UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

CONSERVATION LAW FOUNDATION, INC., Plaintiff, v. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE, Defendant.	Civil Action No. 11-353-JL

PLAINTIFF CONSERVATION LAW FOUNDATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE'S MOTION TO DISMISS PURSUANT TO RULE 12(B)(6)

Plaintiff Conservation Law Foundation ("CLF") submits this memorandum of law in opposition to Defendant Public Service Company of New Hampshire's ("PSNH") Motion to Dismiss Counts One Through Four of the Complaint Pursuant to Rule 12(b)(6) (Doc. #15, hereinafter, the "Rule 12(b)(6) Motion"), as accompanied by a memorandum of law (Doc. #15-1, hereinafter, the "Rule 12(b)(6) Memo.").

INTRODUCTION AND BACKGROUND

This case seeks to hold PSNH accountable for its repeated non-compliance with preconstruction and other permitting requirements applicable at PSNH's Merrimack Station, a coal and oil-fired power plant in Bow, New Hampshire (hereinafter, "Merrimack Station"). Preconstruction review requirements lie at the very heart of the federal Clean Air Act ("CAA") and the federally enforceable New Hampshire air pollution regulations that implement it. Preconstruction review ensures that all construction projects and operational changes that increase air pollution from major emissions sources like Merrimack Station's 350-megawatt Unit

2 ("Unit 2") undergo regulatory review in a public process *before any changes are made*. Through such review, permitting authorities determine the extent of increased air pollution and its effects on air quality and impose enforceable conditions that limit such effects to protect public health and the environment. PSNH has moved to dismiss Counts I through IV of CLF's Complaint, all of which address PSNH's obligations to obtain preconstruction permits in connection with changes it made to Unit 2 in 2008 and 2009. PSNH frequently touts the fact that these changes—its replacement of Unit 2's high-pressure/intermediate-pressure ("HP/IP") turbine and related work (the "Projects")—will increase that unit's efficiency. Indeed, the Projects were designed to, and did, increase Unit 2's ability to generate power and, thus, to burn more coal and emit more air pollutants regulated by New Hampshire law and the CAA. As PSNH itself projected, the Projects will result in an overall increase in the amount of pollutants emitted over the volume that was previously and would otherwise be emitted by Unit 2.

PSNH has utterly disregarded the preconstruction permitting framework that governs its activities. Its actions endanger human health, mislead the public, and degrade the environment by emitting inadequately controlled pollutants to the air. PSNH now urges this Court to ignore its noncompliance, claiming that its activities are sanctioned, and seeking to dismiss the first four counts of CLF's Complaint.

First, with respect to CLF's claims alleging violations of the New Source Review ("NSR") regulations (Counts II and IV), PSNH, incredibly, relies on the *wrong rules*. PSNH's entire argument to this Court centers on a set of U.S. Environmental Protection Agency ("EPA") NSR regulations that *do not apply* in New Hampshire—a fact that a sophisticated party like PSNH most certainly should have known. Bootstrapping its erroneous argument, PSNH resorts to a single district court decision from another state, now on appeal, interpreting the same

inapplicable rules. *See* Rule 12(b)(6) Memo. at 7-9, 10-16. The correct rules, which PSNH previously, publicly, and repeatedly acknowledged as controlling, require preconstruction permits for modifications that result in significant increased emissions. Moreover, even assuming that the regulations PSNH cites are applicable—and they are not—PSNH misconstrues them and in any event failed to comply with them. Nowhere in its brief does PSNH mention that its activities do not comply even with the regulations it now asserts allow it to avoid preconstruction permitting.

Second, PSNH has no answer to CLF's allegations (Counts I and III) that it failed to obtain permits for the Projects under federally enforceable *New Hampshire regulations*, which mandate preconstruction review for changes that increase emissions *by any amount* and are clearly not limited to "major modifications." Rather, PSNH tellingly ignores the controlling provisions of New Hampshire law underlying Counts I and III of CLF's Complaint.

Third, PSNH's claim that CLF's descriptions of the modifications are insufficient also falls short. *See* Rule 12(b)(6) Memo at 16-19. CLF's allegations contain well sourced, appropriate detail and, when accepted as true, provide a plausible and complete account of PSNH's liability for CAA violations in a manner consistent with the Supreme Court's minimum standards for a well-pleaded complaint.

Finally, PSNH also implies in a footnote that certain New Hampshire Department of Environmental Services ("NHDES") proceedings may bar CLF's claims regarding the Projects. *See* Rule 12(b)(6) Memo. at 16 n.12. As PSNH well knows, those proceedings have never resulted in a final, appealable decision on the merits that could preclude CLF's claims here.

STATUTORY AND REGULATORY FRAMEWORK

The CAA establishes a regime of cooperative federalism that assigns states the primary

role of adopting and implementing minimum federal requirements developed by EPA. *See Nat'l Parks Conservation Ass'n v. TVA*, 480 F.3d 410, 412 (6th Cir. 2007). Under the CAA, EPA establishes National Ambient Air Quality Standards ("NAAQS") to protect human health and the environment. Each state must develop and submit to EPA, for approval, a state implementation plan ("SIP") that, in part, must prevent construction of new or "modified" sources of air pollution that would interfere with attainment or maintenance of the NAAQS. 42 U.S.C. § 7410(a)(2)(C). The CAA renders approved SIP requirements enforceable by EPA and by citizen suits in federal court. *See* 42 U.S.C. §§ 7604(a), 7604(f)(4); *Nat'l Parks Conservation Ass'n*, 480 F.3d at 418.

In New Hampshire, as in most states, the SIP is a creature of state regulation. NHDES promulgates state rules, in accordance with state law, for inclusion in the SIP. Those rules must be at least as stringent as federal requirements. *See* 40 C.F.R. pt. 51; 42 U.S.C. §§ 7410, 7413, 7416. New Hampshire has adopted a variety of state rules and programs for its SIP, including provisions that incorporate certain federal regulations by reference. *See, e.g.*, N.H. Code Admin. R. Env-A ("Env-A") 623.03 (2001); Env-A 610.03 (1990). EPA has approved particular New Hampshire rules as part of the New Hampshire SIP. *See* 40 C.F.R. §§ 52.1520 & 52.1525. New Hampshire, however, does not automatically incorporate into its SIP updates to the federal regulations; each such change must proceed through a new state rulemaking. *See* New Hampshire Office of Legislative Services, Drafting and Procedure Manual for Administrative Rules, ch. 4, § 3.12, at 85 (2001), *available at* http://www.gencourt.state.nh.us/rules/manual/manualch4.pdf (last visited Nov. 10, 2011), attached hereto as **Exhibit 1**; Section I.A, *infra*.

As part of New Hampshire's obligation to ensure air quality meets the NAAQS, the New Hampshire regulations approved by EPA as New Hampshire's federally enforceable SIP

(hereinafter, the "EPA-approved N.H. Regulations" or the "N.H. Regulations") impose preconstruction permit requirements on both new air pollution sources and, as here, "modifications" of existing sources. *See* 40 C.F.R. §§ 52.1520 & 52.1525. Among other things, the purpose of these requirements is "to assure that any decision to permit increased air pollution . . . is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." 42 U.S.C. § 7470(5). *See also Nw. Envtl. Def. Ctr. v. Owens Corning Corp.*, 434 F. Supp. 2d 957, 964 (D. Or. 2006).

The CAA requires New Hampshire to establish both specific programs addressing *major* new sources of air pollution and *major* modifications to existing sources, known as New Source Review ("NSR"), as well as a permitting program addressing *all* non-major new sources and modifications to existing sources of air emissions, known as minor preconstruction review ("minor NSR"). *See* 42 U.S.C. § 7410(a)(2)(C); 40 C.F.R. pt. 51, subpt. I (setting forth requirements for minor NSR programs). NSR encompasses the Prevention of Significant Deterioration ("PSD") program applicable in areas that are meeting the NAAQS and the Nonattainment New Source Review ("NA-NSR") program applicable in areas that are not meeting the NAAQS. 42 U.S.C. §§ 7410(a)(2)(C), 7475, 7503; 40 C.F.R. §§ 51.165, 51.166, 52.21.[1] New Hampshire has adopted a single initial permitting process to implement both a PSD/NA-NSR program for major new and modified sources and a minor NSR program for all non-major new sources and modifications—the "temporary permit" preconstruction review program. N.H. Regulations provide that a temporary permit, "which contains conditions, shall be

[1] NSR applies both to new sources of air emissions exceeding major source thresholds and to "major modifications," that is, modifications that result in "significant" net emissions increases of regulated pollutants at major sources. *See* Env-A 623.03 (2001) (incorporating 40 C.F.R. § 52.21(b)(23) (2001)); Env-A 610.01 & 610.03 (1993).

required *prior to commencement of construction or installation of any new or modified device*." Env-A 602.01(a) (1990) (emphasis added). Once established through a temporary permit proceeding, pollution controls and other permit requirements are to be integrated into "a permit to operate." Env-A 602.02(a) (1990).[2]

New Hampshire defines "modification" as "any physical change in, or change in the operation of, a stationary source or device which increases the amount of a specific air pollutant emitted by such source or device, or which results in the emission of any additional air pollutant." Env-A 101.57 (1990); *see also* 42 U.S.C. § 7479(2)(C) (incorporating definition of modification set forth at 42 U.S.C. § 7411(a)(4)); 42 U.S.C. § 7501(4) (same, for purposes of CAA requirements in nonattainment areas). The N.H. Regulations, therefore, require a temporary permit for any modification of an existing source that increases the source's emissions *by any amount*. Env-A 101.57 (1990). PSNH concedes that this definition applies in this case. *See* Rule 12(b)(6) Memo. at 6. If a new source will constitute a "major" source or the modification of an existing major source constitutes a "major" modification, as the CAA and the N.H. Regulations define those terms, the additional procedures and requirements of New Hampshire's approved PSD/NA-NSR program will apply. *See* Env-A pt. 623 (2001) (incorporating 40 C.F.R. § 52.21

[2] This "state permit to operate" is a requirement of the N.H. Regulations that is analytically distinct from and pre-dates the requirement to obtain and comply with an operating permit under Title V of the CAA. *See* 42 U.S.C. § 7661c. Under its EPA-approved Title V program, NHDES issues facility-wide Title V permits that must incorporate all "applicable requirements" under the CAA, including those established in temporary permits and state permits to operate issued by NHDES under the SIP. *See* Env-A pt. 609 (1995 & 2001); 40 C.F.R. pt. 70; *see also* NHDES, Merrimack Station, Title V Operating Permit Findings of Fact and Director's Decision at 6 (Mar. 15, 2010), *at* http://des.nh.gov/organization/divisions/air/pehb/apps/documents/psnh_tv_finds_decision.pdf ("[T]he intent of the Title V Operating Permit is to be an accumulation or clearing house of all existing operating limitations and state and federal requirements that are currently applicable to the facility."); *Sierra Club v. Dairyland Power Coop.*, No. 10-CV-303, 2010 WL 4294622, at *13 (W.D. Wis. Oct. 22, 2010) ("Title V operating program does not impose new obligations but instead consolidates pre-existing requirements . . . .").

(2001)) (PSD); Env-A pts. 610 (1993) and 622 (1999) (incorporating certain provisions of 40 C.F.R. § 51.165 (1989 & 1993 eds.)) (NA-NSR).

NHDES initially promulgated its federally enforceable state permitting program requirements between 1990 and 2001 and sought EPA's approval of its regulations on various occasions. EPA's approvals are noted in the Code of Federal Regulations at 40 C.F.R. §§ 52.1520 and 52.1525.[3] EPA's most recent approval of the N.H. Regulations requiring preconstruction permits was published in the Federal Register on October 28, 2002. *See* 67 Fed. Reg. 65,710 (Oct. 28, 2002). The regulations approved by EPA on that date govern this case. *See* **Appendix 1** (EPA-approved N.H. Regulations).[4]

LEGAL STANDARD

The Federal Rules of Civil Procedure require a plaintiff's complaint to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In reviewing a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded facts in the complaint and draw all reasonable inferences in favor of the plaintiff[]." *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011) (quoting *SEC v. Tambone*, 597 F.3d 436, 441 (1st Cir. 2010)). "To survive a motion to dismiss, the complaint must allege 'a plausible entitlement to relief.'" *Fitzgerald v. Harris*, 549 F.3d 46,

[3] *See also* 74 Fed. Reg. 50,118 (Sept. 30, 2009) (reformatting incorporation of SIP into C.F.R. and referencing compilation of EPA-approved N.H. Regulations at http://www.epa.gov/region1/topics/air/sips/sips_nh.html).

[4] Because EPA approves, and SIPs contain, state regulations that are sometimes subsequently revised by the relevant state, each citation to the EPA-approved N.H. Regulations herein clarifies the correct version by noting the year that the provision in the SIP was promulgated by NHDES.

52 (1st Cir. 2008) (quoting *Twombly*, 550 U.S. at 559). *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (dismissal appropriate only if "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct"); *Sepulveda-Villarini v. Dep't of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) (standard is "plausibility assuming the pleaded facts to be true and read in a plaintiff's favor," including all "fair inferences" from such facts). The Court may consider public documents put into the record by the parties. *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 43 (1st Cir. 2008).

DISCUSSION

I. COUNTS I-IV OF CLF'S COMPLAINT STATE COGNIZABLE CLAIMS FOR RELIEF BECAUSE THE APPLICABLE REGULATIONS REQUIRED PSNH TO OBTAIN PRECONSTRUCTION PERMITS FOR THE ALLEGED MODIFICATIONS AND PSNH FAILED TO DO SO.

PSNH's principal argument for dismissal boils down to a claim that it complied with the law. *See* Rule 12(b)(6) Memo. at 10-16. PSNH is wrong for two reasons: (1) PSNH has exclusively relied on EPA rules that, even the most elementary diligence would reveal, *do not apply in New Hampshire*, and (2) PSNH never complied with the applicable EPA-approved N.H. Regulations. Thus, PSNH's arguments for dismissing CLF's claims have no merit and should be rejected.

A. The 2002 NSR Rule that PSNH Cites Does Not Apply in New Hampshire.

In its Rule 12(b)(6) Motion, PSNH seeks to rely on the "greater flexibility" of revisions to the federal NSR regulations promulgated on the last day of 2002 (the "2002 NSR Rule"). *See* 67 Fed. Reg. 80,186 (Dec. 31, 2002); Rule 12(b)(6) Memo. at 11. *See also* **Appendix 2** (40 C.F.R. §§ 51.165; 52.21 (2008)). Yet, New Hampshire never adopted that version of the NSR rules. PSNH claims that Counts I-IV of CLF's Complaint should be dismissed because PSNH "followed the 2002 NSR Reform Rules and that PSNH's turbine project remains under the

continued monitoring of [NH]DES . . . [c]onsistent with the requirements of applicable rules." Rule 12(b)(6) Memo. at 9.[5] PSNH argues that the 2002 NSR Rule changed the applicable requirements, effectively conceding that PSNH's projects would have been subject to permitting requirements under the prior rules. Whether PSNH followed the 2002 NSR Rule is irrelevant, however, since the rule does not apply in New Hampshire.

1. The Version of 40 CFR 52.21 Applicable in New Hampshire Does Not Include the 2002 NSR Rule.

The N.H. Regulations mandating preconstruction permits were adopted by NHDES under state law and submitted to EPA in 2001 and approved by EPA on October 28, 2002, two months before EPA promulgated the 2002 NSR Rule. *See* 67 Fed. Reg. 65,710 (Oct. 28, 2002); 40 C.F.R. § 52.1520(c)(60). They incorporate federal regulations by reference, but do not specify the date of the incorporated regulations. *See* Env-A 623.03(a) (2001); 67 Fed. Reg. at 65,711.[6]

PSNH leaps to the incorrect legal conclusion that New Hampshire *automatically* incorporates future revisions to the referenced PSD regulations. *See* Rule 12(b)(6) Memo. at 6 n.5.[7] PSNH's error reveals an outright failure to undertake even a cursory examination of the

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[5] *See also* Rule 12(b)(6) Memo. at 6-9 (explaining how "PSNH followed the 2002 NSR Reform Rules"), 10 ("PSNH was not required to obtain a preconstruction permit . . . because PSNH complied with the 2002 NSR Reform Rules"), 11 ("A company that follows the NSR Reform Rule requirements, as PSNH did here, is not required to obtain a preconstruction permit unless and until the agency determines that one is required. . . ."), 13 ("PSNH followed the 2002 NSR Reform Rules . . . ."), 14 (PSNH "submit[s] emissions data annually as required by the 2002 NSR Reform Rules").

[6] The N.H. Regulations also incorporate certain definitions and other provisions from federal regulations for NA-NSR purposes. *See* Env-A pts. 610 (1993) & 622 (1999) (incorporating provisions of 40 C.F.R. § 51.165 (1989 & 1993 eds.)).

[7] PSNH apparently bases this assertion on a single second-hand statement in the 2002 Federal Register notice approving NHDES's 2001 regulations, which EPA itself questioned in the same notice. 67 Fed. Reg. at 65,711 ("New Hampshire *believes* its PSD rules will automatically incorporate and implement all future revisions to 40 CFR 52.21 without the need for additional state rulemaking . . . . Typically, states need to revise their SIP-approved rules to comply with any revisions made to underlying federal rules" (emphasis added).).

legal underpinnings of its Rule 12(b)(6) Motion. As recently as June 14, 2011, EPA published in the Federal Register a proposed revision to New Hampshire's SIP and unequivocally explained that the SIP includes the NSR rules that were in effect *prior to* the promulgation of the 2002 NSR Rule. 76 Fed. Reg. 34,630, 34,632 (June 14, 2011).[8] The relevant section of that notice states: "New Hampshire's PSD SIP consists, in the main, of an incorporation by reference of 40 CFR 52.21 *as it stood when the PSD SIP was approved*" in 2002. *Id.* (emphasis added) (proposing to adopt SIP revisions but "to retain previously-approved" version of PSD regulations "effective under state law on July 23, 2001" and approved by EPA in 2002).

Absent specific statutory authorization, New Hampshire law *prohibits* the prospective incorporation of future federal regulations into state regulations. *See* Drafting and Procedure Manual, *supra*, at 85 (agency "may incorporate the requirements of other documents into its rules, provided that . . . agency identifies in rule, and abides by, a specific edition of the document and *does not automatically adopt future amendments unless allowed by statute*" (emphasis added)); N.H. Rev. Stat. Ann. ("RSA") 541-A:8 ("Each agency shall conform to a drafting and procedure manual for rules, developed by the director of legislative services and the commissioner of administrative services . . . ."). [9] Here, neither NHDES's organic statute nor the

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[8] As required by the CAA, this proposed SIP revision followed a lengthy and detailed public rulemaking and SIP revision process, for which NHDES provided notice to stakeholders throughout the state, including by specific transmittal addressed to PSNH and its New Hampshire counsel, and conducted a public hearing. This process explicitly addressed and provided notice regarding the version of the NSR rules applicable in New Hampshire.

[9] *See also* Drafting and Procedure Manual, *supra*, at 86 ("[m]ake sure to specify an edition in the rule with which persons must comply"); N.H. RSA § 541-A:12, IV (requiring incorporation by reference statement for any "state-enforceable" rule to certify that "the text of the incorporated document . . . has been reviewed by the agency"); *State v. Fitanides*, 139 N.H. 425, 428 (1995) (rejecting argument that "new and additional federal regulations" changed operative definition found in prior federal regulations incorporated into statute by reference); N.H. Atty. Gen. Op. No. 0-88-036, 1988 WL 483308 (Oct. 4, 1988) (opining that agencies should "adopt and specify the particular edition of the EPA regulation which is being

New Hampshire air pollution control statute authorizes prospective incorporation by reference of federal regulations. *See, e.g.*, RSA §§ 21-G:9, II(b) & 21-O:3, IV (rulemaking authority of NHDES Commissioner); RSA § 125-C:4 (rulemaking authority for air pollution control).

Unsurprisingly, NHDES has confirmed to EPA, and in response to inquiries from regulated parties, that the 2002 NSR Rule is *not* incorporated into the EPA-approved N.H. Regulations. *See, e.g.*, Letter from Robert R. Scott, NHDES, to Robert Varney, Regional Administrator, EPA Region I (Feb. 14, 2003) (attached hereto as **Exhibit 2**) ("[W]e do not agree that IBR effects an automatic adoption of the NSR Reform rule program elements as of Mar. 3, 2003.").[10]

NHDES must formally amend its rules to incorporate new or revised federal regulations, including the 2002 NSR Rule, and EPA must approve those amended regulations as revisions to the SIP before they may be given effect as federally enforceable requirements. EPA has not approved any such amendments; thus, the 2002 NSR Rule does not apply in New Hampshire.

2. PSNH's Own Prior Statements Confirm that 2002 NSR Rule Is Not Applicable.

PSNH's argument before this Court that the 2002 NSR Rule governs its operations strains credulity. PSNH's prior representations to NHDES reveal that, before this litigation, PSNH did not believe that the 2002 NSR Rule applied. PSNH's 2008 correspondence to NHDES projecting Unit 2's emissions after the HP/IP turbine project expressly relied on 40 C.F.R. § 52.21(b)(21)(v)—a section that was *deleted* by the 2002 NSR Rule—and EPA's 2000 NSR determination for a turbine project at Detroit Edison's Monroe facility, also before the 2002 NSR

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incorporated" because "[t]he substantive text of that citation will remain in effect, regardless of changes by the federal government, until such time as the [agency] amends its rule to incorporate an updated federal citation or some other substantive source").

[10] By design, New Hampshire *did not* adopt the 2002 NSR Rule, and has demonstrated to EPA that its preconstruction permitting program is more stringent than the 2002 NSR Rule.

Rule. *See* Compl., Ex. A-7, at 4 (citing EPA Region 5, Detroit Edison NSR Applicability Determination (May 23, 2000) ("Detroit Edison Determination"), *at* http://www.epa.gov/region07/air/nsr/nsrmemos/detedisn.pdf); *see also* Compl., Ex. A-16, at 4-5. The recently issued CAA Title V permit for Merrimack Station, attached to PSNH's memorandum supporting its motion to dismiss on standing grounds (Doc. #14-1, "Standing Memo."), repeatedly cites the governing N.H. Regulations that predate the 2002 NSR Rule—40 C.F.R. §§ 52.21(b)(21) and (33)—as authority for several monitoring and reporting provisions applicable to Unit 2.[11] Most troublingly, that memorandum, filed on the same day as PSNH's Rule 12(b)(6) motion, cites the N.H. Regulations that pre-date and were deleted by the 2002 NSR Rule, as authority for the monitoring requirement NHDES has imposed. *See* Standing Memo. at 3 (citing "40 C.F.R. § 52.21(b)(21)(iv)" [sic]).

PSNH's exclusive reliance on the wrong rule (*see* Rule 12(b)(6) Memo at 2, 6-9, 10, 13, 14) requires denial of PSNH's Rule 12(b)(6) Motion.

B. PSNH Was Required to Obtain Preconstruction Permits for the Projects under the N.H. Regulations.

PSNH advances no argument whatsoever that it complied with the preconstruction permit requirements identified in the first and third counts of CLF's Complaint. These counts allege that the 2008 and 2009 Projects, respectively, which included replacement of Unit 2's HP/IP turbine, generator rotor, and related work, constituted physical changes and/or changes in the operation

[11] *See* Standing Memo., Ex. 2, at Condition VIII(I), Table 7, Item 56; Condition VIII(J), Table 8, Item 22, and Condition VIII(K), Table 9, Item 33 (citing 40 C.F.R. §§ 52.21(b)(21) and (33) "*dated July 1, 2002*" (emphasis added)). In its comments on the draft Title V permit PSNH never questioned the applicability of the regulations and referenced those earlier regulations, not the 2002 NSR Rule. *See* Title V Director's Decision, *supra* at 33 (quoting PSNH comment that "the requirement to monitor emissions monthly to ensure compliance with 40 CFR 52.21(b)(21) and (33) as a result of correspondence between PSNH and DES, specifically identified in Footnote 29, is only applicable to MK2").

of Unit 2 under the *minor* NSR requirements of the N.H. Regulations, and that those changes will cause increased emissions of pollutants subject to the NAAQS.

The purpose of those Projects was, as PSNH represented to regulators, to increase the unit's efficiency, output, and reliability. *See* Standing Memo. at 3 n.5 (noting N.H. Public Utilities Commission finding that turbine replacement would "achiev[e] an increase of 1.87% to 4.06%" in Merrimack's energy output); sources cited at Compl., Ex. A, at 8 n.12, 9, 11-12. It is well-recognized that such changes result in lower costs per unit of electricity, driving increased utilization of the unit to sell more power into electric markets. Increased utilization will necessarily increase annual emissions, all other considerations being equal. *See* Detroit Edison Determination at 4 ("[A] physical change in the nature of [a turbine replacement] project, which provides for the more economical production of electricity, would be expected to result in the increased utilization of the affected units, and thus, increased emissions."); Compl., Ex. A-14 (NHDES staff email stating that although "changes that increase plant efficiency, extend boiler life, or reduce the amount of outages needed . . . may result in decreases (or at least no increase) in the hourly emission rate, these changes often allow the plant to run many more hours per year, ultimately increasing emissions on an annual basis, sometimes by hundreds or thousands of tons per year"); *see also* 57 Fed. Reg. 32,314, 32,328 (1992) ("[A]n increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from [PSD] review . . . ."); Declaration of Kenneth E. Traum at ¶¶ 14-15 (Ex. 2 to CLF's Memorandum of Law in Opposition to PSNH's Motion To Dismiss For Lack of Standing). PSNH itself predicted that Unit 2's emissions would increase as result of the turbine replacement and related work before the work began. Compl., Ex. A-7, at Attachment 1 (projecting increase in representative actual nitrogen oxides ("NO_x") emissions for 2008-2009 by

334 tons per year ("tpy")); Compl., Ex. A-16 at 5 (PSNH consultant report noting "cursory review of the MK2 annual current emission rates shows that a very small increase in actual emissions (<1%) is all that would be needed to exceed the NSR significant emission levels").[12]

The 2008 and 2009 Projects were "modifications."[13] PSNH was therefore required to obtain preconstruction permits for the Projects before beginning construction. *See* Env-A 602.01(a) (1990); Env-A 603.01 (1990); Env-A 101.57 (1990).

In its argument under the inapplicable 2002 NSR Rule, PSNH asserts that the Projects do not require preconstruction permits unless and until post-change emissions data show emissions increases. *See* Rule 12(b)(6) Motion at 12. This is not the law. Courts have consistently recognized the CAA's sound rationale for requiring regulated entities to undergo a permitting determination *before* construction commences. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 909 (7th Cir. 1990) (NSR intended "to ensure that pollution control measures are undertaken when they can be most effective, at the time of new or modified construction."); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 865 (S.D. Ohio 2003) ("It would be both bad law and bad public policy to intentionally require or even allow construction before determining whether the modification was permissible under the Clean Air Act."); *TVA*, 9 E.A.D. 357, 438-39 (EPA 2000), *overruled on other grounds sub nom. TVA v. Whitman*, 336 F.3d 1236 (11th Cir. 2003) ("Any other construction of the statute would turn the preconstruction permitting program on its head and would allow sources to construct without a permit while they wait to see if it would be

[12] By highlighting PSNH's projection of increased NO_x emissions, CLF is not waiving any claims it may have that PSNH should have projected increases of other pollutants subject to preconstruction permit requirements.

[13] It is reasonable to infer from the limited available information that the 2009 Projects, which were undertaken over the course of several months and further increased Unit 2's output following a "catastrophic" failure of the turbine, were expected to and did result in emissions increases in the range predicted for the 2008 Projects. *See* Compl., Ex. A-17 at 9.

proven that emissions would increase. Clearly Congress did not intend such an outcome, which would eviscerate the preconstruction dimension of the program."); *see also Envtl. Defense v. Duke Energy Corp.*, 549 U.S. 561, 568 (2007) (NSR program "required a PSD permit before" construction). Likewise, courts have consistently held that violations of preconstruction permit requirements are enforceable based solely on the emissions increases that reasonably should have been expected prior to construction. *See New York v. EPA*, 413 F.3d 3, 34-35 (D.C. Cir. 2005); *Ohio Edison Co.*, 276 F. Supp. 2d at 881. Under the N.H. Regulations, the emissions increases expected from the Projects before construction began triggered preconstruction permit requirements. PSNH failed to obtain those permits.

C. PSNH Was Required to Obtain NSR Permits for the Projects under the CAA and the N.H. Regulations.

As alleged in Counts II and IV of CLF's Complaint, the increases in emissions from the Projects, including PSNH's projected 334-tpy increase in NO_x emissions, are "significant" for CAA purposes and triggered the additional regulatory mandate that PSNH obtain a preconstruction permit with PSD/NA-NSR requirements for each of the Projects. *See* 40 C.F.R. 52.21(b)(23) (2001) (incorporated into the N.H. Regulations by Env-A 623.03(a) (2001)) (thresholds for "significant net emissions increases"); Env-A 610.03(e)(1) (1993) (25 tpy NA-NSR significance threshold); 42 U.S.C. §§ 7475(a), 7503(a).[14] As discussed above, the law is clear that PSNH was required to undergo PSD/NA-NSR permitting before construction and cannot rely on post-change emissions data to avoid NSR. With the 2002 NSR Rule of no relevance here, PSNH has made no argument to defend its noncompliance with the PSD/NA-

[14] Although the N.H. Regulations require PSD/NA-NSR permits for "significant *net* emissions increases," PSNH has previously stated that there are no other increases or decreases in actual emissions for which PSNH could have taken credit that would cause any "net emissions increase" predicted from the Projects to vary from the direct "emissions increase."

NSR permit requirements for the Projects.

D. PSNH Never Complied with the 2002 NSR Rule.

An independent problem with PSNH's effort to seek refuge in the 2002 NSR Rule is that it provides no means for PSNH to avoid preconstruction permitting. In any event, PSNH did not comply with the very provisions of the 2002 NSR Rule on which PSNH erroneously relies.[15]

Most importantly, neither the CAA nor the 2002 NSR Rule authorize the "wait and see" approach to the permitting of major modifications that PSNH has concocted. Nothing in the 2002 NSR Rule affects the fundamental CAA requirement that major modifications—*i.e.*, changes that "would result" in significant emissions increases—require permits before construction begins. *See, e.g.*, 40 C.F.R. § 52.21(b)(2)(i) (2001 and 2008 eds.). Where a source projects that physical or operational changes will cause significant emissions increases as PSNH did here, the changes *are* "major modifications" that require PSD/NA-NSR permits. *See* 40 C.F.R. § 52.21(a)(2)(iii) (2008) (subject to exceptions not at issue, "[n]o . . . major modification . . . shall begin actual construction without a permit"); 40 C.F.R. § 52.21(r)(1) (2008) ("owner or operator of a . . . modification . . . who commences construction . . . without applying for and receiving approval hereunder, shall be subject to appropriate enforcement action").

There is no mechanism, under the 2002 NSR Rule or otherwise, that authorizes PSNH to proceed with a project this is expected to be a major modification without complying with PSD/NA-NSR permitting requirements. The 2002 NSR Rule could not be clearer—its provisions for post-change monitoring, recordkeeping, and reporting apply only to "a project that is not a part of a major modification." 40 C.F.R. § 52.21(r)(6) (2008). *See also* 67 Fed. Reg. at 80,197 (2002 NSR Rule post-change reporting and recordkeeping applicable only to project that "will

[15] Even if PSNH's claims of compliance were legally sufficient, PSNH's representation would present factual issues that are inappropriate for resolution under Rule 12(b)(6). *S.E.C. v. Rocklage*, 470 F.3d 1, 5 (1st Cir. 2006).

not constitute a major modification"). Nonetheless, PSNH seeks to rewrite its exchange of correspondence with NHDES regarding the 2008 Projects as an exercise in compliance with the 2002 NSR Rule. Rule 12(b)(6) Memo. at 9, 13-15. This is an absurd effort; PSNH's and NHDES's letters referenced regulations that were deleted by the 2002 NSR Rule and never once cited the 2002 NSR Rule. But even assuming that PSNH sought to make the 2002 NSR Rule's required pre-change notice, PSNH's letter actually demonstrated that the 2008 Projects constituted a "major modification," [16] rendering the 2002 NSR Rule's post-change reporting provisions inapplicable. *See* 40 C.F.R. §§ 52.21(r)(6)(i)(c); 52.21(r)(6)(ii) (2008) (pre-change notice must show that "project is not a major modification").[17]

Nor has PSNH complied with the post-change reporting obligations of the 2002 NSR Rule, even though it represents to this Court that it has. *See* Rule 12(b)(6) Memo. at 14. Notwithstanding PSNH's commitment in its January 31, 2008 letter, PSNH has not submitted a single post-change emissions report to NHDES, more than three years after the Projects that

[16] PSNH baselessly asks the Court to credit conclusory, self-serving statements in the correspondence over the actual projections. *Compare* Compl., Ex. A-7, at 2, 4 ("there is no change or increase in air emissions associated with the HP/IP turbine and generator project") *with* Compl., Ex. A-7 at Attachment 1 (projecting 334-tpy NO_x emissions increase). *See also* Rule 12(b)(6) Memo. at 4 n.3, 13-14. However, it is the numeric projections of increases from the 2008 Projects, not the cover letter, that would control if the 2002 NSR Rule applied. *See* 40 C.F.R. § 52.21(r)(6)(i)(c) (2008).

[17] PSNH cannot contend that the projected emissions increases were, pursuant to the regulatory exception, attributable to the demand growth unrelated to the 2008 Projects, which its projections expressly did not include. Compl., Ex. A-7, at 3 ("In accordance with EPA guidance, the projection of post-change emissions does not include the portion of emissions that could have been accommodated before the change and is unrelated to the change."). The 2002 NSR Rule requires any pre-change notice to document emissions attributable to such demand growth, which PSNH's letter did not. 40 C.F.R. § 52.21(r)(6)(i)(c) (2008) (requiring "description of the applicability test used to determine that the project is not a major modification" including "amount of emissions excluded under" demand growth exclusion).

were completed on May 22, 2008.[18]

Finally, the only case PSNH cites as support for a "wait and see" approach does not endorse PSNH's reading of the 2002 NSR Rule. *United States v. DTE Energy Co.*, Civ. No. 10-13101, 2011 WL 3706585 (E.D. Mich. Aug. 23, 2011) ("*DTE*"), *appeal docketed*, No. 11-2328 (6th Cir. Oct. 25, 2011). PSNH cites *DTE* for the proposition that "[a] company that follows the 2002 NSR Reform Rule requirements, as PSNH did here, is not required to obtain a preconstruction permit unless and until the agency determines that one is required based on its monitoring of the company's post-project annual submission of emissions data." Rule 12(b)(6) Memo. at 11. PSNH implies that *DTE* interpreted the 2002 NSR Rule as suspending preconstruction permitting altogether, even for projects projected to be "major modifications." *DTE* holds no such thing. The court began by acknowledging that "[a] utility company contemplating a major modification, and thus bringing the project within NSR governance, must obtain a permit before beginning construction" and therefore, "NSR applicability must be determined before a source operator begins work . . . ." *DTE*, 2011 WL 3706585, at *2 (citing, *inter alia*, 42 U.S.C. §§ 7475(a), 7503(a), and *Ohio Edison Co.*, 276 F. Supp. 2d at 881). The court then said that "[a]s a result of the 2002 NSR changes, *if a source operator determines that its project does not constitute a major modification*, it may commence its project without an NSR permit subject to certain post-project emissions monitoring requirements." *Id.* (emphasis added). Here, PSNH projected a significant NO_x emissions increase from the 2008 Projects—a

[18] In the absence of a temporary preconstruction permit, there is no mechanism under the N.H. Regulations to require this reporting. By every April 15, PSNH submits annual emissions reports under N.H. Regulations, but they do not comply with the 2002 NSR Rule, which requires emissions reports to be submitted 60 days after the end of each year during which post-change emissions are recorded. *See* 40 C.F.R. § 52.21(r)(6)(iv) (2008). According to NHDES staff, PSNH will begin submitting separate annual reports under "new" provisions of its recently issued Title V permit, discussed above, that reference the federal regulations predating the 2002 NSR Rule, with the first report due in 2012, four years after the initial Projects.

determination that they would constitute a major modification. Thus, *DTE* forecloses (and does not adopt) PSNH's misreading of the 2002 NSR Rule.[19]

Even under the inapplicable 2002 NSR Rule and *DTE*, PSNH cannot evade preconstruction review and was obligated to obtain PSD/NA-NSR permits for the Projects, as alleged in the second and fourth counts of CLF's Complaint.[20]

E. PSNH Did Not Comply with the Reporting Requirements of the N.H. Regulations, Worsening Its Permitting Violations.

Even if PSNH contended—which it does not—that it complied with the N.H. Regulations, that argument would also fail. The N.H. Regulations make no provision for filing a pre-project notice to avoid preconstruction review. Nor has PSNH made any reports that would satisfy the post-change reporting requirement that the N.H. Regulations do contain. That requirement, applicable only to projects not expected to result in emissions increases, obligates a utility to demonstrate to regulators that its change has not caused an emissions increase. *See* 40 C.F.R. § 52.21(b)(21)(v) (2001) (requiring submission of "information demonstrating that the physical or operational change did not result in an emissions increase"); Detroit Edison Determination, *supra* at 21 (information should include "records on annual fuel use, hours of operation, and fuel sulfur content" and demonstration of contributions of "variability in control

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[19] The *DTE* facts are distinguishable from this case. In *DTE*, prior to undertaking certain renovations to its coal-fired units, the utility submitted a letter that projected certain emissions increases, but claimed that the increases were unrelated to the renovation projects. *DTE* at *4. The court held that this notice satisfied the requirements of the 2002 NSR Rule and rendered premature the United States' enforcement suit to challenge the utility's claims and to compel the utility to obtain an NSR permit. *DTE* at *4-6. Unlike the utility in *DTE*, PSNH gave no exonerating explanation for its projected *significant* emissions increase in its correspondence with NHDES before the 2008 Projects. PSNH's correspondence affirmatively stated that its projections excluded emissions increases unrelated to 2008 Projects. *See* Compl., Ex. A-7, at 3.

[20] PSNH's arguments under the 2002 NSR Rule have no relevance at all to the Complaint's first and third counts, which allege violations of the N.H. Regulations applicable to non-major modifications, or to the Complaint's fourth count, which alleges violations of PSD/NA-NSR for 2009 Projects, for which PSNH never filed a pre-project notice of any kind.

technology performance or coal characteristics" to emissions).[21] PSNH's emissions reports submitted to satisfy other requirements, *see supra* note 18, make no reference to the Projects, nor provide the level of detailed information needed to monitor the quantity of emissions resulting from the change and thus would not suffice.

The N.H. Regulations mandate that, as a result of its failure to file post-change reports, PSNH has now forfeited any opportunity to rely on "representative actual annual emissions" in projecting anticipated post-project emissions. Instead, the required comparison is between the actual emissions during the pre-change baseline period and Unit 2's *potential* emissions. *See* 40 C.F.R. §§ 52.21(b)(4) (defining "potential to emit"), 52.21(b)(21)(v) (2001) (allowing use of "representative actual annual emissions" as "actual emissions of the unit following the physical or operational change," "*provided* the source owner or operator maintains and submits to [NHDES] on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase" (emphasis added)), 52.21(b)(21)(iv) (2001) (unless qualifying to use "representative actual annual emissions," requiring use of "potential to emit" as actual emissions following change). *See also U.S. v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1104-05 (W.D.

[21] Importantly, the purpose of this reporting requirement is to serve as a backstop against increases in emissions that were not projected—not to confirm after the fact the existence of a preconstruction permit requirement. Notwithstanding PSNH's and NHDES's erroneous views, "confirmed actual" emissions decreases are irrelevant under the applicable rules. *See United States v. Cinergy Corp.*, 2005 WL 3018688, at *3 (S.D. Ind. Nov. 9, 2005) ("[F]or NSR purposes the post-project emissions rate is determined before the project begins."); *Ohio Edison Co.*, 276 F. Supp. 2d at 881 (evidence of post-change emissions data not relevant in PSD enforcement case where actual to projected actual, not "actual to confirmed actual," is legally applicable test); *Tenn. Valley Auth.*, 9 E.A.D. at 436, 444 (argument that EPA "should look to historical post-change operating data, rather than hypothetical projections, must be rejected as contrary to the requirements of the CAA and applicable NSR regulation. . . . *[C]onfirmed-actual emissions data . . . is not the best evidence of a violation of a requirement that . . . required the respondent to make a reasonable prediction prior to undertaking the particular change*" (emphasis added).).

Wis. 2001) (affirming use of "actual-to-potential" test for changes to existing unit).

It is indisputable that Unit 2's post-change potential emissions of every regulated pollutant far exceed its baseline actual emissions. Pursuant to the N.H. Regulations, PSNH's failure to report its post-change emissions makes it that much clearer that PSNH was obligated to obtain PSD/NA-NSR permits for the Projects.

II. CLF'S CLAIMS REGARDING THE 2008 AND 2009 PROJECTS SATISFY NOTICE PLEADING REQUIREMENTS.

PSNH disparages CLF's description of the Projects in the Complaint as too non-specific, vague, and formulaic to state a claim. *See* Compl. ¶¶ 49-57, 67-69; Rule 12(b)(6) Memo. at 16-19. This objection lacks legal grounding. The Complaint provides substantial details about the Projects, drawn almost exclusively from PSNH's own regulatory filings and statements, which plausibly allege that the Projects will increase emissions and thus required permits under the CAA and the N.H. Regulations. The details in the Complaint, especially when considered in concert with CLF's notice of intent to sue and its supporting exhibits, gave PSNH ample notice of the particular violations alleged. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (to prevent dismissal under 12(b)(6) a complaint must provide more than "labels and conclusions" but need not include "detailed factual allegations"); *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 8 (1st Cir. 2011) (requiring only enough detail to "give a defendant fair notice of the claim and the grounds upon which it rests") (citing *Twombly*, 550 U.S. at 555).

More fundamentally, PSNH misreads the Complaint. The Complaint describes two distinct sets of related physical and/or operational changes—one set undertaken at Unit 2 during outages during 2008 and one set undertaken at Unit 2 during an outage in 2009. *See* Compl. ¶¶ 49-57 (Counts I and II); Compl. ¶¶ 67-69 (Counts III and IV). According to PSNH itself, both sets of changes bore some relationship to the replacement of the HP/IP turbine and generator

rotor at Unit 2. All of the 2008 changes were grouped together with the turbine replacement in PSNH's statements, were similarly treated as capital expenditures, and were coordinated to occur together during the same plant downtime.[22] *See* Compl., Ex. A at 8-10 (citing Compl., Exs. A-7, A-9, A-10, A-11, A-12).[23] The 2009 changes, about which less is publicly known, addressed the failure of the turbine installed in 2008, which PSNH itself has described as "catastrophic." *See* Compl., Ex. A at 13 (citing Compl., Exs. A-17, A-18).

CLF is claiming that each distinct *set* of related changes was subject to preconstruction permit requirements under the N.H. Regulations because each set results in increased emissions due to the changes. *See* Section I.B, *supra.* CLF does not merely "recit[e] . . . the elements of a cause of action," but describes concrete, factual allegations that track the necessary legal elements of each count and establish, when accepted as true, that PSNH failed to obtain required permits in violation of the law. *Ocasio-Hernandez*, 640 F.3d at 8 (applying *Twombly* and *Iqbal* plausibility standard). As a result, CLF's claims are neither speculative nor unduly conclusory, and they easily satisfy the Supreme Court's standard of facts that plausibly support a case for relief when accepted as true. *Twombly*, 550 U.S. at 555.

[22] At this stage of the litigation, CLF is *not* claiming, as PSNH suggests, that every individual change referenced in the Complaint, standing alone, results in a significant increase in Unit 2's emissions. *See* Rule 12(b)(6) Memo. at 17-18. Ultimately, the precise relationships of the individual changes to each other and to the overall emissions increases are factual issues to be addressed through discovery. *Ocasio-Hernandez*, 640 F.3d at 17 (plausibility standard "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of the illegal [conduct]") (quoting *Twombly*, 550 U.S. at 556).

[23] In light of PSNH's generic descriptions of the 2008 Projects as, *e.g.*, "balance of plant projects to be completed during MK2's 2008 outage . . . *including* the HP/IP project and *associated* generator repair work." CLF's Complaint lists all known outage work as plausibly included as part of the alleged sets of physical and operational changes. *See* Compl., Ex. A-7 at 1 (emphasis added); *see also* Compl., Ex. A-11, at 1-2.

III. CLF'S CLAIMS REGARDING THE 2008 AND 2009 PROJECTS ARE NOT PRECLUDED BY A NHDES PERMITTING PROCEEDING FOR A DIFFERENT PROJECT.

PSNH suggests that "CLF may be barred from relitigating" our allegations regarding the Projects based on the NHDES temporary permit proceeding regarding PSNH's installation of a flue gas desulphurization system at Merrimack Station (the "Scrubber"). Rule 12(b)(6) Memo. at 16 n.12. PSNH waived these arguments by raising them in only a perfunctory manner—in a footnote, with oblique references to a state proceeding that PSNH only passingly explained. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999) (First Circuit has "repeatedly held that arguments raised only in a footnote or in a perfunctory manner are waived"); *Marine Polymer Techs, Inc. v. HemCon, Inc.*, No. 06-CV-100-JD, 2010 WL 840470, at *1 (D.N.H. Mar. 3, 2010) ("matters referred to in a perfunctory manner, such as a mere mention in a footnote, without developed argumentation are deemed to be waived").

In any event, neither the NHDES nor its Air Resources Council ("ARC") made a "final decision" regarding preconstruction permit requirements for the Projects that CLF could have appealed. In response to the effort of *another party* to raise the 2008 turbine replacement as a separate issue in the Scrubber proceeding, the ARC decided that it lacked jurisdiction to consider NSR permit requirements for that project because the project had not yet been addressed by a "final action" by NHDES. ARC, Decision and Order, Docket Nos. 09-10 & 09-11, at 2-4 (Oct. 29, 2009), http://goo.gl/trZCH (citing N.H. RSA §§ 21-O:11, IV; 21-O:14, I). PSNH argued in support of that result.[24]

[24] PSNH's counsel argued repeatedly and successfully to NHDES and then the ARC that permitting requirements applicable to the Projects were outside the scope of the Scrubber temporary permit proceeding. *See, e.g.*, PSNH's Motion for Clarification, ARC Docket Nos. 09-10 & 09-11, at 3 (Aug. 13, 2009), http://goo.gl/meK20; PSNH's Reply to New Hampshire Sierra Club Memorandum Re the Completeness of the Application for Temporary Permit TP-0008 and

The outcome of the NHDES proceeding cannot bar CLF's claims under the doctrines of res judicata and collateral estoppel because, at a minimum, the ARC decision regarding its lack of jurisdiction provided no "final judgment on the merits" regarding any claim raised by CLF in its Complaint. *See Muniz Cortes v. Intermedics, Inc.*, 229 F.3d 12, 14 (1st Cir. 2000) (judgment on tribunal's jurisdiction is not judgment "on the merits"); *Meier v. Town of Littleton*, 154 N.H. 340, 342 (2006) (in New Hampshire, *res judicata* law requires that "a final judgment on the merits must have been rendered in the first action"); *Farm Family Mut. Ins. Co. v. Peck*, 143 N.H. 603, 605 (1999) (reciting required elements for collateral estoppel). *See also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4436 (2011). Moreover, at no time were the 2009 Projects or any minor NSR preconstruction permit requirements ever raised in that proceeding.[25]

CONCLUSION

PSNH's unapologetic refusal to obtain the required permits and accept public scrutiny of its activities has undermined the integrity of New Hampshire's air regulatory program, resulting in harmful emissions that have degraded public health and the environment. In its effort to evade required regulatory review and concoct a *post-hoc* story of compliance, PSNH exclusively relies

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Request for Evidentiary Hearing, ARC Docket Nos. 09-10 & 09-11, at 1 (July 27, 2009), http://goo.gl/05BLM.

[25] PSNH's footnote seeking dismissal of the first four counts of CLF's Complaint on ripeness, comity, and abstention grounds is so lacking in content that CLF cannot reasonably be expected to respond. *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d at 60 n.17 (argument in footnote is waived). Nevertheless, courts routinely reject arguments for dismissing citizen suits based in these doctrines. *See Chico Serv. Station, Inc. v. Sol P.R. Ltd.*, 633 F.3d 20, 31 (1st Cir. 2011) (discussing inapplicability of abstention unless state is diligently prosecuting same violations); *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 929 (7th Cir. 2008) (unnecessary for citizen plaintiffs to wait for state determination to secure federal remedy authorized by statute); *Williams v. Ala. Dept. of Transp.*, 119 F. Supp. 2d 1249, 1256 (M.D. Ala. 2000) (abstention "particularly inappropriate" where federal statute "expressly allows for citizens to bring suit in order to ensure uniform enforcement of federal environmental laws").

on a rule that does not apply in New Hampshire and offers arguments without basis in the CAA or New Hampshire air quality regulations. The CAA's citizen enforcement mechanism exists to compel compliance against just such intransigence. PSNH's Rule 12(b)(6) Motion is therefore without merit and should be denied.

Respectfully submitted,

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Dated: November 10, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2011, a copy of the foregoing memorandum was served electronically via ECF on the following counsel of record: Wilbur A. Glahn, III, Esq. (wilbur.glahn@mclane.com), Barry Needleman, Esq. (bneedleman@mclane.com), Jarrett B. Duncan, Esq. (jarrett.duncan@mclane.com), Linda T. Landis, Esq. (landilt@nu.com), Michael D. Freeman, Esq. (mfreeman@balch.com), Spencer M. Taylor, Esq. (staylor@balch.com), and Elias L. Quinn, Esq. (elias.quinn@usdoj.gov).

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