

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO**

SIERRA CLUB, et al.	:	
	:	
Plaintiffs,	:	
	:	Case No. 2:08 cv 865
v.	:	
	:	Magistrate Judge Mark R. Abel
CHRISTOPHER KORLESKI	:	
Director, Ohio Environmental	:	
Protection Agency,	:	
	:	
Defendant.	:	

**MOTION OF THE OHIO CHAMBER OF COMMERCE, THE OHIO
CHEMISTRY TECHNOLOGY COUNCIL, AND THE OHIO
MANUFACTURERS’ ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE
MEMORANDUM IN OPPOSITION TO PLAINTIFFS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT**

The Ohio Chamber of Commerce, the Ohio Chemistry Technology Council, and the Ohio Manufacturer’s Association (“movants”) hereby move for leave to file an amicus curiae memorandum in opposition to Plaintiffs’ Motion for Partial Summary Judgment. For cause, movants assert that this Court is vested with broad discretion to allow non-parties to participate as amici curiae in a pending action, and that the Court should grant leave to movants to participate as amici in this action for the following reasons: movants are three Ohio business associations that were very active in the legislative process that resulted in the statutory exemption of small sources from the requirement of undergoing “best available technology” (“BAT”) determinations for proposed new or modified air contaminant sources, which exemption is challenged in this case; members of movant associations are regulated by Ohio EPA in the installation and operation of air contaminant sources in conjunction with their business activities in the State of Ohio; many of such members are likely to apply to Ohio EPA for permits to install or modify small sources, and thus receive the benefit of the small source

BAT exemption; and, this Court will benefit from a memorandum of law submitted by regulated entities that are not parties to this action, but nevertheless have a significant interest in the outcome of this action, which arguments may not otherwise be presented to the Court.

The Court is respectfully referred to the below memorandum in support of this motion, and to the below memorandum in opposition to Plaintiffs' Motion for Partial Summary Judgment, which is offered for the Court's consideration in the event this motion is granted.

**MEMORANDUM IN SUPPORT OF THE MOTION FOR LEAVE TO FILE
A MEMORANDUM IN OPPOSITION TO THE MOTION
FOR PARTIAL SUMMARY JUDGMENT**

I. IDENTIFICATION AND INTERESTS OF AMICI CURIAE

Movants are three Ohio business associations that are vitally interested in the BAT exemption that is challenged in this action. The Ohio Chamber of Commerce is a diverse business advocacy group, consisting of approximately four thousand members ranging from small businesses to international companies. The Ohio Chemistry Technology Council is an association of over sixty chemical manufacturing companies with facilities in Ohio. The Ohio Manufacturers' Association represents nearly 1800 manufacturers of all sizes throughout Ohio. All three associations consist of, and advocate the interests of, many large and small companies that are regulated by Ohio EPA's air pollution control program, and thus have a substantial interest in how the program is administered. All three were very active in urging the Ohio General Assembly to enact Senate Bill 265 (effective August 3, 2006), which created the BAT exemption. All three have members that are likely to install or modify small sources that annually emit less than ten tons of a criteria pollutant, and thus are eligible for the BAT exemption. The three movant associations therefore have interests that will be directly affected by the judgment rendered in this case.

II. THE COURT HAS BROAD DISCRETION TO ALLOW MOVANTS TO PARTICIPATE AS AMICI CURIAE, AND SHOULD GRANT LEAVE TO MOVANTS TO FILE A MEMORANDUM IN OPPOSITION TO THE MOTION FOR PARTIAL SUMMARY JUDGMENT.

District courts have broad discretion to permit non-parties to participate as amici, Jin v. Ministry of State Security, 557 F.Supp.2d 131 (D.D.C, 2008); Citizens Against Casino Gambling v. Kempthorne, 471 F.Supp.2d 295 (W.D.N.Y, 2007); Bryant v. Better Business Bureau of Greater Maryland, Inc., 923 F.Supp. 720 (D. Md., 1996). Participation as amicus curiae has been allowed where the court concludes that an additional analysis of the issues would assist the court, Bryant, supra., at 728, and where the amicus has demonstrated “a special interest in the subject matter of the suit”, *id.*, at 728; Strasser v. Doorley, 432 F.2d 567 (1st Cir., 1970).

The factors favoring participation as amici are present here. As noted above, the BAT exemption for small sources was created by the General Assembly in S.B. 265, effective August 3, 2006, and is codified at ORC Section 3704.03(T). The movant associations were very active in the legislative process, providing testimony to legislative committees and otherwise advocating for the passage of the legislation in general and the exemption in particular. Thus, the associations have a strong interest in assisting the State in defending the lawfulness of the exemption in this Court. Members of the association also operate air contaminant sources at manufacturing and other industrial facilities, and therefore can offer the perspective of entities regulated by the Ohio EPA’s air pollution control program, a perspective that is not present among the parties to this action. Movants wish to place before the Court their view that the BAT exemption enhances the efficacy of the regulatory program, rather than detracts from it, by making the permitting process more efficient, and that the exemption will not adversely affect the State’s ability to attain and maintain compliance with federal ambient air quality standards. Movants also wish to address the questions of whether Plaintiffs have Article III standing to

challenge the exemption and whether the citizen suit provision in the Clean Air Act, 42 U.S.C. Section 7604, authorizes suit against a state environmental director due to compliance with state statutory law that allegedly conflicts with a state implementation plan. An amicus memorandum on these issues will assist the Court in its analysis of these questions that are central to this case.

Accordingly, the Court should grant the motion for leave to participate as amici curiae, and receive and consider the below memorandum in opposition to Plaintiffs' motion for partial summary judgment.

**MEMORANDUM OF AMICI CURIAE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Plaintiffs have moved for partial summary judgment, asking the Court to order Director Korleski to disregard his obligation under ORC Section 3704.03(T) to prospectively exempt all new and newly-modified small sources throughout the state from the requirement to install BAT. Plaintiffs argue that the exemption "violates" the state implementation plan, thus authorizing Plaintiffs to obtain injunction relief under 42 U.S.C. Section 7604(a)(1). Plaintiffs also argue that they have standing to seek such relief. Plaintiffs err in both respects. They do not meet the requirements for standing, as provided in applicable decisions of the Supreme Court and the Sixth Circuit. Moreover, 42 U.S.C. Section 7604 does not authorize this suit. Plaintiffs' motion should be denied on both grounds.

This memorandum will first discuss the BAT exemption, and how it fits into the broader context of permitting the installation of new or newly-modified air contaminant sources. The memorandum will then turn to the threshold issue of standing. Lastly, the memorandum will address the correct construction of 42 U.S.C. Section 7604, and demonstrate that this suit is not within the scope of that provision.

II. THE BAT EXEMPTION APPLIES PROSPECTIVELY TO SMALL NEW OR NEWLY-MODIFIED SOURCES, AND WILL NOT INTERFERE WITH OHIO'S ATTAINING AND MAINTAINING COMPLIANCE WITH NATIONAL AMBIENT AIR QUALITY STANDARDS.

The BAT exemption was enacted by the General Assembly to enhance the procedural efficiency of small source installation permitting. The BAT exemption does not have any effect on the independent (and unchanged) provision of the Ohio implementation plan that prohibits any new or modified source from preventing or interfering with the attainment of ambient air quality standards. See, OAC 3745-31-05(A)(1). S.B. 265, effective August 3, 2006, among many other desirable reforms to the air pollution regulation program, amended ORC Section 3704.03(T) to provide that new or newly-modified small sources applying for permits to install from Ohio EPA would no longer be subject to the requirement to procedurally determine BAT in a preconstruction permitting process, and then install BAT as a criterion for issuance of the permit. ORC Section 3704.03(T) states, in pertinent part, "Best available technology standards shall not apply to an air contaminant source that has the potential to emit, taking into account air pollution controls installed on the source, less than ten tons per year of emission of an air contaminant or precursor of an air contaminant for which a national ambient air quality standard has been adopted under the federal Clean Air Act." Such small sources have a very slight, if any, effect on air quality, and any such effect would be confined to a relatively small area near the source. The General Assembly was persuaded that such small sources should not be subject to a case-by-case determination by Ohio EPA as to what constitutes BAT for the source, which determination frequently delays the processing of applications for permits to install new or modified sources. The General Assembly correctly concluded that other criteria applicable to the permitting of such new or newly-modified sources would suffice to protect and enhance air quality. Amici note that BAT is an Ohio state policy preference, not a requirement of the federal

Clean Air Act. In fact, none of the other five states in U.S. EPA's Region 5 have ever had a BAT requirement in their state implementation plans.

The other criteria appear in OAC 3745-31-05(A). A small source, to obtain a permit to install, must demonstrate that it will comply with applicable emission standard regulations (standards that may be equally or more stringent than BAT as applied, but that are separate and independent of any BAT requirements), OAC 3745-31-05(A)(2)(a), and that it will "[n]ot prevent or interfere with the attainment or maintenance of applicable ambient air quality standards," OAC 3745-31-05(A)(1). Thus, the BAT exemption does not excuse a new or newly-modified small source from regulation or from meeting these core requirements. The BAT exemption merely excuses such small sources from an additional layer of permitting complexity that may or may not result in restraints on emissions that go beyond those necessary to comply with emission standard regulations and to assure attainment and maintenance of ambient air quality standards. In fact, the exemption may have no effect on a source for which BAT requires no additional controls beyond what is required to meet these other permitting criteria or what the source will emit in the absence of BAT terms due to its inherent characteristics.

Thus, the Court should not form the misimpression that the BAT exemption may result in the permitting of new or modified sources that will jeopardize public health by interfering with the attainment or maintenance of ambient air quality standards. Rather, the BAT exemption, applicable only to insignificant sources, merely removes Ohio EPA's authority to impose technology for the sake of technology on the smallest new sources where such technology requirements are more than necessary to comply with pre-established emission standards and to maintain compliance with ambient air quality standards.

Thus, properly understood, the BAT exemption is a small adjustment to source permitting in Ohio that does not undermine the Clean Air Act's goal of attaining and maintaining ambient air quality standards. It is simply not an assault on public health, as Plaintiffs imply. In fact, a new BAT-exempt source often replaces an already permitted higher-emitting source, and thereby results in less overall emissions. Moreover, the small source BAT exemption is beneficial to applicants for permits to install small sources by removing the subjective, discretionary BAT criterion that often caused delays in the permitting process (often with large adverse economic impacts and no environmental benefits). The exemption also is beneficial to Ohio EPA by decreasing the time and effort of Ohio EPA personnel in processing applications for permits to install small sources, and conserving staff resources to be more productively devoted to permit applications for larger sources. Thus, the BAT exemption results in an air program that is more efficient and more effective in protecting public health.

III. THE MOTION FOR PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE PLAINTIFFS HAVE NOT ESTABLISHED THAT THEY HAVE STANDING TO CHALLENGE THE BAT EXEMPTION.

Subject matter jurisdiction of this Court depends, in part, upon whether a justiciable case or controversy is presented by the parties, as required by Article III of the Constitution. One element of a justiciable controversy is the standing of the plaintiff to assert the claim. The very recent decision in Summers v. Earth Island Institute, 555 U.S. ____ (March 3, 2009) is directly on point, and compels the conclusion that these plaintiffs have not demonstrated standing to invoke this Court's jurisdiction. In the absence of a plaintiff with standing, the Court lacks subject matter jurisdiction, and must decline to grant the relief requested in the motion for partial summary judgment.

Summers involved an action by a group of environmental organizations, including the Sierra Club, challenging United States Forest Service regulations that exempted certain small fire rehabilitation and timber salvaging projects from notice, comment, and appeal procedures applicable to larger projects. The plaintiff groups requested an injunction against enforcement of the regulations. The Court concluded that the groups lacked standing to challenge the regulations, both as organizations and as representatives of their members. The Court stated, Slip Opinion, at 4, “To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury,” citing, Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Where the challenged government action does not directly affect the plaintiff, but rather is alleged to indirectly injure a protected interest of plaintiff, “standing is not precluded, but it is ‘substantially more difficult’ to establish,” Defenders of Wildlife, *supra.*, at 562, Slip Opinion, at 5. A group may assert the standing of its members, but “generalized harm to the forest or the environment will not alone support standing,” Slip Opinion, at 5. Rather, particularized harm to the plaintiff must be established.

The Court examined plaintiffs’ affidavits submitted to the district court in an effort to establish standing, and concluded that they were insufficient. The affidavits identified only one forest project to which the challenged regulations had been applied and for which the plaintiffs were able to identify an injury to their recreational interest by visiting the site of the project. But the parties settled the dispute as to that project, and thus that project could not be invoked to

establish standing, Slip Opinion at 6. The affidavits were otherwise insufficient to establish standing because plaintiffs “have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the interests of their members.” Slip Opinion, at 6. One such affidavit, for example, was insufficient because it asserted harm that “was not tied to application of the challenged regulations, because it did not identify any particular site, and because it related to past injury rather than imminent future injury that is sought to be enjoined.” Slip Opinion, at 6. (Emphasis added.) Regarding the need to identify harm from application of the regulations to particular projects to establish standing, the Court stated, Slip Opinion, at 7, that one particular affidavit was insufficient because of its “failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of [affiant] Bensman’s to enjoy the National Forests.” (Emphasis in original.) Thus, the plaintiff groups’ failure to establish by affidavit that any member of the groups had suffered concrete, imminent harm from application of the challenged regulations to specific, identified forestry projects caused the Court to conclude that standing had not been established.

The standing principles identified and applied in Summers are consistent with earlier decisions of the Sixth Circuit and other federal circuits in environmental cases. In Center for Biological Diversity v. Lueckel, 417 F.3d 532 (6th Cir., 2005), the court concluded that the group lacked standing to challenge the Forest Service’s failure to establish river corridors and management plans for scenic rivers in Michigan. The court stated, at 539, that the plaintiffs were required to establish by affidavit that “actual site-specific activities [of the government] are diminishing or threatening to diminish their members’ enjoyment of the designated river segments.” They were further required to demonstrate that “their injuries are causally connected

to the [government's] inaction, and that plaintiffs' injuries are likely to be alleviated if the Forest Service is compelled to" complete the plans. But plaintiffs failed to show that the corridors and plans would provide greater protection to the plaintiffs at specific locations than the protection already afforded by law, and thus that the requested injunction would redress their claimed injury.

In Grassroots Recycling Network, Inc. v. USEPA, 429 F.3d 1109 (D.C. Cir., 2005), an environmental group was held to lack standing to contest a USEPA regulation that provided an exemption to research, development, and demonstration projects from solid waste landfill rules. The court held that the group lacked standing. Affidavits that group members lived near specific landfills were insufficient, since it was a matter of conjecture whether those landfills would ever seek an exemption under the regulation, whether the exemption would be granted, and whether, as a result, the members' property values would be adversely affected. The court characterized the lack of evidence on the missing facts as "multi-tiered speculation" that precluded standing, *id.* at 1112.

In Texas Independent Producers and Royalty Owners Assn. v. EPA, 410 F.3d 964 (7th Cir., 2005), the Natural Resources Defense Council was held to lack standing to challenge a general permit issued by USEPA under the Clean Water Act that authorized storm water discharges from construction projects. The group's effort to establish standing failed because its affidavit, although identifying specific bodies of water used by group members for recreation, "fails to identify any specific construction project authorized under the General Permit into these bodies of water, and more significantly it fails to present evidence that discharges of sediment from the sites are actually occurring." *Id.*, at 972.

Standing requirements established in these cases are derived from Article III, and are thus as applicable to claims arising under the Clean Air Act as under the statutes invoked in those cases. Texans United for a Safe Economy Education Fund v. Crown Central Petroleum Corporation, 207 F.2d 789 (5th Cir., 2000) illustrates how these principles apply to that act. Texans United, like the instant case, was a claim brought under the citizen suit provision of the Clean Air Act. Plaintiff groups and individuals alleged that a refinery operated by Crown Central in Pasadena, Texas, emitted air contaminants in violation of applicable state implementation plan (“SIP”) requirements. Crown Central challenged the plaintiffs’ standing to sue. The court, based upon a careful review of the plaintiffs’ affidavits, concluded that the plaintiffs had established all the elements of standing: affiants resided near the refinery and breathed polluted air (“injury in fact”); affiants, by visual observation and the tracing of odors, were able to identify the refinery as the source of the pollution (“traceability”); and, an injunction against further unlawful emissions from the refinery would, at least in part, reduce their identified injury (“redressability”), supra, at 792-794. It is clear from the court’s opinion that had the plaintiffs not established all of those facts by affidavit, the court would have held that standing to contest the emissions from the refinery had not been demonstrated.

Applying the standing principles of the above cases to this case, to demonstrate standing, the individual plaintiffs or identified members of the Sierra Club, by affidavit, must establish all of the following in order to demonstrate standing to challenge the BAT exemption: 1) they reside near or otherwise come into close proximity to identified, specific air contaminant sources to which the BAT exemption has been or will be applied; 2) they breathe or will breathe the emissions from the identified sources; 3) the emissions from the identified sources are or will be greater due to the BAT exemption; and, 4) an order from the Court requiring BAT on the sources

will redress their injury by reducing emissions. Only such facts will suffice to establish injury in fact, traceability of the injury to the conduct challenged, and redressability by the Court. Moreover, the standing established by those facts will be limited to challenging the BAT exemption only as to those identified sources, not others that have not been identified or to which plaintiffs have not or will not be exposed, Summers, supra.

Plaintiffs' four "declarations" filed on March 13, 2009 (Document 21), do not establish any of these indispensable facts. Although all of the declarations (in identical language obviously drafted by someone other than declarants) state that the declarant "understands" (i.e., was told by someone or read somewhere) that "over 100 less than ten ton sources of air pollution" have been exempted from BAT, not one such air contaminant source is identified by name and location, contrary to the clear command of Summers, supra, Slip Opinion, at 7, that an affiant identify each particular project and location to which the challenged regulation has been or will be applied that injures the affiant. There are no statements that the affiants have been or will be injured in any fashion by the named sources. And, there are no statements that the emissions from the named sources are greater due to the BAT exemption than they would be without it. As noted above, requiring BAT may not result in lesser emissions than are required to meet the other criteria for issuance of permits to install, such as compliance with applicable emission standards. Without establishing that BAT would have reduced emissions from a particular source, an order of the Court to install BAT would not redress any injury caused by the emissions.

Moreover, the "declarations" are not affidavits under oath, and therefore are insufficient to establish the necessary facts for standing, as required by the above cases. Unless a declarant is under oath, he is not subject to prosecution for perjury (see, ORC Section 2921.11(A)), and thus

the statements cannot be relied upon to establish standing. Moreover, the statement of an “understanding” about one hundred BAT-exempt sources is obvious hearsay, and should therefore be disregarded as wholly unreliable.

Amici anticipate that Plaintiffs will argue that they need not identify specific sources to establish standing, since emissions from all sources blend together in the atmosphere that Plaintiffs breathe. But Texans United, supra., requires rejection of that argument. There, the court quite clearly required affiants to establish exposure to the emissions of the refinery that was sued, traceability of their injury to that specific source, and a showing that reduction in emissions from that source would redress their injury. Moreover, emissions of air contaminant sources, especially small sources to which the BAT exemption applies, have limited geographic impact. Surely, such a source in Cleveland can have no effect on a person residing in Cincinnati. And yet these Plaintiffs claim standing to contest the BAT exemption as applied state-wide. They cannot credibly claim injury from every BAT exempt source everywhere in Ohio, and must identify the specific sources from which they claim injury, Summers, supra.

Plaintiffs may also argue that they or members of the Sierra Club, in traveling to and from work or other activities, are likely to come into close proximity to BAT exempt sources and breathe their emissions, thus establishing standing. But this approach to standing, embraced by the dissent in Summers, supra., was expressly rejected by the majority, Slip Opinion at 9-12. The Court stated, at 11, that “such probabilistic standing” is “speculation” and “an exercise in the conceivable” that falls short of the requirement of a plaintiff to establish “imminent” or “perceptible” harm. Only affidavits of plaintiffs or plaintiff group members that identify specific locations or facilities where the challenged action of the government has occurred and that establish the harm caused to the plaintiff by the government action at those locations or facilities

will suffice. A conceivable probability of harm, without such particularized demonstration of harm, does not establish Article III standing.

In their notice of filing the declarations, Plaintiffs cite two cases in support of their standing, Massachusetts v. EPA, 549 U.S. 497 (2007), and American Canoe Association, Inc., v. City of Louisa Water & Sewer Commission, 389 F.3d 536 (6th Cir., 2004). Neither case assists them. In Massachusetts, the Court assessed whether the State of Massachusetts had standing to contest EPA's failure to regulate carbon dioxide, a greenhouse gas, in new motor vehicle emissions, and found that the state had standing. The Court reasoned that a state is different than private litigants due its "stake in protecting its quasi-sovereign interests", and thus "is entitled to special solicitude in our standing analysis." 549 U.S. at ____, Slip Opinion at 17. The Court found that climate change is likely to cause an increase in sea level, which will result in the loss of coastal land in Massachusetts, an injury to the state's interest in protecting its territory from harm that might be reduced if carbon dioxide were reduced in vehicle emissions. This analysis is completely inapplicable here. Plaintiffs are not a state, and are thus not deserving of "special solicitude". Also, Plaintiffs' claimed injury is very different than that claimed by Massachusetts. They claim injury from breathing polluted air. Thus, to challenge the BAT exemption, they must show that the air they are breathing is "fairly traceable to the challenged action of the defendant", Summers, Slip Opinion, at 4, and that such injury is "concrete and particularized" and "not conjectural or hypothetical". The decision in Massachusetts does not free Plaintiffs from these requirements that their declarations do not satisfy.

American Canoe is also unhelpful. In that case, two environmental organizations (including the Sierra Club) brought a citizen suit under the Clean Water Act contending that the City of Louisa was discharging effluent from its water treatment plant in violation of its

discharge permit, and that it was not complying with reporting and record-keeping requirements of the permit. The court held that the Sierra Club had standing to sue regarding the effluent discharges because an affidavit filed by a member of the organization established that the member had used the river near the discharge for boating and other recreational pursuits, but had stopped doing so because of the polluted condition of the river resulting from the discharge, *id.* at 540-544. The court also held that both groups had “informational standing” to contest the city’s alleged failure to create records and report information to the state as required by the permit, which information would be useful to the organizations in their advocacy and litigation activities. But, in the instant case, the Plaintiffs have not provided information identifying the BAT exempt sources, Plaintiffs’ residing near or otherwise coming into close contact with emissions from the sources, and the injuries caused by each such source to the Plaintiffs, as was found necessary for standing in American Canoe. Also, Plaintiffs in this case do not assert information standing.

Plaintiffs’ theory of standing in this case is that any citizen of Ohio, located anywhere in Ohio, can challenge the BAT exemption as it is applied state-wide, without filing affidavits under oath identifying any BAT exempt source, the injuries caused by such exempt sources, whether such sources emit more because of the BAT exemption than had they not been exempted, and that the requested injunction would redress their injuries by reducing the emissions. Plaintiffs cite no cases that support their theory of standing, and all of the cases discussed above refute it. This Court, therefore, should conclude that Plaintiffs have not demonstrated their standing to contest the BAT exemption.

IV. PLAINTIFFS' MOTION SHOULD BE DENIED BECAUSE 42 U.S.C. SECTION 7604 DOES NOT AUTHORIZE SUIT AGAINST A STATE TO ENJOIN THE STATE TO ENFORCE AN EMISSION STANDARD IN A STATE IMPLEMENTATION PLAN AGAINST AIR CONTAMINANT SOURCES.

Plaintiffs' motion should also be denied because it rests upon a flawed interpretation of the citizen suit provision in the Clean Air Act, 42 U.S.C. Section 7604. Plaintiffs have invoked Section 7604(a)(1), which authorizes suit "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation." (Emphasis added.) Assuming for the purpose of argument that BAT is an "emission standard or limitation", it strains the natural reading of the term "violated" or "violation" to contend that Defendant Korleski, by not enforcing BAT, is "violating" BAT. He is not. Rather, a source that is required by law to employ BAT, but operates without it, "violates" the BAT requirement. Defendant, by not enforcing BAT, may be violating a duty to enforce it, if such a duty exists, but he does not "violate" BAT itself. Thus, Plaintiffs' suit, to fall within the scope of Section 7604(a)(1), should have been directed at sources they regard as unlawfully operating without BAT, rather than the Director, for only such sources "violate" BAT.

Had Congress wished to authorize a citizen suit against a state for nonenforcement of a SIP, it could have done so in plain terms. Plaintiffs assert in their memorandum, at page 3, that a state has a mandatory duty under the Clean Air Act to enforce its SIP. Citizen suits to mandate performance of mandatory duties are authorized in Section 7604(a)(2), but are limited to suits

against the Administrator of USEPA, stating that suits may be filed “against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” That Congress did not include states within that provision indicates quite clearly that Congress did not intend to authorize citizen suits against states to perform mandatory regulatory duties under the Act. What Congress clearly chose not to do in Section 7604(a)(2) should not be found in Section 7604(a)(1) though an awkward reading of that provision that a state “violates” an emission standard when it does not require an air contaminant source to comply with the standard.

Also cutting against Plaintiffs’ reading of Section 7604(a)(1) is that Congress, in plain terms, elsewhere in the Clean Air Act provided a remedy to address a state’s failure to enforce emission standards in the SIP. 42 U.S.C. Section 7509(a)(4) provides that if the Administrator “finds that any requirement of an approved plan (or approved part of a plan) is not being implemented”, and the “deficiency” is not corrected by the state within eighteen months of notice to the state, the Administrator may impose significant sanctions against the state, including prohibition of federal funding of highway projects, Section 7509(b)(1). It makes little sense for Congress to have established a process for the Administrator to compel a state’s enforcement of the SIP, in which the state is given eighteen months to correct any such deficiencies, and at the same time in Section 7604(a)(1) to have authorized district courts to order a state to enforce the SIP. The clear remedy for state nonenforcement in Section 7509 strongly implies that Congress had no intent to authorize citizen suits for state nonenforcement in Section 7604.

The cases relied upon by Plaintiffs are either distinguishable from the instant case or fail to recognize that a state’s failure to enforce a SIP emission standard, even if a “violation” of the

Clean Air Act, is not a “violation” of the standard itself, and thus not within the scope of Section 7604. American Lung Ass’n of New Jersey v. Kean, 871 F.2d 319 (3rd Cir., 1989), involved suit against New Jersey for failure to adopt emission standard regulations by a deadline prescribed by its SIP. Thus, the state was found not to have complied with a requirement that it had imposed upon itself in the SIP, i.e., the adoption of regulations. The court, at 324, broadly interpreted the phrase “emission standard or limitation” in Section 7604(a)(1) to include a self-imposed requirement in a SIP to adopt emission standard regulations. Because the state was in “violation” of that requirement, the citizen suit was within the scope of that section. Citizens for a Better Environment v. Deukmejian, 731 F.Supp. 1448 (N.D. Cal., 1990), also involved a claim that a requirement of a SIP to adopt rules had not been met. In the case at bar, however, there is no allegation that Ohio has failed to adopt rules required by its SIP, but, rather, is failing to enforce the existing SIP BAT rule against a class of air contaminant courses. These cases are therefore inapposite.

Also inapposite are General Motors Corp. v. United States, 496 U.S. 530 (1990), and United States v. Ford Motor Co., 814 F.2d 1099 (6th Cir., 1987). Both cases are enforcement actions brought by the government under 42 U.S.C. Section 7413, not citizen suits under Section 7604. These cases do not address the proper interpretation of Section 7604.

Plaintiffs lastly rely on three cases in which a district court held that a state may be sued for failure to implement a motor vehicle emissions inspection program contained in the SIP, Kentucky Resources Council v. USEPA, 304 F.Supp.2d 920 (W.D. Ky., 2004); Citizens for Pennsylvania’s Future v. Mallory, 2002 WL 31845880, and Sweat v. Hull, 200 F.Supp. 1162 (D. Ariz., 2001). In all three, the court found that the Clean Air Act required states to implement their SIP’s, and then, without explanation, concluded a failure of a state to do so constituted a

“violation” by the state of an “emission limitation or standard” under Section 7604(a)(1). For example, in Kentucky Resources, at 96, the court stated, “The central question in this case from which all others devolve is whether the Cabinet, the District, or the EPA has violated the [Clean Air] Act.” (Emphasis added.) Upon answering that question in the affirmative, the court jumped to the conclusion that suit therefore lay against the state under Section 7604(a)(1) to remedy that violation. Similarly, in Sweat, at 1170, the court stated, “Plaintiffs have persuaded the Court that repeal and subsequent non-enforcement of the RSD Program violated the CAA . . .” Yet, again, the court does not explain why that violation is a violation of the “emission standard or limitation” that the state had repealed and was not enforcing.

This Court should not repeat the error of those cases. Had Congress wished to authorize citizen suits against states for non-enforcement of SIP’s, it would have said so, just as it authorized suits against the Administrator for nonperformance of nondiscretionary duties in Section 7604(a)(2). The clear purpose of Section 7604(a)(1) is to authorize suits against air contaminant sources that are emitting “in violation of an emission standard or limitation under this chapter”, not suits against states for not enforcing the emission standard. To accept Plaintiffs’ invitation to stretch that language beyond its clear meaning is error.

The Court should therefore deny Plaintiffs’ motion as seeking relief that is beyond the scope of Section 7604.

CONCLUSION

For these reasons, the motion for partial summary judgment should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2009, a copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF System, which will send notification of such filing to the following:

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/s/ David E. Northrop
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