23-1988

United States Court of Appeals
for the
Fourth Circuit

BENJAMIN BUTLER; CHERYLL RILEY CLAPPER; ANGELA COLLLINS; CHARLES H. HOWARD; KAREN KASPER; JOEL PARRIS; JENNIFER TSONAS,

Plaintiffs/Appellants,

– v. –

NEW-INDY CATAWBA LLC, d/b/a New-Indy Containerboard; NEW-INDY CONTAINERBOARD LLC,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT ROCK HILL

BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 23-1988 Caption: Benjamin Butler et al. v. New-Indy Catawba LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Benjamin Butler
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

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If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Cheryll Riley Clapper
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Angela Collins
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Charles H. Howard
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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No. 23-1988 Caption: Benjamin Butler et al. v. New-Indy Catawba LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Karen Kasper
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Joel Parris
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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Pursuant to FRAP 26.1 and Local Rule 26.1,

Jennifer Tsonas
(name of party/amicus)

who is an Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

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Signature: /s/ T. David Hoyle Date: 10/10/2023

Counsel for: Appellants

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INTRODUCTION

Plaintiffs-Appellants Benjamin Butler, Cheryll Riley Clapper, Angela Collins, Charles H. Howard, Karen Kasper, Joel Parris and Jennifer Tsonas (collectively "Citizens") brought suit under the Clean Air Act's ("CAA's") citizen suit provision, 42 U.S.C. § 7604(a)(3), against Defendants-Appellees, New-Indy Catawba, LLC d/b/a New-Indy Containerboard, and New-Indy Containerboard, LLC (collectively "New-Indy"), for violation of the CAA at their pulp and paper mill located at 5300 Cureton Ferry Road, Catawba, York County, South Carolina. Citizens contend that New-Indy violated the CAA when it modified the plant's pollution control systems in a manner that would cause, and has caused, a net significant increase of regulated air pollutants without first obtaining a Prevention of Significant Deterioration ("PSD") permit from the South Carolina Department of Health and Environmental Control ("DHEC"), as required by both federal and state law. Citizens sought, *inter alia*, injunctive relief to prevent future operation of the plant in violation of the CAA until New-Indy obtained, and complied with the requirements of, a PSD permit.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to the Clean Air Act citizen suit provision, 42 U.S.C. § 7604, and federal question jurisdiction, 28 U.S.C. § 1331.

The district court granted New-Indy's motion to dismiss on grounds of abstention under *Burford*, (JA335-351), and entered final judgment on August 24, 2023. (JA352). Citizens timely noticed their appeal on September 18, 2023. (JA353). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291, as this appeal is from a final order and judgment that disposes of all parties' claims.

STATEMENT OF ISSUES

Whether the district court erred in abstaining from deciding Citizens' claim under the citizen suit provision of the Clean Air Act, pursuant to *Burford*, where the only matters at issue concerned New-Indy's violation of a mandatory requirement of the CAA, and corresponding requirement of state law, and the claim in no way implicated discretionary or policy decisions rendered by the state agency, DHEC?

STATEMENT OF THE CASE

I. The New-Indy Mill

Defendants-Appellees own and operate a pulp and paper mill in Catawba, South Carolina. (Compl., JA19). Because the mill has the potential to emit 100 tons per year or more of regulated air pollutants, it is classified as a major stationary source of air pollutants under the CAA and South Carolina regulations. (Compl., JA19.) Citizens all live within nine miles of the mill and have been adversely affected by the pollutants it emits. (Compl., JA18-19.)

a. The Mill Converts to Producing Containerboard Grade Paper

In 2019, New-Indy decided to convert the mill from producing bleached white paper to production of containerboard grade paper, unbleached brown paper known as linerboard used for making cardboard. Because the changes could emit additional regulated air pollutants, New-Indy required a permit from DHEC before it could make this modification to the plant. *See* S.C. Code Regs. 61-62.70.

New-Indy applied for a minor construction permit from DHEC in July 2019, predicting only minor changes in its emissions as a result of the changes. In April 2020, New-Indy filed an addendum to its construction permit application "to address changes in the project scope." (Constr. Permit App., April 2020, JA40.) In particular, New-Indy wanted to take its hazardous air pollutant steam stripper, located within the mill, out of service and to instead construct a hard pipe to transport all of the process-generated foul condensate to the Facility's outdoor wastewater treatment system or plant ("WWTP") for biological treatment. (Compl., JA25-26.)

New-Indy would only be eligible for such a minor construction permit if the modifications to the mill would *not* result in a net significant increase in any of the pollutants that are regulated under the CAA's New Source Review[1] requirements. In particular reference to this case, if the modifications to the plant would result in a

[1] New Source Review is an umbrella term that includes both the Prevention of Significant Deterioration permit required for areas where ambient air quality standards are met and Nonattainment permits, where they do not.

projected net increase of emissions of either hydrogen sulfide (H_2S)[2] or total reduced sulfur ("TRS")[3] at the threshold level of 10 tons per year or more, the CAA would require New-Indy to obtain a CAA Subchapter I, Part C, Prevention of Significant Deterioration ("PSD") permit to proceed with the modifications to the plant.[4] *See* 42 U.S.C. § 7475. A PSD permit triggers numerous obligations for the applicant that are not required by a minor construction permit, including requirements that the plant model potential ambient impacts of the increased emissions and other adverse impacts on the population and apply Best Available Control Technology ("BACT") to control the emissions resulting from the change.

New-Indy represented to DHEC that it was not subject to PSD permitting requirements because the projected net increases of these pollutants were below the PSD thresholds. (Order on Mot. to Dismiss, JA336.) New-Indy represented that its

---

[2] H_2S is a flammable colorless gas that smells like rotten eggs. Elevated concentrations of H_2S can cause various adverse health effects, such as headache, nausea, difficulty breathing among people with asthma, and irritation of the eyes, nose, and throat. The Agency for Toxic Substances and Disease Registry has established an ambient Minimum Risk Level ("MRL") for H_2S of 70 parts per billion ("ppb") averaged over a 24-hour period. (Compl., JA21.)

[3] TRS includes not only H_2S but also methyl mercaptan, methyl disulfide, and dimethyl disulfide. Methyl mercaptan is a noxious gas with a disgusting odor that adversely impacts quality of life and can irritate mucus membranes in the respiratory system, eyes, and skin. Methyl mercaptan is designated as a toxic air pollutant by DHEC and considered 14 times more toxic than H_2S. Methyl disulfide and dimethyl disulfide have a noxious odor described as a "stench" that adversely impacts quality of life and causes serious eye and respiratory irritation. (Compl., JA21-22.)

[4] Additional details concerning the requirements of the CAA can be found below at pp. 8-11.

Baseline Actual Emissions were 147.2 tons per year of TRS and 9.7 tons per year of H_2S and that the proposed modifications would result in a net increase of only 6.9 tons per year of TRS and 2.2 tons per year of H_2S over its baseline. (Compl., JA27.) These representations were inaccurate.[5]

In reliance on New-Indy's representations concerning the projected increases in emissions, DHEC issued a minor construction permit for the plant modifications on May 13, 2020. (Order on Mot. to Dismiss, JA336). After receiving its minor construction permit from DHEC, New-Indy closed the plant from September to November 2020 to convert the mill from producing white paper to containerboard grade paper. After resuming operations, New-Indy began in February 2021 to emit high levels of TRS, including H_2S, methyl mercaptan, and other toxic air pollutants, far in excess of the thresholds that would have required a PSD permit for the plant's modifications. (Compl., JA20.) These excessive emissions have caused substantial harm to thousands of residents living nearby.

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[5] New-Indy achieved these lower projections by inaccurately representing that:

1. Its total volume of wastewater would decrease by 50% as a result of its changes to the plant; and
2. By treating the foul condensates using its wastewater treatment plant, more than 96% of the [hazardous air pollutants] and 94% of TRS compounds would be removed biologically in the wastewater treatment system.

(Compl., JA26-27.) Both representations were wrong. Wastewater was never reduced and toxics were not removed as represented. The details of New Indy's misrepresentations of conditions at the plant that it cited to support these conclusions are detailed in the Complaint. (Compl., JA27-28.)

b. Emissions from the Reopened Plant Cause Ambient Impacts in the Community Which Vastly Exceed Regulatory Limits and Have Led to Thousands of Citizen Complaints.

Shortly after the mill reopened, residents of nearby communities in both South Carolina and North Carolina began to submit complaints concerning strong odors and adverse health effects to DHEC. (Compl., JA20.) In the eight-week period between March 12, 2021 and May 7, 2021, DHEC's online reporting database received approximately 17,000 such complaints, some from residents living as far as thirty miles away from the mill. By August 8, 2021, the number of complaints approached 30,000. (Compl., JA22-23.) The reported health effects have included nausea, headaches including migraines, and irritation of the eyes, nose, and throat. Less frequently reported symptoms have included coughing, difficulty breathing, nose bleeds, asthma "flare ups," and dizziness. (Compl., JA22.)

These complaints triggered investigations and enforcement actions. In April 2021, DHEC conducted a trajectory analysis to determine the source of the emissions complaints and determined that New-Indy was the main, if not only, source of H_2S causing the symptoms that residents had reported. (Compl., JA23.) On May 7, 2021, DHEC issued New-Indy a Determination of Undesirable Levels and an Order to Correct Undesirable Level of Air Contaminants. (Compl., JA23-24.)

The federal Environmental Protection Agency (EPA) also conducted an investigation. On April 15, 2021, EPA inspectors visited the New-Indy plant, where

they detected H_2S readings as high as 15,900 ppb, more than 200 times the minimum risk level for that pollutant. (Compl., JA24.) EPA inspectors subsequently collected air samples in the surrounding communities, many of which exceeded exposure thresholds for H_2S. (Compl., JA24.) EPA personnel reported noticing unpleasant odors and experiencing adverse health effects as they were collecting the samples. (Compl., JA24.) EPA ultimately exercised its authority under Section 7603 of the CAA and, on May 13, 2021, ordered New-Indy to reduce its H_2S emissions, monitor and limit its emissions so as not to exceed certain ambient concentrations of H_2S outside the plant, and to submit a long-term plan to control H_2S emissions. (Compl., JA25.)

Despite these enforcement actions, emissions from the mill continued to exceed acceptable levels. (Compl., JA25.) Using back-calculations and reverse modeling from the EPA's ambient air monitoring data, Citizens' air dispersion modeling expert, Dr. Steven Hanna, determined that the actual H_2S emissions from New-Indy exceeded fifteen tons *per day* in April 2021. This equates to more than 1000 tons of H_2S emitted between February and May 2021, far in excess of the regulatory threshold of a ten tons *per year* net increase in H_2S over the represented baseline emissions of 9.7 tons *per year* that triggered the obligation to obtain a PSD

permit, with all its attendant requirements, prior to the plant's modification. (Compl., JA29-30)(citing 42 U.S.C. § 7475.)[6]

II. The Clean Air Act

a. The CAA Establishes a Cooperative Federalism Scheme that Assigns Specific Roles to the Federal Government and States.

The CAA provides pollution control requirements for which EPA promulgates regulations that the states then administer and apply. This division between state and federal responsibility is called "cooperative federalism." Specifically, states must develop "state implementation plans" (SIPs) that address a series of specific federal requirements under the CAA. *See* 42 U.S.C. §§ 107, 110; 40 CFR § 51.230(d). The requirements include PSD permit rules for major modifications by major sources that are necessary to preserve healthy air quality. The states then submit their version of these regulations to EPA for approval as meeting the requirements of the CAA. *See* 42 U.S.C. §110(k). Upon approval of a SIP, the state's implementing laws become "federalized" and are the operative provisions.

[6] New-Indy has represented that H_2S constitutes approximately 10% of the mill's TRS emissions, (Compl., Ex. 3, CAP Table 6-1, JA152.) It may therefore be inferred that New-Indy likewise grossly exceeded the regulatory threshold of a ten tons per year net increase of TRS over its represented baseline emissions, which also triggers the PSD permit requirement. (Compl., JA29-30.)

South Carolina has an approved SIP, which includes PSD permitting. *See* 40 CFR § 52.2120-2141. The state's approved PSD permit rules appear in SC Reg. 61-62.5, Standard 7. They repeat, virtually verbatim, the federal regulations governing PSD, 40 CFR § 52.21, including the PSD definitions, applicability, emissions thresholds and requirements. *See* 40 CFR § 52.2131. As a practical matter, what happens is that sources submit applications to DHEC for air construction permits, including PSD permits. If the applicant indicates that emissions following the modification will increase at levels that equal or exceed the PSD-triggering significance thresholds, DHEC conducts a PSD permit review. DHEC then makes all of the determinations as to permit provisions, such as what constitutes the Best Available Control Technology (BACT), emission limits, operating requirements, monitoring requirements, etc.

When a major modification is proposed at a major emitting facility, a PSD permit is *required* under state and federal law. The state has no discretion to waive it. New-Indy's disconnection of its steam-stripper and re-piping of foul condensate was in reality a "major modification" of its facility because it resulted in a "significant increase" and a "significant *net* increase in H_2S and TRS," SC Reg. 61-62.5 Standard 7, (B)(30)(a), (34)(a). H_2S and TRS are regulated pollutants and New-Indy emitted them at rates very substantially above their "significance" rates. *Id*. at

§ (B)(49).[7] Consequently, a PSD permit was required under Subchapter I, Part C of the CAA and SC regulations implementing the CAA. SC Reg. 61-62.5 Standard 7, (B)(30)(a).[8]

b. Citizen Suits.

Citizen suits are an important aspect of the CAA enforcement scheme. *See Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976); *Nat. Resources Def. Council, Inc. v. Train*, 510 F.2d 692, 699-700 (D.C. Cir. 1974). In enacting this provision, Congress expanded federal court jurisdiction by circumventing the diversity of citizenship, jurisdictional amount, and traditional standing requirements, in order to allow citizens to bring suit. *See Friends of the Earth*, 535 F.2d at 172-73; *Nat. Resources Def. Council*, 510 F.2d at 700; *see also* S.Rep. No. 91-1196, 91st Cong., 2d Sess., reprinted at Appendix B, 510 F.2d at 725. *Wilder v. Thomas*, 854 F.2d 605, 613 (2d Cir. 1988).

However, to avoid either overburdening the courts or unduly interfering with implementation of the act, Congress carefully circumscribed the scope of the

[7] These state definitions are identical to the federal formulations in 40 CFR § 52.21.
[8] By contrast, minor source permits do not require that the applicant be subject to Best Available Control Technology review or do modeling to demonstrate that ambient air impacts would not adversely affect the community. The state regulations for issuance of minor modification permits also do not provide for public notice or public participation. (Opp. Mot. to Dismiss, JA267.)

provision by authorizing citizens to bring suit only for violations of specific provisions of the act or specific provisions of an applicable implementation plan. *See* S.Rep. No. 91-1196, reprinted at 510 F.2d at 723, *see also Friends of the Earth v. Consol. Rail Corp*., 768 F.2d 57, 63 (2d Cir. 1985) (discussing congressional purpose in limiting citizen suits). *Id.*

Congress provided, in relevant part, for citizen suits against any person "who proposes to construct or constructs any . . . modified major emitting facility *without a permit* required under part C of Subchapter 1 of this chapter (relating to significant deterioration of air quality)." 42 U.S.C. §7604(a)(3) (emphasis added). Significantly, this provision embraces the *failure to obtain* a PSD permit—as New-Indy failed to do here—as opposed to potential disagreements with the provisions in a PSD permit issued by the administering state.

III. Procedural History

Citizens commenced this federal Citizen Suit action under 42 U.S.C. §7604(a)(3), alleging that New-Indy violated the CAA by making significant modifications to the mill without first obtaining a PSD permit, and sought both injunctive relief and civil penalties under the Act. (Compl., JA18-32). New-Indy moved to dismiss Citizens' complaint on multiple grounds, including for lack of subject matter jurisdiction – arguing the CAA's citizen suit provision did not apply – and also that the court should abstain from hearing this matter under *Burford.* After

briefing and argument, the district court found that it had subject matter jurisdiction over this action under the CAA, but decided to abstain from considering the matter pursuant to *Burford.* (Order on Mot. to Dismiss, JA340-351.) It therefore dismissed Citizens' action without prejudice and entered final judgment. (Order on Mot. to Dismiss, JA351.) This appeal followed.

SUMMARY OF ARGUMENT

The district court erred in abstaining from consideration of Citizens' CAA claim under *Burford.* Citizens brought a federal claim under a federal statute to enforce the federally-created PSD permit requirement. 42 U.S.C. § 7604(a)(3). All of the essential elements of this cause of action have been defined by Congress and the EPA, and incorporated virtually verbatim into South Carolina's approved SIP. Citizens seek to enforce a consistent, national policy regarding air pollution established by federal law. For this reason, as detailed below, most courts have rejected arguments that *Burford* abstention applies to citizen suits under the CAA.

This Court's decision in *Sugarloaf Citizens Ass'n v. Montgomery Cnty., Md.*, 33 F.3d 52 (Table), 1994 WL 447442 (4th Cir. 1994), on which the district court relied, is not to the contrary. *Sugarloaf* is distinguishable from this case because the plaintiffs there had not asserted viable claims for relief under the CAA. The defendant there had already obtained a PSD permit from the state regulatory agency and could not yet have violated CAA emission standards because it had not yet

begun operations. *Id.*, at *5, n.9. Because what plaintiffs had really brought was a "collateral attack" on the state regulatory agency's permitting decision, "disguise[d] . . . as federal claims," this Court ruled that abstention was appropriate. *Id.,* at *4, *6. But the Court also made clear that *Burford* abstention would not be appropriate where, as here, a plaintiff has asserted valid federal CAA claims. *Id.,* at *4, *7.

Neither, contrary to the district court's ruling, does the existence of a procedure for Citizens to potentially obtain a declaratory ruling from DHEC concerning New-Indy's need for a PSD permit, S.C. Code Ann. § 48-1-90(A)(4), provide a basis for abstention. That provision at most provides an alternate, state-law remedy that Citizens could opt to pursue, but one with less effective remedies than those available under the CAA. Citizens were entitled to choose to pursue the federal remedy Congress had provided them for New-Indy's violations of federal law.

ARGUMENT

I. Standard of Review

This Court reviews district court dismissals under the *Burford* abstention doctrine for abuse of discretion. *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 280–81 (4th Cir. 2008). That deferential standard of review, however, must be "tempered by the truism that 'the federal courts have a virtually unflagging obligation to exercise their jurisdiction.'" *Id.* (quoting *Deakins v. Monaghan,* 484

U.S. 193, 203 (1988) (internal quotation omitted). "[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716 (1996). "Abstention 'remains the exception, not the rule," *MLC Auto*, 532 F.3d at 280 (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans ("NOPSI"),* 491 U.S. 350, 359 (1989)), and "there is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Id.* (quoting *Martin v. Stewart,* 499 F.3d 360, 363 (4th Cir. 2007) (internal quotation omitted); *see also Koon v. United States,* 518 U.S. 81, 100 (1996) ("A district court by definition abuses its discretion when it makes an error of law.").

II. The District Court Erred in Abstaining from Consideration of Citizens' CAA Suit.

a. *Burford* Abstention is Not Applicable to this Case.

Citizens brought this action pursuant to a federal cause of action created by Congress as part of the CAA. 42 U.S.C. § 7604(a)(3) provides, in relevant part:

> [A]ny person may commence a civil action on his own behalf . . . against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) . . . .

See 42 U.S.C. § 7604(a)(3).

Citizens contend that New-Indy made major modifications to the mill that should have been projected to result—and did result—in a significant net increase

in emissions of H_2S and TRS without seeking or obtaining the required PSD permit from DHEC.

This CAA cause of action does not implicate any questions purely of state law.[9] The definitions of, *inter alia*, major stationary source of pollutants, major modification, and significant emissions increase are all established by federal law. *See* 40 C.F.R. § 52.21(b)(1), (2), & (40). Likewise, the rates of emissions of H_2S and TRS that constitute a significant enough increase to require a PSD permit, and the requirement that PSD permittees apply BACT standards to limit emissions, are set forth in federal regulations. *Id.,* (b)(23) & (12).[10]

Under these circumstances, it would seem odd to suggest, as the district court held, that the "exercise of federal review of the question in [this] case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI,* 491 U.S. at 361 (quoting

[9] Neither New-Indy nor the district court disagrees with this proposition. (Order on Mot. to Dismiss, n.4, JA348) ("New-Indy does not suggest there are difficult questions of state law at issue . . . .").

[10] South Carolina has copied and incorporated these requirements, virtually verbatim, into its own state environmental regulations in order to obtain approval of its SIP, but the source of these requirements is the CAA itself and EPA regulations promulgated thereunder. *See Voigt v. Coyote Creek Mining Co., LLC,* No. 1:15-cv-00109, 2016 WL 3920045, at *8 (D.N.D. July 15, 2016) ("[N]ot only are the general parameters of the PSD program federally created, so also are most of the implementing regulations, including those adopted by the states with federally approved PSD programs") All of the definitions and requirements referenced above have state regulatory counterparts in SC Reg. 61-62.4, Standard 7.

Colorado Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976). The "coherent policy" at issue has already been established by the federal government, including a SIP approval system meant to establish national consistency on CAA requirements.

For this reason, most courts have rejected arguments that *Burford* abstention applies to citizen suits brought under the CAA and related federal environmental statutes. *See, e.g., Sierra Club, Inc. v. Sandy Creek Energy Assocs., L.P.,* 627 F.3d 134 (5th Cir. 2010) (CAA); *Ctr. For Biological Diversity v. Univ. of N. Carolina at Chapel Hill,* No. 1:19-CV-1179, 2020 WL 6947694, at *2 (M.D.N.C. Oct. 21, 2020) (CAA; "it is not at all clear that this case will require resolution of issues of state policy, and in any event, the case law indicates *Burford* abstention does not apply in this context"); *WildEarth Guardians v. Extraction Oil & Gas, Inc.,* 457 F.Supp.3d 936, 950 (D. Colo. 2020) ("Abstaining under *Burford* here would undermine congressional intent by precluding federal oversight of a citizen's challenge to the construction and operation of a major source in violation of major source requirements under the CAA"); *Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., LLC*, 405 F. Supp. 3d 408, 427, 429–30 (W.D.N.Y. 2019) (concluding that *Burford* abstention does not ordinarily apply in CAA cases); *Voigt,* 2016 WL 3920045, at *10 ("The CAA allocates what are federal responsibilities and what are state responsibilities and then, against that backdrop, provides a federal cause of

action in § 7604(a)(3) for when a major source begins construction without having first obtained a major source permit"); *Citizens for Pennsylvania's Future v. Ultra Res., Inc.,* 898 F. Supp. 2d 741, 750 (M.D. Pa. 2012) (CAA; "it would be improper to abstain from exercising jurisdiction when Congress has clearly established a cause of action for citizen suits"); *DMJ Assocs. v. Capasso*, 228 F. Supp. 2d 223, 229 (E.D.N.Y. 2002) ("[A] number of courts have ... [found] abstention inappropriate in citizen's suits brought under the Clean Air Act").[11]

In *Sandy Creek,* the Fifth Circuit identified five factors for courts to weigh when considering whether to abstain under *Burford*, but concluded that the first factor alone—"whether the cause of action arises under federal or state law," with "abstention being inappropriate where the case did not involve a state-law claim"—was sufficient to reject abstention in a citizen suit under the CAA. 627 F.3d at 144 ("The first factor overwhelmingly affirms the district court's decision [not to abstain], since no state cause of action is involved in a federal CAA citizen suit.").[12]

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[11] *See also Chico Serv. Station, Inc. v. Sol P.R. Ltd.,* 633 F.3d 20, 29-31 (1st Cir. 2011) (declining to follow *Burford* in the context of citizen suits under RCRA); *Johnson v. 3M,* 563 F.Supp.3d 1253, 1292 (N.D. Ga. 2021), *aff'd,* 55 F.4th 1304 (11th Cir. 2022) ("courts in the Eleventh Circuit have consistently found *Burford* abstention inapplicable to environmental citizen suits") (collecting cases under CWA and RCRA).

[12] The other four factors identified in *Sandy Creek* were: "(2) whether the case requires inquiry into unsettled issues of state law, or into local facts; (3) the importance of the state interest involved; (4) the state's need for a coherent policy in that area; and (5) the presence of a special state forum for judicial review." *Sandy*

The Court of Appeals explained that such a citizen suit is entirely distinguishable from the situation that gave rise to abstention in *Burford*: "Whereas *Burford* consisted of a federal constitutional challenge to a state-created agency action, the present challenge raises no federal constitutional concerns about any state-created regulatory body, but instead utilizes a federal congressionally-created cause of action to challenge a particular entity's failure to comply with a federally created regulatory scheme." *Id.*

The same is true in the present case. Citizens do not bring a federal challenge to any regulatory action taken by DHEC. Rather, they invoke a federal, congressionally-created cause of action, 42 U.S.C. § 7604(a)(3), to challenge New-Indy's failure to comply with a federally created regulatory scheme by modifying the plant in a manner that significantly increases emissions of regulated air pollutants without a PSD permit for that modification. *Burford* abstention is simply inapplicable on these facts and the district court's contrary conclusion should be overturned by this Court.

b. This Court's Decision in *Sugarloaf Citizens Ass'n v. Montgomery Cnty., Md.* Is Distinguishable and Not Controlling in this Case.

The district court believed that its decision on abstention was required by this Court's ruling in *Sugarloaf Citizens Ass'n v. Montgomery Cnty., Md.*, 33 F.3d 52

Creek Energy Assocs., L.P., 627 F.3d at 144 (citing *Wilson v. Valley Elec. Membership Corp.,* 8 F.3d 311, 313 (5th Cir. 1993)).

(Table), 1994 WL 447442 (4th Cir. 1994). But that conclusion was also erroneous. *Sugarloaf* is distinguishable from the present case for one simple, but critical reason: Plaintiffs in that case had not asserted viable claims for relief under the citizen suit provisions of the CAA. *Id.,* at *6. Instead, they had done "nothing more than resurrect in a different forum objections to a proposed incinerator that have already been litigated before a state ALJ and the Secretary of MDE . . . dressed in the raiments of federal claims." *Id.* Under those particularized circumstances, where the only real questions to be litigated were a "collateral attack" on the state agency's permitting decision, this Court held that *Burford* abstention was appropriate. But that conclusion has no application to the present appeal, where Citizens have asserted a viable federal claim for relief under 42 U.S.C. § 7604(a)(3), based on New-Indy's failure to obtain a PSD permit. Indeed, as discussed below, *Sugarloaf* itself recognized that *Burford* abstention would not have been warranted if plaintiffs had brought valid federal claims. *Id.,* at *4.

Unlike New-Indy, the applicant to build the incinerator in *Sugarloaf* had already applied for and obtained a PSD permit from the state regulatory agency. *Sugarloaf Citizens Ass'n v. Ne. Md. Waste Disposal Auth*., 323 Md. 641, 594 A.2d 1115 (1991). Moreover, because the incinerator was still under construction, it could not have violated any "emission standard or limitation" under the CAA. Under these

circumstances, this Court concluded that the plaintiffs had not stated valid claims for relief under the citizens suit provisions of the CAA:

> The CAA federal citizen suit provisions applicable to this case authorize actions against persons allegedly violating an "emission standard or limitation," 42 U.S.C.A. § 7604(a)(1), or *constructing a major emitting facility without a permit,* 42 USCA Sec. 7604(a)(3). This case involves neither scenario, since Appellees have all of the permits required for the construction of this facility, and, until construction is completed in 1995, can neither begin emissions nor violate any emissions standard.

1994 WL 447442, at *5, n.9 (emphasis added).

What the Sugarloaf Citizens had brought instead was "merely . . . a collateral attack of MDE's permitting decisions." *Id.,* at *4. They challenged the adequacy of certain specific provisions of the PSD permit, specifically the provisions related to offsets for ozone pollution (in Count I) and BACT determinations (in Count IV). *Id.,* at *5-*6. These were claims "that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors," that could be and were being challenged through state administrative review proceedings. *Id.,* at *5 (citing *NOPSI*, 491 U.S. at 362). Under these particularized circumstances, where there were no valid claims under federal law, this Court ruled that *Burford* abstention was appropriate: "[W]e have held that, absent unusual circumstances, a district court should abstain under the *Burford* doctrine from exercising its jurisdiction in cases arising solely out of state or local … land use law,

despite attempts to disguise the issues as federal claims." *Id.,* at *6 (emphasis in original; internal citation and quotation omitted).

The district court below treated this case as equivalent to *Sugarloaf*, as "a collateral attack of [DHEC]'s permitting decisions." (Order on Mot. to Dismiss, JA351) (citing and quoting *Sugarloaf*.) But it is not. The court's ruling misses the fundamental distinction between *permit decisions* made by a state that has been authorized to implement the CAA (with an approved SIP) and an applicant's *failure to obtain* the PSD permit required by both the CAA and state law. The former is not actionable under 42 U.S.C. § 7604(a)(3); the latter is. The federal citizen suit cause of action for failure to obtain a required PSD permit was not available in *Sugarloaf* because there was a PSD permit. But, unlike *Sugarloaf*, the case before this Court does indeed involve failure to obtain a required PSD and, thus, the citizen suit opportunity under 7604(a)(3) is clearly available.

The *Sugarloaf* court recognized that this distinction was critical to its *Burford* abstention analysis: "the absence of a properly asserted federal citizen suit under CAA or RCRA precludes any suggestion that state court review would deprive Sugarloaf of an adjudication on the merits of any claim asserted in its complaint." *Id.,* at *7. And, as already noted, that decision made clear that abstention would not be appropriate where a plaintiff asserted valid federal claims under the CAA:

> " '[T]he presence of federal-law issues must always be a major consideration weighing against surrender' [of federal jurisdiction], ... [a] consideration [that] is even more significant when federal jurisdiction is exclusive." If Sugarloaf's claims are indeed subject to exclusive federal jurisdiction, then the presence of the *NOPSI* circumstances discussed above would not warrant *Burford* abstention, because of the absence of available "timely and adequate state-court review" for those federal claims.

Id., at *4 (quoting *Kruse v. Snowshoe Co.,* 715 F.2d 120, 124 (4th Cir.1983), and *NOPSI*, 491 U.S. at 361).

For these reasons, *Sugarloaf* is entirely distinguishable from the matter before this Court and does not provide a basis for abstaining from consideration of Citizens' claims.

c. The Separate Remedy Potentially Available to Citizens Under S.C. Code § 48-1-90(A)(4) Does Not Provide a Basis for Abstention.

The other principal basis on which the district court decided to abstain from consideration of Citizens' CAA claim concerned the availability of an administrative remedy under South Carolina law. S.C. Code Ann. § 48-1-90(A)(4), a provision of the state Pollution Control Act. (Order on Mot. to Dismiss, JA344-348.) That provision permits any person to "petition [DHEC] in writing for a declaratory ruling as to the applicability of a specific, existing regulatory program to a proposed or existing discharge into the environment." DHEC must act on the petition within 60 days and a dissatisfied petitioner can request a contested case hearing before the

Administrative Law Court, and the decision of that body may in turn be appealed to the state Court of Appeals. (Order on Mot. to Dismiss, JA344-345.)

The district court decided that this provision constituted "timely and adequate" review under state law, which it understood to be a requirement for *Burford* abstention under *NOPSI.* But that was incorrect. S.C. Code Ann. § 48-1-90(A)(4) is not a state court review provision, as that term was used in *NOPSI.* Instead, that provision is simply an alternative form of remedy potentially available to Citizens to contest New-Indy's actions—but one with less robust remedies than are available under 42 U.S.C. § 7604(a)(3). In the "cooperative federalism" regime established by the CAA, Citizens were under no obligation to pursue that path rather than their citizen suit under federal law.

NOPSI distilled the abstention analysis under *Burford* into the following summary:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

NOPSI, 491 U.S. at 361.

Here, the district court decided that "timely and adequate state-court review is available" under South Carolina law, because Citizens could seek a declaratory

ruling regarding New-Indy's emissions from DHEC under S.C. Code Ann. § 48-1-90(A)(4), and DHEC's decision on that petition would be subject to review on appeal. (Order on Mot. to Dismiss, JA346.) But that reading of *NOPSI* completely ignores the second clause quoted above: "a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies." As discussed above, Citizens do not ask this Court to interfere with the proceedings or orders of DHEC. Rather, they simply ask that the federal requirements of the CAA apply to New-Indy. They do not challenge DHEC's issuance of a minor construction permit to New-Indy[13], except to the extent it purported to authorize New-Indy to make modifications to its plant that would result in a significant net increase in emissions of CAA regulated pollutants in violation of federal law. Because Citizens do not ask the federal courts to interfere with DHEC proceedings or orders, the *NOPSI* and *Burford* abstention analysis is inapplicable.[14]

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[13] As Citizens note above at n.5, the minor modification permit was issued on the basis of inaccurate representations by New-Indy, and DHEC seems to have accepted New-Indy's inaccurate representations in treating this modification as minor. Regardless of the reasons DHEC issued a minor source construction permit, the absence of a PSD permit in these circumstances is challengeable in a citizen suit under 42 U.S.C § 7604(a)(3). *See Weiler v, Chatham Forest Prods.*, 392 F.3d 532 (2d Cir. 2004) (Holding that a citizen suit under § 7604(a)(3) lies even where the state agency determined that a PSD permit was not required). Here, New-Indy never raised its potential need for a PSD permit with DHEC.

[14] The only way in which *NOPSI*'s "timely and adequate review" language could ever become relevant might be if Citizens did in fact seek a declaratory judgment from DHEC under S.C. Code Ann. § 48-1-90(A)(4) and then, if dissatisfied by DHEC's ruling, opted to challenge that ruling in federal court through a CAA citizen

A petition to DHEC for a declaratory judgment concerning New-Indy's emissions under S.C. Code Ann. § 48-1-90(A)(4) may well be another form of legal remedy Citizens could choose to pursue. To date, they have not done so, and for good reason: the remedies available under S.C. Code Ann. § 48-1-90(A)(4) fall far short of those available under 42 U.S.C. § 7604(a)(3). The primary remedy available under S.C. Code Ann. § 48-1-90(A)(4) would be a declaration from DHEC requiring New-Indy to apply for a PSD permit.[15] In the present action, by contrast, Citizens seek injunctive relief to prevent New-Indy from continuing to emit excessive pollutants without a valid PSD permit in violation of the CAA, and to require monitoring and reporting to ensure compliance, along with civil penalties under the CAA. (Compl., JA31-32.)

In any event, Citizens are free to opt to pursue the federal remedy provided for them by Congress, regardless of the availability of other forms of relief under state law. And *Burford* abstention provides no basis for courts to prevent them from doing so. As the *Voigt* court wrote:

> [W]hile Congress has made the states the front line regulators of the CAA and encouraged them to adopt their own programs for air pollution control (including imposing controls not required by the CAA

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suit, rather than by appealing through state channels. But that would obviously be a very different case than the one before the court.

[15] Under the plain language of S.C. Code Ann. § 48-1-90(A)(4), more substantial remedies only become available if DHEC determines that "immediate action is necessary to protect the public health or property due to such unpermitted discharge" and declares a public health emergency.

> as well as requiring that certain non-major sources obtain state-created minor source permits), Congress was not content to leave the enforcement of the PSD provisions entirely up to the state environmental agencies and then to the state courts if there were questions as to whether the state agencies were doing their job properly. Rather, Congress enacted several provisions imposing federal supervision, including: . . . (2) providing for citizen suits in federal courts to ensure compliance with the key PSD requirements, including that a major source obtain a major source construction permit prior to commencing construction, 42 U.S.C. 7604(a)(3). . . .
>
> Arguably, Congress has already decided how this balance [between federal and state interests] should be struck. The CAA allocates what are federal responsibilities and what are state responsibilities and then, against that backdrop, provides a federal cause of action in § 7604(a)(3) for when a major source begins construction without having first obtained a major source permit along with a *specific* grant of federal court jurisdiction.

Voigt, 2016 WL 3920045, at *9-*10; *WildEarth Guardians*, 457 F.Supp.3d at 950 (quoting *Voigt*). "[I]t would be improper to abstain from exercising jurisdiction when Congress has clearly established a cause of action for citizens suits." *See Citizens for Pennsylvania's Future*, 898 F.Supp.2d at 750.

Thus, the availability of a declaratory judgment petition to DHEC under S.C. Code Ann. § 48-1-90(A)(4) provided no basis for the district court to abstain from considering the merits of Citizens' CAA claim under 42 U.S.C. § 7604(a)(3).

CONCLUSION

For the foregoing reasons, Citizens respectfully request that this Court reverse the district court's dismissal of Citizens' CAA claims on grounds of *Burford*

abstention and remand the case for further proceedings on the merits of Citizens' claim for relief.

REQUEST FOR ORAL ARGUMENT

Because this case involves complex legal questions concerning the interplay of state and federal law under the regime of "cooperative federalism" established by Congress in the CAA, and because the issue presented has not previously been decided by this Court, Citizens respectfully request oral argument.

November 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: November 1, 2023

/s/ T. David Hoyle
Counsel for Appellants

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I hereby certify that on this 1st day of November, 2023, I caused this Brief of Appellants and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

/s/ T. David Hoyle
Counsel for Appellants