UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLOBAL COMMUNITY MONITOR, a California nonprofit corporation; LABORERS' INTERNATIONAL UNION OF NORTH AMERICA LOCAL UNION NO. 783, an organized labor union; RANDAL SIPES, JR., an individual; RUSSEL COVINGTON, an individual,

Plaintiffs,

v.

MAMMOTH PACIFIC, L.P., a California Limited Partnership; ORMAT NEVADA, INC., a Delaware Corporation; ORMAT TECHNOLOGIES, INC., a Delaware Corporation; and DOES I-X, inclusive,

Defendants.

No. 2:14-cv-01612-MCE-KJN

MEMORANDUM AND ORDER

Plaintiffs Global Community Monitor, Laborers' International Union of North America Local Union No. 783, Randal Sipes, Jr., and Russel Covington (collectively, "Plaintiffs") filed a citizen suit pursuant to section 304(a) of the federal Clean Air Act, 42 U.S.C. § 7604, which allows any person to bring a lawsuit in federal court against any person who violates an "emission standard or limitation."[1]

[1] The term "emission standard or limitation" includes "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" and "any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator,

Presently before the Court are two motions: (1) Defendants' Motion to Dismiss for Failure to Join Necessary and Indispensable Parties under Federal Rules of Civil Procedure ("FRCP") 12(b)(7) and 19; and (2) Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State a Claim for Which Relief Can be Granted under FRCP 12(b)(1) and 12(b)(6). For the reasons stated below, Defendant's first Motion (ECF No. 14) is DENIED and Defendant's second Motion (ECF No. 17) is GRANTED in part and DENIED in part.[2]

BACKGROUND

Plaintiffs' Complaint asserts eight causes of action against Defendants Mammoth Pacific, L.P., Ormat Technologies, Inc., and Ormat Nevada, Inc. (collectively "Defendants"), the owners and operators of several geothermal plants located in the Great Basin Valleys Air Basin. Three of the plants—(1) Mammoth Pacific I (MP-I), which is made up of MP-I East and MP-I West; (2) Mammoth Pacific II (MP-II); and (3) Pacific Lighting Energy Systems Unit I (PLES-I)—are operational. Another plant, M-1, is a proposed replacement plant for MP-I that has thus far only received local land use permits.

At the plants, Defendants use hot geothermal water pumped from deep underground to heat volatile organic compounds ("VOC"), which in turn spin turbines to generate electricity. The facilities emit VOCs (in the form of fugitive emissions of either n-pentane or isobutene) through valves, flanges, seals, or other unsealed joints in facility equipment. VOCs combine with nitrogen oxides to form ozone in the atmosphere. Ozone is a criteria air pollutant regulated by the Clean Air Act, and thus VOCs are

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any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f).

[2] Because oral argument would not have been of material assistance, the Court ordered this matter submitted on the briefing. E.D. Cal. L. R. 230(g).

regulated as ozone precursors. According to the United States Environmental Protection Agency ("EPA"), breathing ground-level ozone can result in a number of negative health effects, including induction of respiratory symptoms, decrements in lung function, and inflammation of airways. Plaintiffs are individuals and organizations with members who live, work, and recreate in direct vicinity of the plants.

The Great Basin Unified Air Pollution Control District (the "Air District") is the state agency charged with developing air regulations for Mono, Inyo and Alpine Counties. The Air District has established rules and regulations to reduce the emission of ozone-forming pollutants. On August 20, 1979, the Air District promulgated Rules 209-A and 209-B. Rule 209-A prohibits the Air District from issuing an authority to construct ("ATC") permit for any new stationary source or modification[3] to a stationary source that emits 250 pounds per day or more of VOCs unless the facility obtains emissions offsets and installs the best available control technology ("BACT"). Emissions offsets are reductions from other facilities equal to the amount of increased emissions and BACT is advanced pollution control technology that dramatically reduces pollution. Rule 209-B prohibits the Air District from issuing a permit to operate ("PTO") for any new or modified stationary source to which Rule 209-A applies unless the owner or operator of the source has obtained an ATC permit granted pursuant to Rule 209-A. In combination, these rules ensure that all required emissions offsets will be implemented at start-up and maintained throughout the source's operational life. Rules 209-A and 209-B were approved by the EPA as part of California's State Implementation Plan ("SIP") on June 18, 1982, making the regulations fully-enforceable federal law. See Safe Air for Everyone v. U.S. EPA, 488 F.3d 1088, 1096-97 (9th Cir. 2007).

Plaintiff's Complaint alleges that Defendants violated both Rule 209-A and 209-B. With respect to the existing plants, Plaintiffs allege that while originally separately permitted as four plants in the late 1980s, in 2010 Defendants applied for and obtained

[3] Modification is defined as "any physical change in, change in method of operation of, or addition to an existing stationary source, except that routine maintenance or repair shall not be considered to be a physical change." Rule 209-A(F)(2).

PTOs from the Air District that authorize combined emissions limits for MP-I East and MP-I West as a single source and for MP-II and PLES-I as a single source. Each single source was permitted to emit up to 500 pounds per day of fugitive VOC emissions—double the limit under Rule 209-A—without receiving ATC permits that required installing BACT and obtaining emissions offsets. Additionally, Plaintiff alleges that in 2013, the Air District issued ATC permits for a modification of MP-I without requiring Defendants to install BACT or obtain emissions offsets.

Plaintiff's Complaint also alleges that Defendants have operated the three existing geothermal plants for over twenty years as a single stationary source without applying for the permits required by Rules 209-A and 209-B.[4] Plaintiffs contend that the complex should be viewed as a single stationary source because the plants are owned and operated by the same company, located on adjacent lands, and share a single geothermal wellfield, a common control room, common pipes that carry geothermal liquid to and from wellfield and other common facilities.

Plaintiffs request that the Court issue a preliminary and permanent injunction requiring Defendants to cease and desist from any operation of the existing plants until Defendants install BACT and obtain emissions offsets.

While Plaintiffs originally challenged the proposed M-1 facility's permitting and sought an injunction to halt construction, they now concede that the Court does not have jurisdiction to consider these claims since the Air District has yet to issue permits to Defendants for this plant. ECF No. 21 at 8. Accordingly, Plaintiffs' sixth and seventh causes of action, which pertain to the M-1 facility, are DISMISSED. Additionally, because of this concession, on the second Motion to Dismiss, the Court will consider only Defendants' remaining argument that Plaintiffs failed to state a claim under which

[4] Rule 209-A defines "Stationary Source" as

> any aggregation of air-contaminant emitting equipment which includes any structure, building, facility, equipment, installation or operation (or aggregation thereof) which is located on one or more bordering properties within the District and which is owned, operated, or under shared entitlement use by the same person.

relief can be granted in their first, second, third, fourth, fifth and eighth causes of action and thus the case should be dismissed under FRCP 12(b)(6).

STANDARD

On a motion to dismiss for failure to state a claim under FRCP 12(b)(6), all allegations of material fact must be accepted as true and construed in the light most favorable to the nonmoving party. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). FRCP 8(a)(2) "requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to '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) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). A complaint attacked by a FRCP 12(b)(6) motion to dismiss does not require detailed factual allegations. However, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal citations and quotations omitted). A court is not required to accept as true a "legal conclusion couched as a factual allegation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). "Factual allegations must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, § 1216 (3d ed. 2004) (stating that the pleading must contain something more than "a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")).

Furthermore, FRCP "8(a)(2) . . . requires a showing, rather than a blanket assertion, of entitlement to relief." Twombly, 550 U.S. at 555 n.3 (internal citations and quotations omitted). Thus, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirements of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." Id. (citing Wright &

Miller, supra, at 94, 95). A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Id. at 570. If the plaintiffs "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. However, "[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" Id. at 556 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

A court granting a motion to dismiss a complaint must then decide whether to grant leave to amend. Leave to amend should be "freely given" where there is no "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment . . . ." Foman v. Davis, 371 U.S. 178, 182 (1962); see Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (listing the Foman factors as those to be considered when deciding whether to grant leave to amend). Not all of these factors merit equal weight. Rather, "the consideration of prejudice to the opposing party . . . carries the greatest weight." Id. (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 185 (9th Cir. 1987)). Dismissal without leave to amend is proper only if it is clear that "the complaint could not be saved by any amendment." Intri-Plex Techs. v. Crest Group, Inc., 499 F.3d 1048, 1056 (9th Cir. 2007) (citing In re Daou Sys., Inc., 411 F.3d 1006, 1013 (9th Cir. 2005)); "Leave need not be granted where the amendment of the complaint . . . constitutes an exercise in futility." Ascon Props., Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989).

ANALYSIS

In their 12(b)(6) Motion, Defendants argue that Plaintiffs' complaint fails to state a claim for which relief can be granted for five reasons: (1) the Clean Air Act's new source performance standards do not apply to Defendants' facilities, so Plaintiffs' claims under Clean Air Act section 111(e) fail as a matter of law; (2) Defendants' facilities are not

located in a federal ozone nonattainment area, and thus Plaintiffs' claims under Clean Air Act section 173(a) fail as a matter of law;[5] (3) Rule 209 does not apply to Defendants as the only emissions from Defendants' facilities are fugitive, and Rule 209 does not explicitly include fugitive emissions; (4) Plaintiffs have failed to allege facts showing a violation of Rules 209-A or 209-B; and (5) Plaintiffs may not collaterally attack Defendants' existing permits via a citizen suit.

Before reaching the merits of Defendants' 12(b)(6) Motion, the Court must first determine whether it has jurisdiction to hear this case.

A. Necessary and Indispensable Parties

Defendants argue that the Court lacks jurisdiction because the Air District and the EPA are necessary and indispensable parties to this case. The Clean Air Act creates an "unusual, bifurcated jurisdictional scheme" that divides jurisdiction between the federal district and circuit courts. Sierra Club v. Thomas, 828 F.2d 783, 794 (D.C. Cir. 1987). Pursuant to the Clean Air Act's judicial review provision, "[a] petition for review of the [EPA] Administrator's action in approving or promulgating any [state] implementation plan . . . or any other final action of the Administrator under this chapter . . . may be filed only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. § 7607(b)(1) (emphasis added). Certainly, the Air District may be joined without depriving the Court of jurisdiction. But if the Court determines that the EPA is a necessary and indispensable party because Plaintiffs are asking the Court to review a final action by the EPA, only the Ninth Circuit Court of Appeals would have jurisdiction over this case, and this Court would have to dismiss it.

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[5] The Court does not address these first two arguments, as Plaintiffs have essentially conceded—despite language in the Complaint to the contrary—that their arguments are based on Rule 209 and not sections 111(e) and 173(a) of the Clean Air Act. See Pls.' Opp., ECF No. 21, at 14 ("The instant case does not seek to enforce nationwide 'standards of performance' . . . the action seeks to enforce Rule 209."). Any allegations as to violations of sections 111(e) and 173(a) in the Complaint are therefore STRICKEN. See Compl. at ¶¶ 120, 104, 119, 127, 134. Despite these concessions, the Court must still consider whether Defendants have violated Rule 209, a full-enforceable federal law independent of sections 111(e) and 173(a).

Under FRCP 19, the Court must make three successive inquiries to determine if a party is necessary and indispensable. First, the Court "must determine whether a nonparty should be joined under Rule 19(a)," in other words, whether the absent party is "necessary." E.E.O.C. v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005). If the Court determines that an absent party is a "necessary party" under FRCP 19(a), "the second stage is for the court to determine whether it is feasible to order that the absentee be joined." Id. "Finally, if joinder is not feasible, the court must determine at the third stage whether the case can proceed without the absentee, or whether the absentee is an 'indispensable party' such that the action must be dismissed." Id. A person is considered an "indispensable party" when "he cannot be made a party and, upon consideration of the [FRCP 19(b)] factors . . . , it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it." Id. at 780. The inquiry under FRCP 19 is "a practical one and fact specific . . . and is designed to avoid the harsh results of rigid application." Makah Indian Tribe v. Verity, 920 F.3d 555, 558 (1990) (citations omitted). The moving party, here Defendants, has the burden of persuasion in arguing for dismissal. Id.

"There is no precise formula for determining whether a particular non-party is necessary to an action." Confederated Tribes of Chehalis Indian Reservation v. Lujan, 928 F.2d 1496, 1498 (9th Cir. 1991) (internal citations and quotations omitted). "The determination is heavily influenced by the facts and circumstances of each case." Id. In conducting this analysis, the Court must examine whether it "can award complete relief to the parties present without joining the non-party" or, alternatively, "whether the non-party has a 'legally protected interest' in [the] action that would be 'impaired or impeded' by adjudicating the case without it." Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, Cal. v. City of Los Angeles, 637 F.3d 993, 997 (9th Cir. 2011) (internal citations omitted). If the Court answers either of these questions in the affirmative, the absent party is a "required party" under Rule 19(a). Id.

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The "complete relief" factor considers whether the existing parties can obtain "consummate rather than partial or hollow relief" and whether there is a real possibility of "multiple lawsuits on the same cause of action." Northrop Corp. v. McDonnel Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983). According to Plaintiffs, "[c]omplete relief in this matter would be an order from the Court requiring Defendants to cease and desist from . . . operation of its geothermal facilities until they comply with Rule 209-A and 209-B and an order requiring defendants to install BACT and obtain offset emissions for those facilities in accordance with Rule 209-A and 209-B." Pls.' Opp., ECF No. 22, at 8.

It is undisputed that the Court has the authority to enforce Rule 209-A and Rule 209-B in this citizen suit. "Approved SIPs may be enforced 'by either the State, the EPA, or via citizen suits.'" Cal. Dump Truck Owners Ass'n v. Nichols, No. 13-15175, 2015 WL 1883368, at *1 (9th Cir. Apr. 27, 2015) (citing Bayview Hunters Point Cmty. Advocates v. Metro. Transp. Comm'n, 366 F.3d 692, 695 (9th Cir. 2004)). When a citizen suit is brought to compel enforcement, the Court "has the authority and indeed the responsibility to enforce the provisions of [a] SIP." Citizens for a Better Env't v. Deukmejian, 731 F. Supp. 1448, 1454 (N.D. Cal. 1990) (quoting NRDC v. New York, 668 F. Supp. 848, 854 (1987)); see also 42 U.S.C. § 7604(a) ("The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be."). Thus, the issue before the Court is whether enforcement of Rule 209—Plaintiffs' requested relief—requires the joinder of the Air District and the EPA.

Defendants argue that enforcement would require ordering the Air District to issue new permits, relief the Court cannot provide without the Air District's joinder. Defendants further argue that Plaintiffs' interpretation of the Rules 209-A and 209-B is incorrect and that "in order to grant Plaintiffs' requested relief, the Court must order the [Air District] to interpret and apply Rule 209 in a manner completely at odds with both the plain language of the Rule and the District's method of administering it." Defs.' Reply, ECF

No. 25, at 5. Additionally, since EPA previously adopted Rule 209 as part of the SIP, and only the EPA can make changes to the SIP, Defendants argue that complete relief would also require joinder of the EPA. See Safe Air for Everyone, 488 F.3d at 1097.

Further complicating the issue is the fact that Plaintiffs later state, in passing, that they seek "relief that would oblige Defendants to apply for and obtain permits that comply with Rule 209-A and 209-B." Pls.' Opp'n., ECF No. 22, at 10. While the Court would have the authority to order Defendants to apply for permits, it does not have the authority to order Defendants to obtain permits. Only the Air District can issue permits to Defendants, and the Air District is not currently a party to this case. However, the Court does not need to definitively decide at this point in the litigation whether enforcement of Rule 209 requires Defendants to obtain new permits that contain BACT and emission offset requirements, or if the Court can simply order Defendants to install BACT and acquire emissions offsets. Even if Defendants were required to obtain new permits from the Air District—and are therefore forced to cease operations until the Air District completes a review of the permit applications—Plaintiffs would have the relief that they seek: fewer VOC emissions in the Great Basin Valleys Air Basin. See Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res., Inc., 299 F.3d 1007, 1014-15 (9th Cir. 2002) (finding complete relief could be achieved without the state agency because plaintiff would find complete relief regardless of whether defendant was able to acquire a permit). Thus, the prospective benefit does not depend "on independent decisions of government entities not a party to the pending lawsuit." California Dump Truck Owners Association v. Nichols, 924 F. Supp. 2d 1126, 1147 (E.D. Cal. 2012) (quoting San Joaquin River Group Auth. v. Nat'l Marine Fisheries, 819 F. Supp. 2d 1077, 1097 (E.D. Cal. 2011)), aff'd, No. 13-15175, 2015 WL 1883368 (9th Cir. Apr. 27, 2015). As discussed more fully below, modification of Rule 209 (and thus the SIP) is not a conceivable outcome of this case. Therefore, complete relief does not require joinder of the EPA.

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Alternatively, in determining whether an absentee is a "necessary" party under FRCP 19, the Court may consider "whether the non-party has a 'legally protected interest' in [the] action that would be 'impaired or impeded' by adjudicating the case without it." Paiute-Shoshone Indians, 637 F.3d at 997 (internal quotations and citations omitted). The absentee's interest "must be more than a financial stake, and more than speculation about a future event." Makah Indian Tribe, 910 F.2d at 558 (citations omitted). Impairment of the absentee's interest "may be minimized if the absent party is adequately represented in the suit." Id. (internal citations omitted). In assessing whether an existing party can adequately represent the interests of the absent party, courts consider the following three factors: (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments," (2) "whether the party is capable of and willing to make such arguments," and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) (internal citations and quotations omitted).

In arguing that the Air District and EPA have a legally protected interest in this action, Defendants liken this case to Nichols, where this Court held that "[a] public agency has an interest in a lawsuit that could result in the invalidation or modification of one of its . . . rules [or] regulations." 924 F. Supp. 2d at 1147 (quoting E.E.O.C., 610 F.3d at 1082). Contrary to Defendants' argument, however, this action is not analogous to Nichols.

In Nichols, the plaintiff challenged the constitutionality of a regulation that became part of the SIP during the course of litigation. The plaintiff sought a declaration from the Court that the regulation was preempted by federal law and sought a permanent injunction on the regulation's enforcement. Here, in contrast, Plaintiffs have brought a citizen suit ostensibly to enforce compliance with two regulations that were promulgated in the 1980s. Plaintiffs argue that Rule 209, as written, requires BACT or emissions offsets at Defendants' plants. Plaintiffs are not seeking to have the rule invalidated or

altered like the plaintiffs in Nichols, nor would this suit have the possible outcome of invalidating or altering Rule 209. Thus, this situation is not a direct challenge to EPA's final action of adopting the SIP, nor does it have the practical effect of upsetting EPA's final action. See id. at 1139.

In adjudicating a citizen suit, the Court only has jurisdiction to enforce a regulation as written. See El Comité Para El Beinstar de Earlimart v. Warmerdam, 539 F.3d 1062, 1066, 1073 (9th Cir. 2008) (holding that in a citizen suit under the CAA, the district court had jurisdiction only to enforce an "emission standard or limitation," and that any challenge related to the validity of the SIP "would have to be brought as a petition to review the EPA's rulemaking process"). "Plaintiffs seeking to bring a citizen suit for violation of an emission standard or limitation contained in a SIP must allege a violation of a specific strategy or commitment in the SIP." Cmtys. for a Better Env't v. Cenco Ref. Co., 180 F. Supp. 2d 1062, 1077 (C.D. Cal. 2001) (internal citation and quotation omitted). A citizen suit "may not be maintained solely to force regulators to attain the [air quality standards] or to modify or amend a SIP to conform to a plaintiff's own notion of proper environmental policy." Id.[6] Thus, there are two possible outcomes in this case: (1) Plaintiffs are correct and Defendants have violated Rule 209, resulting in a Court order that enforces Rule 209 against Defendants; or (2) Plaintiffs are incorrect and Defendants have not violated Rule 209, resulting in a judgment in Defendants' favor. There is no third option in which this suit, as currently brought, results in the modification of Rule 209.

While the regulations are not in danger of invalidation or modification, the Court agrees with Defendants that Plaintiffs directly challenge the Air District's previous application, and therefore interpretation, of Rule 209. Multiple permits have been issued to Defendants, and during each of those permitting processes, the Air District determined that Defendants were not required to install BACT or obtain emissions

[6] Defendants' argument that this action was incorrectly brought as a citizen suit is discussed below.

offsets under Rule 209. The onus was on the Air District to make this determination.[7] Thus, it is disingenuous for Plaintiffs to claim that their Complaint does not suggest "that the District misapplied its own rules." Pls.' Opp'n., ECF No. 22, at 10. That is exactly what the Complaint alleges. See Compl., ECF No. 1, at ¶ 8 (Defendants applied for "and obtained" permits in violation of Rule 209-A and 209-B); ¶¶ 81-82 (Defendants "applied for, and [the Air District] issued" ATC permit in violation of Rule 209-A); ¶ 87 (Defendants applied for "and obtained" ATC Permit in violation of Rule 209-A); ¶¶ 94-95 (Defendants applied for "and obtained" PTO permits from the Air District which should have been denied by the Air District); ¶¶ 103-104 (Defendants applied for "and obtained" PTO permits from the Air District in violation of Rule 209-B); and ¶ 119 (Defendants "illegally obtained PTOs that fail to comply with Rule 209-B" from the Air District).

However, a challenge to the interpretation of regulations does not rise to the level of "invalidation or modification." Citizen suits frequently challenge the interpretation of a regulation, as the suits are often brought under a claim that a state agency issued an invalid permit or incorrectly determined that a permit was not necessary. See Hammersly, 299 F.3d at 1013-15 (determining that a citizen suit was appropriate to challenge the state agency's failure to issue a permit); Cenco, 180 F. Supp. 2d at 1082 (holding that even though defendants already had a permit from the local air district, an allegedly invalid permit does not insulate the applicant from a citizen suit).

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[7] The first section of the regulation states:

> The Air Pollution Control Officer shall deny an authority to construct for any new stationary source or modification, or any portion thereof, unless:
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> The new source or modification, or applicable portion thereof, complies with the provisions of this rule and all other applicable district rules and regulations; and
>
> The applicant certifies that all other stationary sources in the State which are owned or operated by the applicant are in compliance, or on approved schedule for compliance, with all applicable emissions limitations and standards under the Clean Air Act (42 USC 7401 et. seq.) and all applicable emission limitations and standards which are part of the State Implementation Plan approved by the Environmental Protection Agency.

Rule 209-A(A) (emphasis added).

The general rule is that "federal and state agencies administering federal environmental laws are not necessary parties in citizen suits to enforce the federal environmental laws." Hammersley, 299 F.3d at 1014 (citing Friends of Earth v. Carey, 535 F.2d 165, 173 (2d Cir. 1976) (EPA not a necessary party in Clean Air Act citizen suit); Metro. Wash. Coal. for Clean Air v. Dist. of Columbia, 511 F.2d 809, 814-15 (D.C. Cir. 1975) (per curiam) (same); Sierra Club v. Young Life Campaign, Inc., 176 F. Supp. 2d 1070, 1078-80 (D. Colo. 2001) (state not necessary party in Clean Water Act citizen suit); Student Pub. Interest Research Group of N.J., Inc. v. Monsanto Co., 600 F. Supp. 1479, 1484 (D. N.J. 1985) (state and EPA not necessary parties in Clean Water Act citizen suit). While that maxim usually refers to situations where the agencies decide not to prosecute the action themselves, it also applies to situations like this, where the agency is a possible defendant. The citizen suit provision allows citizens to sue the violators directly without including the administering agencies as defendants. Id.

While the Air District may have an interest in defending its current interpretation of the rules, this interest would be well represented by Defendants, as the beneficiaries of permits issued under that current interpretation. The Court does not doubt that the interests of Defendants "are such that [they] will undoubtedly make all of the absent party's arguments," that Defendants are "capable of and willing to make such arguments," and that the Air District "would offer any necessary element to the proceedings that the present parties would neglect." Shermoen, 982 F.2d at 1318. Therefore, this is not enough to make the Air District a necessary party.

Because the EPA and Air District do not have a sufficient interest in this case to be necessary parties, they also cannot be considered indispensable. "Indispensable parties under Rule 19(b) are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." E.E.O.C., 400 F.3d at 780 (internal quotation marks and citation omitted). Accordingly, the Court

has jurisdiction to consider the merits of this case and must deny Defendants' Motion to Dismiss for Failure to Join Necessary and Indispensable Parties.

B. FRCP 12(b)(6) Motion to Dismiss

The Court will first address the threshold issue of whether this case was appropriately brought as a citizen suit. Plaintiffs' Complaint is based on two assertions: (1) that permits issued for Defendants' existing plants were improperly issued by the Air District because they did not comply with Rule 209; and (2) that Defendants should have sought a permit for the "Complex" of plants because it qualifies as a stationary source under Rule 209. Pursuant to section 304(a) of the federal Clean Air Act, a citizen suit may be brought against any person who violates an "emission standard or limitation." Contrary to Defendants' argument that a citizen suit must be brought in order to enforce a standard or limitation in a permit, the term "emission standard or limitation" includes "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard" and "any other standard, limitation, or schedule established . . . under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations." 42 U.S.C. § 7604(f) (emphasis added).

Rule 209 is an emissions standard or limitation contained in California's SIP. The regulation requires applicants to obtain permits prior to construction (ATC) and prior to beginning operations (PTO). As discussed previously, the fact that the Air District has issued permits that purport to comply with Rule 209 or have chosen not to issue a permit for the Complex as a whole under Rule 209 does not make this action inappropriate for a citizen suit. See Cenco, 180 F. Supp. 2d at 1082; Hammersley, 299 F.3d at 1011-12. Once it is established that the citizen suit seeks to enforce an emissions standard or limitation, the Court must only confirm that the procedural requirements were met. Hammersley, 299 F.3d at 1012. Here, Plaintiffs have complied with the procedural requirements by notifying the EPA and the Air District sixty days before commencing this litigation. Thus, the Court has jurisdiction to consider the merits of Plaintiffs' claims.

The Court will next address whether Rule 209 applies to Defendants' fugitive emissions. The only emissions from Defendants' plants are fugitive; that is, they come from leaks at the plant and not from a smoke stack or chimney like a "point source" emission. See Ala. Power v. Costle, 636 F.2d 323, 368 (D.C. Cir. 1979). There is no definition for "fugitive emissions" in Rule 209. Defendants argue that because Rule 209 does not define "fugitive emissions," the Rule should be interpreted in a manner consistent with other federal law regarding fugitive emissions. Under federal law, fugitive emissions from a stationary source are not included in determining whether the source is a "major stationary source" (unless the source belongs in one of 28 listed categories, geothermal binary power plants not included). See 40 CFR. 70.2. Defendants' plants fall under the minor source program, so this federal rule is not directly on point.[8]

The plain language of Rule 209 simply states that the rule applies to "any pollutant for which there is a national ambient air quality standard (excluding carbon monoxide), or any precursor of such pollutant." Rule 209-A(B)(2)(a). As previously stated, VOCs are regulated as precursors to Ozone, for which there is a national ambient air quality standard. "As a general interpretative principle, 'the plain meaning of a regulation governs.'" Safe Air for Everyone, 488 F.3d at 1097 (quoting Wards Cove Packing Corp. v. Nat'l Marine Fisheries Serv., 307 F.3d 1214, 1219 (9th Cir. 2002)). "The plain language of a regulation, however, will not control if 'clearly expressed [administrative] intent is to the contrary or [if] such plain meaning would lead to absurd results.'" Id. (quoting Dyer v. United States, 832 F.2d 1062, 1066 (9th Cir. 1987)). Defendants argue that when calculating total emissions it would be absurd for fugitive emissions to be exempt for large, major sources but not for minor sources. While persuasive, at this stage in the litigation, the Court is not willing to infer a distinction

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[8] In the regulations of major sources, the Air District does include the same definition and exception found in the federal regulations. See Rule 218(B)(7) ("Fugitive emissions of these pollutants shall be considered in calculating total emissions for stationary sources in accordance with 40 CFR Part 70.2); and Rule 217(II)(Z)(2) (same).

between fugitive and point source emissions in Rule 209 when they are not clearly delineated in the Rule itself.[9]

The Court also notes that the Air District has been regulating Defendants' emissions, even though they are fugitive, in each permit it issued to Defendants over the past 25 years. The permits have also limited the fugitive emissions from Defendants' plants to 250 pounds per day, ostensibly to avoid triggering Rule 209's BACT and emission offsets requirements. Defendants argue that a permit limitation is distinct from a requirement in the regulation itself to consider fugitive emissions when calculating a net emissions increase. While this may be true, at this stage in the litigation, the Court finds that the plain language of the Rule along with the previous regulation of fugitive emissions by the Air District is sufficient to show that Plaintiffs may have a cause of action against Defendants under Rule 209 based solely on fugitive emissions.

At the conclusion of the parties' briefing on the Motions to Dismiss, Plaintiffs raise two remaining arguments as to how Defendants violated Rule 209-A:[10] (1) that in 2010, the issuance of PTO permits combining of MP-I West with MP-I East and MP-II with PLES-I violated Rule 209 because the permits did not impose BACT and offset requirements despite the fact that the emissions could be as high as 500 pounds per day per combined plant; and (2) that Defendants' four existing plants constitute a single stationary source within the meaning of Rule 209, and thus when each facility was permitted, Defendants added another 250 pounds per day of VOCs to the "Complex" without obtaining the appropriate permits under Rule 209.

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[9] This is especially true since the major source regulations cited by Defendants show that the Air District is capable of making a distinction between fugitive and point source emissions, but chose not to do so in this regulation.

[10] By failing to oppose Defendants' arguments in their Motion to Dismiss, Plaintiffs appear to concede that the 2013 modification, which involved an upgrade to MP-I's facility turbines and condensers and approved a change in motive fluid in order to decrease emissions, does not trigger the BACT or offset requirements of Rule 209. See Tatum v. Schwartz, No. 2:06-cv-01440-DFL-EFB, 2007 WL 419463, *3 (E.D. Cal. Feb. 5, 2007). Therefore, Plaintiffs' First Cause of Action, which pertains to the 2013 modification, must be DISMISSED.

In regard to the combining of the plants in 2010, Defendants argue that in both cases, two 250 pounds per day plants became one 500 pounds per day plant, which cannot lead to an increase in emissions. Defendants contend that the amount of emissions allowed in the permit establishes the emissions amount when calculating whether there would be an increase. Rule 209 does state that "emissions from an existing source shall be based on the specific limiting conditions set forth in the source's authority to construct and permit to operate, and, where no such conditions are specified, on the actual operating conditions of the existing source averaged over the three consecutive years immediately preceding the date of application." Rule 209-A(C)(2) (emphasis added). Since there were conditions in the permits limiting these plants to 250 pounds per day, that amount is considered the emissions level for those existing sources.

However, there is a different test used for determining whether there is a net increase in emissions.

> A net increase for a modification is determined by comparing the yearly emissions profiles for the existing source to the yearly emissions profiles for the proposed source after modification. A net increase in emissions exists whenever any part of an emissions profile for a modified source exceeds the emission profile for the existing source.

Rule 209-A(C)(3). Therefore, the Court would have to look at the emissions levels in preceding years to determine whether there would be a net increase in emissions. According to Plaintiffs, the emissions from MP-I East and MP-I West had dropped to less than half of their permitted capacity due to aging equipment, so there could have been a net emissions increase from the previous yearly levels to the newly permitted amount of emissions. Compl. at ¶ 61. Because of this, Plaintiffs argue that there remains a factual issue on the previous level of emissions, which cannot be determined on a motion to dismiss. The Court disagrees, as this issue can be determined based on the

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permits themselves, of which the Court can take notice in determining this Motion to Dismiss.[11]

When the plants were "combined" in 2010, the Air District issued two separate ATCs and two separate PTOs for MP-I: one for MP-I East and one for MP-I West. The Air District took the same approach with the combination of PLES-I and MP-II. The most recently issued permits for the PLES-I and MP-II plants clearly state that "the combined point and fugitive n-butane emissions shall be limited to 250 pounds per day" for each plant. Jones Decl., ECF No. 15-18 at 3 (PLES-I) and ECF No. 15-19 at 3 (MP-II). Additionally, Plaintiffs have not alleged facts sufficient to show that the "combining" of the facilities was a modification under Rule 209. Modification is defined as "any physical change in, change in method of operation of, or addition to an existing stationary source, except that routine maintenance or repair shall not be considered to be a physical change." Rule 209-A(F)(2). A change in how the plants are described in the renewed PTO permits does not appear to be a change in the plants themselves or in the method of operation.

Even if a modification did occur, while the total emissions from both plants can be up to 500 pounds per day, the net increase in emissions into the atmosphere is no more than it was when the plants had individual limits of 250 pounds per day. While Plaintiffs argue that the plants were previously operating at "less than half" capacity, since each plant remains limited to 250 pounds per day, the plants would have to operate at zero capacity for there to be a net emissions increase of 250 pounds per day. Thus, no matter what the actual emissions were over the previous years, it is nearly impossible for the modification to result in a net increase of 250 pounds per day unless Plaintiffs could show that the plants were not operating at all. Therefore, Plaintiffs second, third, fourth and fifth causes of actions are DISMISSED.

[11] When deciding a motion to dismiss, the Court "may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). Plaintiffs have not disputed the authenticity of the permits proffered by Defendants and have in fact cited to them in their Opposition.

Finally, in the eighth cause of action, Plaintiffs' argue that Defendants' "Complex" of plants constitutes a single stationary source within the meaning of Rule 209, and thus when each facility was permitted Defendants added another 250 pounds per day of emissions to the Complex's overall emissions. Plaintiffs contend that Defendants "piecemealed" their permitting by slowly adding plants until they had total emissions of 1,000 pounds per day but avoided the requirement in Rule 209 to offset these emissions or try to prevent the emissions by installing BACT once the emissions exceeded 250 pounds per day.

Under Plaintiffs' reading of Rule 209, the complex should be viewed as a single stationary source because the plants are owned and operated by the same company, located on adjacent lands, and share a single geothermal wellfield, a common control room, common pipes that carry geothermal liquid to and from wellfield, and other common facilities. Rule 209-A defines "Stationary Source" as

> any aggregation of air-contaminant emitting equipment which includes any structure, building, facility, equipment, installation or operation (or aggregation thereof) which is located on one or more bordering properties within the District and which is owned, operated, or under shared entitlement use by the same person. Items of air-contaminant-emitting equipment shall be considered aggregated into the same stationary source, and items of non-air-contaminant-emitting equipment shall be considered associated with air-contaminant-emitting equipment only if:
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> a. The operation of each item of equipment is dependent upon, or affects the process of, the other; and
>
> b. The operation of all such items of equipment involves a common raw material or product.
>
> Emissions from all such aggregated items of air-contaminant-emitting equipment and all such associated items of non-air-contaminant-emitting equipment of a stationary source shall be considered emissions of the same stationary source.

Rule 209-A(F)(3).

Defendants counter that Rule 209 is triggered only if a new stationary source or modification to an existing source itself results in a net increase in emissions of 250 pounds per day, and "the Air District's minor source rules do not aggregate permit limits

from existing sources with those from new sources or modifications when assessing the 250 pounds per day trigger under Rule-209A(D)." Defs.' Reply, ECF No. 24, at 7.

It is not clear from the language of the regulation when and how a determination is made on what constitutes a stationary source under Rule 209. But it appears from the face of the complaint that this argument is plausible due to location and ownership of Defendants' plants and the definition of stationary source contained in the regulation. It also seems contrary to the intent of the regulation that an applicant could avoid triggering Rule 209's offset and BACT requirements by simply opening new plants next to existing plants, each emitting 250 pounds per day of VOCs. A pleading must contain "only enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570. While the Court has doubts about Plaintiff's success of recovery, the complaint may proceed on the eighth cause of action. See id. at 556 ("[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely'") (quoting Scheuer, 416 U.S. at 236).

CONCLUSION

For the foregoing reasons, Defendant's first Motion to Dismiss (ECF No. 14) is DENIED and Defendant's Second Motion to Dismiss (ECF No. 17) is GRANTED with leave to amend in part and DENIED in part. Plaintiffs' case proceeds on the eighth cause of action only. Not later than twenty (20) days following the date this Memorandum and Order is electronically filed, Plaintiffs may (but are not required to) file an amended complaint.

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If no amended complaint is filed within said twenty (20) day time period, without further notice to the parties, the causes of action dismissed by virtue of this Memorandum and Order will be dismissed with prejudice.[12]

IT IS SO ORDERED.

Dated: May 8, 2015

MORRISON C. ENGLAND, JR, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[12] Defendants are admonished that their attempts to avoid the page limit requirements set by the Court by filing two motions to dismiss and putting over one hundred lengthy footnote in each filing will not be acceptable going forward and could be grounds for sanctions.