

IV. JURISDICTION

This Court has jurisdiction over this matter, which is a Clean Air Act citizen suit brought pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 7604(a) (CAA jurisdiction).

Furthermore, Plaintiffs have standing to bring this action. *See Friends of the Earth v. Laidlaw Envtl. Services* 528 U.S. 167, 180-81 (2000) (to have standing, (1) plaintiffs' members must demonstrate concrete and particularized "injuries in fact;" (2) those injuries must be fairly traceable to the challenged actions of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injuries will be redressed by a favorable decision). The attached declarations show that Plaintiffs' members have suffered and will continue to suffer injuries that are reasonably attributable to Boardman's illegal emissions. *See* Declarations of Aaron Isherwood, Gerik Kransky, Kevin Gorman, Tom Wood, Gregory Dyson, Brett Brownscombe, Mark Riskedahl, and Brett VandenHeuvel; *see also* P. Ex. 258 at 4 (Oregon DEQ concludes that if various combinations of pollution controls were installed, pollution impacts attributable to the Boardman plant, as measured by predicted visibility impairment, would decrease significantly). Success in this case will lead to the installation of enhanced pollution controls at Boardman, and

[12] As noted above, Plaintiffs also have claims regarding PSD and NSPS applicability based upon alterations to the Boardman boiler beginning in 1998 that turned Boardman from a 540 megawatt plant to a 615 megawatt plant. That modification, however, is not the subject of this motion.

thus redress Plaintiffs' members' injuries. *See* OAR 340-028-0110(14) and 40 C.F.R. § 60.43Da(a).

V. STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978 (9th Cir. 1985). A plaintiff may move for summary judgment on "all or part of the claim." Fed. R. Civ. P. 56(a).[13] Summary judgment is not a "disfavored procedural shortcut, but an integral part of the federal rules as a whole." *Celotex*, 477 U.S. at 327.

To earn summary judgment, the moving party must show an absence of an issue of material fact. *Celotex*, 477 U.S. at 323; *Fairbank v. Wunderman Cato Johnson*, 212 F.3d. 528, 531 (9th Cir. 2000). Once the moving party does so, the nonmoving party must present evidence of "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Horphag Research Ltd. v. Garcia*, 475 F.3d. 1029, 1035 (9th Cir. 2007). Only disputes over facts that might affect the outcome of the suit should preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). If a nonmoving party is unable to make a showing of specific facts to support its claim of a genuine issue requiring a trial, the law requires entry of a judgment in favor of the moving party. *Beard v. Banks*, 548 U.S. 521, 529 (2006).

When summary judgment is not appropriate, Fed. R. Civ. P. 56(d) allows for partial summary judgment to adjudicate some of the issues in the case by authorizing an order specifying the facts that are deemed established for trial. The ability of a court to enter partial

[13] Plaintiffs note that amendments to the Federal Rules of Civil Procedure, including Rule 56, take effect on December 1, 2010. The new version of Rule 56 continues to allow summary judgment on a claim or defense, or a part of a claim or defense.

summary judgment "serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact." *See* Fed. R. Civ. P. 56, Advisory Committee Notes (1946).

VI. ARGUMENT

A. The Boardman Plant is Subject to PSD Requirements Because PGE Neither Commenced Construction Prior to August 7, 1977, Nor Obtained All Final Federal, State, and Local Preconstruction Approvals or Permits before March 1, 1978.

As discussed above, under the 1980 PSD Rule, major sources were subject to PSD unless they were specifically exempted. *See* 40 C.F.R. § 52.21(i)(2) (1980), Appendix at 40. Under either EPA's 1978 or 1980 PSD Rules, Boardman was a "major source," because it is a power plant that emits or has the potential to emit more than 100 tons per year of a pollutant. *See* 40 C.F.R. § 52.21(b)(1) (1978), Appendix at 19 and 40 C.F.R. § 52.21(b)(1) (1980), Appendix at 37. Between 2003 and 2007, Boardman's average annual emissions were as follows: sulfur dioxide: 12,056 tons; nitrogen oxides: 8559 tons; particulate matter: 718 tons. *See* P. Ex. 066 at 1. Consequently, Boardman is a major source for those pollutants and subject to PSD applicability under EPA's 1980 PSD Rules if it was subject to the 1974 or 1978 Rules.

Having shown Boardman is a major source, the only question is whether one of the exemptions in the 1980 Rule, 40 C.F.R. § 52.21(i)(4) (1980), Appendix at 40-41, applies. In the Applicable Law section, above, this brief distilled those requirements and demonstrated that Boardman would be subject to the 1980 Rules if either (1) it was subject to the 1974 Rule, or (2) it was subject to the 1978 Rule and did not commence construction prior to August 7, 1977.

Boardman's applicability under the 1974 Rule is not the subject of this motion. Even if Boardman was not subject to the 1974 Rule, however, Boardman is still subject to PSD under the 1980 Rule if PGE did not commence construction prior to August 7, 1977, and was subject to the

1978 Rule. Boardman was subject to the 1978 Rule because PGE failed to obtain all final federal, state, and local preconstruction approvals or permits before March 1, 1978. *See* 40 C.F.R. § 52.21 (i)(3)(1978), Appendix at 22, and 40 C.F.R. § 52.21(i)(4)(iv) and (v) (1980), Appendix at 40-41.

It is an undisputed fact that PGE did not obtain a final Air Contaminant Discharge Permit until December 1979, which is obviously after the key dates mentioned above. PGE's only escape, then, is its assertion in a 2007 letter to DEQ that it obtained a "temporary" Air Contaminant Discharge Permit in May 1977. *See* P. Ex. 225 at 8. That argument fails for two reasons. First, as a matter of law, obtaining a temporary permit would not meet the conditions for commencement of construction laid out by Congress and EPA. Second, PGE cannot show that it ever actually obtained a temporary permit.

1. Having a Temporary Air Contaminant Discharge Permit Would Not Have Satisfied the Requirements for Commencement of Construction.

As mentioned above, in order to "commence" construction, as that term is defined in the statute, the 1978 Rule, and the 1980 Rule, an owner or operator must have obtained "**all** necessary preconstruction approvals or permits." *See* 42 U.S.C. § 7479(2) and 40 C.F.R. § 52.21(b)(8) and (9) (1978) and (1980), Appendix at 20 and 38 (emphasis added).

Having a temporary permit would not have satisfied the requirement to have "**all** necessary preconstruction approvals" because even if PGE obtained a temporary permit in May 1977, Oregon DEQ still had the authority to deny PGE's application for a final Air Contaminant Discharge Permit. Under the then-applicable Oregon State Implementation Plan, the rule regarding the issuance of temporary permits provided that temporary permits "expire upon final action by the Department **to grant or deny** the original application." OAR Chapter 340, Division 1, Subdivision 4(D) (1972), Appendix at 53-54 (emphasis added). Thus, any company

commencing construction with a temporary permit did so at its own risk. It was the final Air Contaminant Discharge Permit that was necessary to fulfill "all" preconstruction requirements in Oregon.

Allowing a temporary permit to satisfy the statutory requirement to have "all necessary preconstruction approvals" would thwart Congressional intent by not giving full effect to the word "all." Several courts have confirmed that use of the word "all" means *all*: that is 100% and nothing less. *See Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 610-11 (1944) (reversing district court's statutory construction of the word "all" as meaning "substantially all" because the district court's reading was counter to literal reading of the statutory language); *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989) ("It is a maxim of statutory construction that, unless otherwise defined, words should be given their authority, common meaning. . . . The common meaning of 'all' is 100 percent.") (citations omitted); *ACandS, Inc. v. Aetna Cas. and Sur. Co.*, 764 F.2d 968, 974 (3d Cir. 1985) (affirming district court's interpretation that "all sums which [insurer] shall become legally obligated to pay" requires insurer to pay all sums even if insured's damages are caused partly outside of an insured period); *Gilliam v. Gadsden Country School Bd*., 1999 WL 420299 (N.D. Fla. June 14, 1999), *aff'd in part, rev'd in part*, 240 F.3d 1077 (11th Cir. 2000). ("[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning…There is nothing ambiguous in the two statutes [imposing duty on school board running to "all children"]. All means all.") (internal citations omitted).

In summary, because PGE did not obtain its final Air Contaminant Discharge Permit until December 1979, it had not "commenced" construction on the Boardman plant in time for the plant to receive "grandfathered" status. Consequently, the plant is subject to PSD.

2. The Record Shows that PGE Never Obtained a Temporary Air Contaminant Discharge Permit.

As discussed above, PGE asserts that it obtained a temporary Air Contaminant Discharge Permit in May 1977, but the documentary evidence from the period shows otherwise. In correspondence with DEQ in 2007, PGE asserted that it obtained a temporary permit because it received a letter from DEQ in April 1977 acknowledging receipt of its application and did not receive another letter from DEQ until August 1977. P. Ex. 225 at 8. PGE's own letter submitting the application, however, acknowledged that PGE still owed DEQ information about a system to control fly ash. P. Ex. 253 at 2. Indeed, as of April 1977, PGE had not even decided whether it would be using an electrostatic precipitator or a fabric filter baghouse to control fly ash. P. Ex. 253 at 2, 4, 6. Consequently, there would have been no need for DEQ to inform PGE that PGE's application was incomplete since *PGE acknowledged* that fact when it submitted the application. Not surprisingly, DEQ never acted as though PGE had obtained a temporary permit. In a memo written in October 1977, P. B. Bosserman of DEQ noted that: "[s]ince we are a little outside of our rules in allowing them to construct **without an ACDP**, I don't like to delay the ACDP past 1977," P. Ex. 242 at 4 (emphasis added), and complained a few months later that PGE submissions were still "dribbling in." P. Ex. 255 at 1. Meanwhile, DEQ continued intensive work preparing Boardman's air permit, including meetings with PGE engineers to discuss "serious problems" with the design of the plant being constructed and an airplane trip to look at other plants in Colorado and Texas. P. Ex. 243; P. Ex. 256.

Indeed, the record shows that, if anything, PGE risked having its application for an Air Contaminant Discharge Permit withdrawn by operation of law. The temporary permit rule provided that permit applicants had an ongoing obligation to provide requested information to DEQ or risk having the application considered withdrawn by operation of law. OAR Chapter 340, Division 1, Subdivision 4(D)(4)(a) (1972), Appendix at 53 (noting that if DEQ determines that additional information is needed, it will request it, that the application will not be considered complete until that information is received, and that if the information is not forthcoming within 90 days, the application will be considered withdrawn). The record shows that DEQ was aware of the proposed Boardman plant from the very beginning. *See* P. Ex. 228 at 30. In December 1976, DEQ asked PGE for information regarding impacts on regional visibility, how the plant's particulate emissions could be differentiated from nearby sources, and a quality assurance program. P. Ex. 241 at 5. In January 1977, DEQ asked for other information regarding pollution control design. P. Ex. 241 at. 4. As of August 1977, PGE had not provided the requested information. P. Ex. 241 at 4-5. In February 1978, DEQ personnel were still complaining that information from PGE was "dribbling in," and that the "dribbling must cease." P. Ex. 241 at 1. From this record, PGE's permit application was clearly incomplete in April 1977, and therefore, any assertion by PGE that it obtained a temporary permit is without merit.

3. As a Matter of Law, the Defenses PGE Has Asserted Are Either Irrelevant or Inapplicable to this Motion.

In its Amended Answer, PGE asserts sixteen defenses, most of which are irrelevant to this motion.[14] The only two *even potentially* relevant defenses, laches and equitable estoppel, are unavailable to PGE as a matter of law.

[14] The third (no modification under Oregon law), eighth (fair notice), ninth (maintenance, repair, and replacement routine in the source category), tenth (no capital expenditure), eleventh (routine

a. Laches is not an Available Defense.

In its fifth defense, PGE has asserted the defense of laches. Defendant's Amended Answer at 48. That defense, however, is unavailable because the Ninth Circuit has ruled that "the doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern [an] action. *See Miller v. Maxwell's Int'l*, 991 F.2d 583, 586 (9th Cir. 1993) (*citing International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975)). In *Miller*, the plaintiff's age discrimination claims had been dismissed on statute of limitations and laches grounds. The Ninth Circuit reversed, finding that Miller had successfully alleged willful conduct by the defendants, making her claims covered by a three-year, rather than a two-year, statute of limitations. *Id.* The court then went on to conclude that the laches defense was unavailable because Congress had provided a statute of limitations. *Id.; see also Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) ("[W]hen considering the timeliness of a cause of action brought pursuant to a statute for which Congress has provided a limitations period, a court should not apply laches to overrule the legislature's judgment as to the appropriate time limit to apply for actions brought under the statute."); *Ivani Contr. Corp. v. City of New York*, 103 F.3d 257, 260 (2d Cir. 1997) ("The prevailing rule, then, is that when a plaintiff brings a federal statutory claim seeking legal relief, laches cannot bar that claim, at least where the statute contains an express limitations period within which the action is timely."); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 170 (8th Cir. 1995) *rev'd on*

---

maintenance, repair, and replacement), and thirteenth defenses (BACT not applicable to boiler) all relate to Plaintiffs' modification claim. The first defense (no construction of PSD new source) relates only to whether PGE commenced construction under the 1974 PSD Rule. The second defense (no construction of a PSD source) relates to the issue of whether PGE obtained all necessary preconstruction permits, an issue which, of course, is discussed above. The fourth defense (statute of limitations) has already been resolved by motion. The seventh (mootness), twelfth (Boiler complied with BACT), and fifteenth (balance of the equities) defenses relate only to remedy issues. The fourteenth defense (startup, shutdown, malfunction) relate only to the opacity claims. The sixteenth defense is a generic catch-all.

other grounds, Rowe v. Hussmann Corp. 381 F.3d 775 (8th Cir. 2004) ("Separation of power principles dictate that federal courts not apply laches to bar a federal statutory claim that is timely filed under an express federal statute of limitations.").

This Court has already ruled that Plaintiffs' PSD claims are governed by the five-year statute of limitations provided by 28 U.S.C. § 2462, and that those claims are not time barred. Opinion and Order (Doc. 49) at 10, 16-17. Because a statute of limitations can apply in this situation, under *Miller*, a laches defense, already strongly disfavored in environmental cases, *see Ocean Advocates v. United States Army Corps of Engineers*, 402 F.3d 846, 862 (9th Cir. 2005), is unavailable.

b. Equitable Estoppel is not an Available Defense.

Finally, in its sixth defense, PGE asserts that Plaintiffs are estopped because PGE relied on representations from DEQ and EPA that the plant did not require a PSD permit as a result of the initial plant construction. The necessary elements for the estoppel defense are:

(1) Affirmative misconduct going beyond mere negligence;

(2) The government's wrongful act will cause a serious injustice, and the public's interest will not suffer undue damage by imposition of the liability;

(3) The party to be estopped must know the facts;

(4) The party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;

(5) The party asserting the estoppel must be ignorant of the true facts; and

(6) The party asserting the estoppel must rely on the former's conduct to his injury.

Watkins v. United States Army, 875 F.2d 699, 707-09 (9th Cir. 1989); *see also Gibson v. West*, 201 F.3d 990, 993 (7th Cir.)("[E]quitable estoppel against the government is disfavored and is rarely successful. . . . [T]he government [must have] engaged in 'affirmative misconduct.' This

is more than mere negligence. It requires an affirmative act to misrepresent or mislead." (citations omitted)); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-CM/F, 2002 U.S. Dist. LEXIS 14039 (S.D. Ind. July 26, 2002).

This defense is unavailable to PGE for at least four reasons. First, PGE has not asserted that it has relied to its detriment on any representations by *Plaintiffs*, but rather that the alleged representations were made by the government. By its terms, the estoppel defense applies to the party whose alleged misconduct is at issue, and since the government is not a party, the defense does not attach.

A second and related point is that this Court has already ruled that prior determinations by EPA are not binding on this Court's ability to determine whether the law applies. This Court held "[i]n short, regardless of whether EPA believes, or believed, that PGE had commenced construction [by the applicable date] does not preclude this court from determining whether PGE in fact had commenced construction within the meaning of the Act." Opinion and Order at 22-23 (relying on *Ass'n to Protect Hammersly, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1012 (9th Cir. 2002)); *see also Weiler v. Chatham Forest Prods., Inc.*, 392 F.3d 532, 535-36 (2d Cir. 2004); *id.* at 539 ("[A] state determination that a prospective source of air pollution is not a major emitting facility does not prevent a private plaintiff from bringing a suit seeking to enjoin the construction of the facility pursuant to section 304(a)(3) of the Act, 42 U.S.C. § 7604(a)(3)."); *Sierra Club v. Cedar Point Oil*, 73 F.3d 546, 561 (5th Cir. 1996) ("[A] citizen may bring an action against a person allegedly discharging a pollutant without a permit, even if the discharger's illegal behavior results from EPA's failure or refusal to issue the necessary permit."); *N. Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003) ("[A state] has no authority to create a permit exemption from the [Clean Water Act] for

discharges that would otherwise be subject to the NPDES permitting process."). Accordingly, even if DEQ or EPA made representations, in the form of an applicability determination or otherwise, that PGE was not subject to the 1978 and 1980 PSD rules, those representations cannot bar this citizen suit.

Third, the evidence shows that PGE did not rely to its detriment on any representations from either EPA or DEQ regarding whether PGE was subject to the 1978 or 1980 PSD Rules or when the Boardman plant "commenced" construction as that term is defined under the 1977 amendments to the Act and EPA's subsequent regulations. Indeed, the evidence shows that, if anything, PGE was worried that EPA would conclude PGE had not commenced – under the revised definition of "commenced" – construction as of the grandfathering date. PGE acknowledged this concern in a July 1981 letter from PGE to the Oregon Environmental Quality Commission. P. Ex. 258 at 2. In the letter, PGE notes that "a case can be made" that Boardman commenced construction, as that term is used in the 1974 Rule, before the grandfathering date, and therefore its emissions should be included in the PSD "baseline." *Id.*[15] PGE goes on to acknowledge, however, that under the revised definition of "commenced construction," there might be a different outcome:

[15] To understand the importance of this letter, a review of PSD concepts is helpful. One of the purposes of the PSD program is to ensure that new sources do not cause air quality in clean air areas to overly degrade. 45 Fed. Reg. 52678, Appendix at 30. To prevent this degradation, the regulations only allow pollutant levels in the air to increase by a predetermined amount above the *status quo*. The amount of degradation allowed is called the "increment," *id.*, and the *status quo*, or starting point for the degradation analysis is known as the "baseline," *id*. Emissions from existing, non-PSD sources are part of the baseline, whereas emissions from new, PSD sources are not; rather these new PSD sources consume the increment, and if a proposed new source's emissions would exceed the increment it cannot be constructed. *Id.* The subject of the 1981 letter is whether the Boardman plant should be considered part of the baseline. If the government considered Boardman to be grandfathered, then its emissions would be part of the baseline. If the Boardman was not grandfathered, then its emissions would be counted against the increment.

> Regrettably, the EPA definition of "commenced construction" was amended some time after the Boardman site certificate was executed to require that an owner or operator of a source have in hand "all necessary preconstruction approvals." The new EPA definition, which has been incorporated by Staff into the proposed New Source Review rules, could be interpreted in such a way that Boardman Unit I emissions are not in the baseline.
>
> These developments are most distressing to PGE, and should be to the State as well . . . .

Id. Thus, in this letter, PGE is arguing that while it may have an argument that it is grandfathered under the 1974 PSD Rules, it may not be able to maintain that argument under the 1978 and 1980 PSD Rules. In addition to being a tacit admission by PGE that it did not have "all necessary preconstruction approvals in hand" before the 1978 Rule applicability date, this letter also shows that PGE was not relying on any representations from EPA or DEQ that it was not subject to the 1978 or 1980 PSD Rules. Had there been any representations, not to mention "affirmative misconduct" on the part of either EPA or DEQ regarding this issue, PGE would have laid it out in this letter. Thus, with respect to the question of whether PGE was grandfathered under the 1978 or 1980 PSD Rules, there is simply no evidence to support an equitable estoppel defense.

Finally, allowing PGE to assert this defense would definitely harm the public's interest in cleaner air, and for that reason as well, the estoppel defense is unavailable.

B. This Court Should Order PGE to Begin to Remedy its PSD Violations Now.

Although this matter is bifurcated into liability and remedy phases, there is one remedy that is a clear consequence of PGE's violation of PSD requirements, and that is that PGE needs to apply for an Air Contaminant Discharge Permit with PSD requirements from the State of

Oregon.[16] *In re Tenn. Valley Auth.*, 9 E.A.D. 357, 2000 WL 1358648, at *79 n.126 (EAB 2000) ("Since we have found that TVA violated the CAA by failing to obtain preconstruction NSR permits, it is appropriate that TVA be required under section 113 to comply by applying for such permits."), *rev'd on other grounds*, *Tenn. Valley Auth. v. U.S. Envtl. Prot. Agency*, 278 F.3d 1184 (11th Cir. 2002), *withdrawn in part*, 336 F.3d 1236 (11th Cir. 2003). Consequently, once the Court finds that the Boardman plant is subject to PSD requirements, an order by the Court requiring PGE to apply for and obtain a PSD permit is an appropriate remedy. *See id.* at *80 (sustaining EPA's order requiring TVA to "apply for, and obtain" the necessary permits).

This remedy will provide actual relief to the Plaintiffs by requiring reductions in the amount of pollution that the Boardman plant emits. PGE's obligation to obtain a PSD permit necessarily requires that they operate with Best Available Control Technology emission limitations as determined by the Oregon DEQ. 42 U.S.C. § 7475; OAR 340-224-0070. Requiring PGE to apply for the proper Air Contaminant Discharge Permit and thus have Best Available Control Technology emission limits determined will lead to significant decreases in emissions from the Boardman plant. *See* 42 U.S.C. § 7479(3) (requiring Best Available Control Technology to be at least as stringent as New Source Performance Standards under section 7411); 40 C.F.R. § 60.43Da(a) (sulfur dioxide New Source Performance Standard for Electric Steam Generating Units, requiring a 70% to 90% reduction from combustion potential). Because every day that PGE operates in violation of PSD requirements further degrades the environment, Plaintiffs ask this Court to order PGE to begin to prepare an application for such a permit immediately and file the application with the State within six months.

[16] Pursuant to 42 U.S.C. § 7604(a) and (g), this Court can order additional remedies, including penalties, which can be assessed during the remedy phase of this litigation.

VII. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant this motion for partial summary judgment and declare that the Boardman plant is (1) subject to PSD requirements and is operating in violation of the requirement that it have an Air Contaminant Discharge Permit with PSD requirements for sulfur dioxide, nitrogen oxides, and particulate matter; and (2) in violation of the requirement that it operate with an emission limit reflective of "best available control technology." Plaintiffs further request that this Court order PGE to begin to prepare an application for such a permit immediately and file the application with the State within six months.

Respectfully submitted this 5th day of November, 2010,

/s/ George E. Hays
GEORGE E. HAYS, CA Bar No. 119904
georgehays@mindspring.com
236 West Portal Avenue #110, San Francisco, CA 94127
(415) 566-5414

AUBREY BALDWIN, OSB No. 060414
abaldwin@lclark.edu
5023-768-6929
ALLISON LAPLANTE, OSB No. 02361
laplante@lclark.edu
503-768-6894
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219

Counsel for Plaintiffs