UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NEW INDY CATAWBA, LLC Defendant	Civil Action No. 21-cv-2053 SAL

MOTION TO INTERVENE AND LIFT STAY

COMES NOW Enrique Lizano, Melda Gain, Krista Cook, Jean Hovanec, Kathleen Moran, Terri Kennedy, Marsha Stewart, Ida McMullen, Cammie Barnes, Donald Honeycutt, Kenny N. White, Tracie Nickell, Amanda Swagger, and John Hollis (the "Intervenors") who move to intervene in this action, pursuant to Rule 24, Fed. R. Civ. P., and 42 U.S.C. §7604, and to lift the current stay in this action to consider this Motion.

BACKGROUND

A. New Indy's Emissions and the EPA's actions.

The United States of America, on behalf of the Environmental Protection Agency (the "EPA"), filed this action against defendant New-Indy Catawba, LLC ("New Indy") concerning emissions of hydrogen sulfide ("H_2S") from its pulp and paper mill located in Catawba, York County, South Carolina (the "Facility"). New Indy manufactures pulp and brown paper for linerboard and related products at the Facility which results in the emission of H_2S and other toxic pollutants to the air. The emissions from the Facility present an imminent and substantial endangerment to the public health and welfare and the environment. (D.I. 1 ¶1). The EPA and the

South Carolina Department of Health and Environmental Control ("DHEC") have received over 22,000 complaints from residents living near the Facility about noxious odors, nausea, irritation of the eyes, nose, and throat, and other adverse health effects. (D.I. 1 ¶2).[1]

On May 13, 2021, the EPA issued a Clear Air Act Emergency Order ("Emergency Order") to New Indy under Section 303 of the Clean Air Act ("CAA"), 42 U.S.C. §7603. (D.I. 1 ¶3 & Ex. A). The Emergency Order required New Indy to reduce its H_2S emissions, monitor the concentration of emissions, and submit a long-term plan to control the emissions in the future. (D.I. 1 ¶23).

The EPA's Emergency Order contains factual determinations that New Indy emitted H_2S in excessive amounts, exceeding levels permitted by law, and the EPA "predicted that the general population, including susceptible individuals, could experience notable discomfort, irritation, or certain asymptomatic nonsensory effects." (D.I. 1, Ex. A ¶37). Residents have reported intense rotten egg odors throughout their homes and complained of health effects. (*Id.* ¶¶37-40).

Based upon its factual findings, the EPA concluded that New Indy was creating an "imminent and substantial endangerment to the public health or welfare or the environment." (*Id.* at ¶52). The EPA also concluded that New Indy's emissions of H_2S into the ambient air were adversely affecting the public health and welfare within the meaning of the CAA, 42 U.S.C. §§ 7401(b), 7602(h), and 7603. (*Id.* at ¶48).

The EPA's Emergency Order included a schedule or timetable of compliance and emission limitations that New Indy was required to meet as it developed a remediation plan. The Emergency Order established specific concentrations of H_2S in the air at the Facility's fence-line that New

[1] According to DHEC's website, the total number of complaints as of August 8, 2021 was up to 29,928. *See* Ex. A, Complaint in Intervention ¶33.

Indy was not to exceed. (*Id.* at ¶52(b)). "[A]ny exceedance of these facility fence-line concentrations during the pendency of this Order, shall constitute a violation of this Order." (*Id.*).

On July 12, 2021, the United States, on behalf of the EPA, filed suit against New Indy in this Court. The lawsuit was necessary to give continuing life to the EPA's Emergency Order, which would have expired by operation of law. On the same day, this Court entered a consent order extending the EPA Order and staying the case through October 31, 2021 (the "Consent Decree") (D.I. 6).

The EPA's Complaint alleged 28 monitored concentrations of H_2S during the period of May 26, 2021 to June 20, 2021 that exceeded New Indy's fence-line concentration limits required by the EPA's Order, constituting violations of that order (D.I. 1 ¶25).

In addition, the EPA found New Indy's efforts to comply with the Emergency Order had been "temporary, speculative, or inadequate." (D.I. 1 ¶24). The EPA concluded that New Indy failed to comply with the Emergency Order. (D.I. 1 ¶25). Likewise, after issuance of the Emergency Order, the EPA and DHEC have continued to receive *thousands* of citizen complaints. (D.I. 1 ¶¶26-27). With exceedances unabated and citizen complaints continuing, the EPA determined and alleged that "New Indy's continued operations at the Facility are causing and contributing to an imminent and substantial endangerment to public health or welfare or the environment." (D.I. 1 ¶28).

The EPA seeks injunctive relief under 42 U.S.C. §7603, alleging that New Indy's excessive H_2S emissions are contrary to the mandate of the CAA that air resources must be protected to promote the public health and welfare, not damage it. *See* 42 U.S.C. §7401(b)(1); (D.I. 1 ¶30). The EPA alleges that the H_2S is an "air pollutant" within the meaning of 42 U.S.C. § 7602(g), because it is a chemical substance that is emitted to the air from the Facility. (D.I. 1 ¶31). The EPA

also alleges the Facility is a pollution source or "combination of sources" within the meaning of 42 U.S.C. § 7603, because it is the emission source of H_2S into the air. (D.I. 1 ¶32). The EPA views New Indy's actions as threatening the health or welfare of the community, with the H_2S releases from the Facility causing adverse effects on personal comfort and well-being of thousands of people. (D.I. 1 ¶35). As a result, the EPA alleges that the emissions from the Facility continue to cause an imminent and substantial endangerment to public health or welfare or the environment such that New Indy is liable for an injunction to immediately reduce H_2S in the air in and around the Facility and to abate the endangerment. (D.I. ¶37).

B. The Intervenors and their Claims.

Intervenors reside within 15 miles from the Facility. They have all experienced, and continue to experience, pervasive rotten egg odors and other odors from the plant that invade their properties inside and out. They have also experienced, and continue to experience, adverse health effects from the Facility's emissions, including headaches, bloody noses, sinus issues, persistent nausea, and balance disruption and dizziness. (Ex A, Complaint in Intervention, ¶1).

In addition to Intervenors, undersigned counsel also represent approximately 1,500 similarly situated persons living within 30 miles of the Facility and its wastewater and sludge disposal facilities, who have similarly suffered health effects and disrupted lives due to New Indy's emissions. All of these people own or lease their properties. These and other individuals are simultaneously pursuing class actions pending before this Court based on the grossly malodorous, toxic, and harmful emissions from the Facility. *See Kennedy et al. v. New Indy Catawba, LLC et al.*, Case No. 0:21-cv-01704-SAL; *see also White et al. v. New Indy Catawba, LLC et al.*, Case No. 0:21-cv-1480-SAL. (Ex A, Complaint in Intervention, ¶2).

Attached to this Motion as Exhibit A is Intervenors' Complaint in Intervention. In addition to incorporating the EPA's allegations, Intervenors raise several other important issues. First, Intervenors allege that New Indy proposed to and did construct a major modification to an existing major stationary source of air pollutants in an attainment area without the necessary Clean Air Act Prevention of Significant Deterioration ("PSD") permit, which were based on emission of excessive amounts of total reduced sulfur ("TRS"), including hydrogen sulfide (H_2S) and other toxic air pollutants, from its Facility. (Ex. A ¶¶ 4, 11-22, 64-67). Second, Intervenors allege that the use of the Agency for Toxic Substances and Disease Registry ("ATSDR") Minimum Risk Level ("MRL") for H_2S of 70 ppb over a 24-hour averaging period is inappropriate for the population affected by New Indy's emissions, and the 70 ppb MRL is not a "safe level." (Ex. A ¶¶ 4, 11-22, 65-68). Third, Intervenors allege that the monitoring program the EPA is requiring New Indy to implement is deficient in many material respects, including: the failure to monitor the three other TRS compounds (besides H_2S) which make up as much or more than 90% of New Indy's emissions; only requiring three fence-line monitors when the Facility has a fence-line of over six miles in length; only covering with community monitoring 30 square miles of the affected area that is at least 265 square miles and up to almost 500 square miles; and using inconsistent monitoring methodology and equipment (Ex. A, ¶¶ 45-52).

Intervenors raise two claims for relief in their Complaint in Intervention. In Count I, Intervenors allege that New Indy has violated a Standard or Emission Limitation under the Clean Air Act, 42 U.S.C. § 7604. (Ex. A, ¶¶ 53-64). In Count II, Intervenors allege that New Indy proposed and constructed a major modification to a major stationary source of pollutants in an attainment area without a PSD permit, in violation of the Clean Air Act. (Ex. A, ¶¶ 65-68). Intervenors' Complaint in Intervention seeks, among other remedies, injunctive relief to require New Indy to comply with

the EPA Order, immediately reduce its wrongful and damaging emissions of TRS and H_2S, apply for and obtain a PSD permit, and conduct proper monitoring. (Ex. A, pg. 19).

ARGUMENT

MOTION TO INTERVENE

I. Intervenors have an unconditional right to intervene under 42 U.S.C. § 7604(b)(1)(B).

Intervenors seek to intervene under Rule 24(a)(1), Fed. R. Civ. P., and 42 U.S.C. § 7604(b)(1)(B). Under Rule 24(a)(1), "[o]n timely motion, the court must permit anyone to intervene who … is given an unconditional right to intervene by a federal statute."

The EPA filed this action pursuant to the CAA; specifically, 42 U.S.C. § 7603. The CAA provides Intervenors with an unconditional right to intervene. 42 U.S.C. § 7604. When the EPA has "commenced and is diligently prosecuting a civil action in" a district court "to require compliance with the standard, limitation, or order," "any person may intervene as a matter of right" in that action. *Id.* §7604(b)(1)(B).

Intervenors meet both requirements under §7604(b)(1)(B) to be entitled to intervention as a matter of right. First, the EPA commenced this action in this District Court to require New Indy to comply with its Emergency Order, and Intervenors assume the EPA is diligently prosecuting this action.[2] Second, the Emergency Order for which the EPA seeks to require compliance is an "order issued by the [EPA] with respect to" "an emission standard or limitation" under the CAA. *Id.* §7604(a)(1). The CAA defines "emission standard or limitation" as, among other things, "a schedule or timetable of compliance, emission limitation, standard of performance or emission

[2] Presumably, there will be subsequent filings relating to New Indy's remedial plan or further litigation. Intervenors do not know what those filings will say and thus reserve the right to assert later that the EPA is not diligently prosecuting this action, thereby allowing a separate citizen suit.

standard." *Id.* §7604(f).[3] In the Emergency Order, having found that New Indy is not meeting the mandates of 42 U.S.C. §7401(b)(1), the EPA ordered New Indy to: 1) "immediately begin taking steps to minimize air emissions of hydrogen sulfide to not exceed" specific facility fence-line ambient concentration limits; and 2) monitor the fence-line ambient concentrations of H_2S; and 3) submit a plan to meet the requirements of the Emergency Order. D.I. 1-1 at ¶52. The EPA's Emergency Order is a schedule or timetable of compliance that New Indy has self-reported violating on many occasions. (D.I. 1 ¶¶ 19, 20, 25, 28). New Indy is subject to suit by Intervenors for violating an order imposing a schedule of compliance. *See* 42 U.S.C. § 7604(a)(1), (f); (D.I. 1 ¶¶24-28, 34-37). Because the EPA has already filed suit, Intervenors had no obligation to send a notice letter under 42 U.S.C. § 7604(b)(1) and may intervene "as a matter of right." 42 U.S.C. § 7604(b)(1)(B).

Intervenors' motion is timely. "In order to properly determine whether a motion to intervene in a civil action is sufficiently timely, a trial court in this Circuit is obliged to assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the other parties; and third, why the movant was tardy in filing its motion."[4] In evaluating these factors, courts look at the status of discovery, if and how the named parties will be prejudiced by the intervention, and whether the decision of the would-be intervenor to intervene

[3] The definition of "emission standard or limitation" should be broadly construed. *See Nat. Res. Def. Council, Inc. v. EPA*, 489 F.2d 390, 394, n.2 (5th Cir. 1974), rev'd on other grounds sub nom. *Train v. NRDC*, 421 U.S. 60 (1975) ("'[E]mission limitations' is an inclusive term referring to any type of control to reduce the amount of emissions into the air."); *Communities For A Better Env't. Cenco Refining Co.*, 180 F.Supp.2d 1062, 1076 (C.D. Cal. 2001) ("Put more simply, an emission standard or limitation is broadly construed as any type of control to reduce the amount of emissions into the air.") (quoting *Citizens for a Better Env't v. Deukmejian*, 731 F.Supp. 1448, 1454 (N.D. Cal. 1990)); *cf U.S. v. Duke Energy Corp*., 171 F.Supp.2d 560, 566 (M.D.N.C. 2001) (ruling that a regulated entity's failure to obtain required permits constitutes an alleged violation of an "emission standard or limitation.").

[4] *Alt v. U.S. E.P.A.*, 758 F.3d 588, 591 (4th Cir. 2014).

at a later date was strategically motivated by the issue of expenses and resources.[5] All factors show Intervenors' motion is timely: 1) the action was filed in July 2021 with no further pleadings except for the Consent Order extending the EPA's Emergency Order; 2) there is no prejudicial delay as no further proceedings have occurred and discovery has not commenced with the Court staying the matter until October 31, 2021; and 3) Intervenors were not tardy in filing this motion.

Finally, Intervenors' motion complies with the requirement set forth in Rule 24(c), Fed. R. Civ. P., specifying that the motion be accompanied by a complaint setting forth Intervenors' claims under the CAA and requested relief. Attached hereto as Exhibit A is Intervenors' Complaint in Intervention.

Intervenors have an unconditional right to intervene in this matter under the CAA, and intervention is appropriate.

II. Intervenors are entitled to intervention as of right under Rule 24(a)(2).

Under Rule 24(a)(2) of the Federal Rules of Civil Procedure:

> A court must allow intervention as of right upon timely motion if a movant demonstrates "(1) an interest in the subject matter of the action; (2) that the protection of this interest would be impaired because of the action; and (3) that the applicant's interest is not adequately represented by the parties to the litigation."[6]

This test is applied liberally. Indeed, "[t]he Fourth Circuit has 'noted that liberal intervention is desirable to dispose of as much of a controversy "involving as many apparently concerned persons as is compatible with efficiency and due process.'"[7]

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[5] *See e.g. Middleton v. Andino*, 481 F.Supp.3d 563, 567-68 (D.S.C. 2020).
[6] *Lee v. Va. Bd. of Elections*, 2015 WL 5178993, *1 (E.D. Va. Sept. 4, 2015) (quoting *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013)).
[7] *N.C. State Conference of NAACP v. Cooper*, 332 F.R.D. 161, 165 (M.D.N.C. 2019) (quoting *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)); *Ohio Valley Env't Coal., Inc. v. McCarthy*, 313 F.R.D. 10, 16 (S.D.W.Va. 2015)).

Intervenors satisfy each requirement for intervention as of right under Rule 24(a)(2). First, Intervenors' motion is timely, as shown above.

Second, Intervenors must have a significant protectable interest in this litigation. In an analysis of the "interest" element of a Rule 24(a) request for intervention, the Fourth Circuit requires the would-be intervenor to show it has a "significant protectable interest" in the litigation.[8] A movant has a "significant protectable interest" if she stands "to gain or lose by the direct legal operation of the district court's judgment…."[9]

Here, Intervenors have a significant protectable interest in this litigation: their health and welfare and the use of their properties. The EPA's Complaint recognizes that New Indy has not found a permanent solution to control its emissions, as shown by community members who continue to file complaints with DHEC about odors and health concerns (D.I. 1 ¶¶24, 28). The EPA alleges that New Indy's continued operations at the Facility are "causing and contributing to an imminent and substantial endangerment to public health or welfare of the environment" (*Id.*). Intervenors are members of the community affected by New Indy's wrongful conduct. (Ex. A, ¶¶ 1-2). Intervenors have a significant protectable interest in this action because they have personally experienced adverse health effects from exposure to H_2S. (*Id.*). Their interest is to not only ensure that the Facility immediately ceases emitting malodorous and toxic H_2S and TRS to the air, but also that New Indy undertake substantial upgrades to its massive and outdated outdoor wastewater treatment plant to prevent further air pollution events that will negatively impact their health, welfare, and use of their properties. Indeed, a remediation plan which addresses these concerns is

[8] *Lee*, 2015 WL 5178993 at *2 (citing *Teague v. Bakker*, 931 F.2d 259, 261 (4th Cir. 1991)).
[9] *Def. of Wildlife v. N.C. Dep't of Transp.*, 281 F.R.D. 264, 268 (E.D.N.C. 2012) (quoting *Teague*, 931 F.2d at 261).

required under the Emergency Order, and it is speculative, at best, whether it is adequate and when it will come to fruition.

Third, Intervenors need to demonstrate that "failure to allow intervention would impair that interest."[10] "This requirement is one of 'practical impairment.'"[11] The United States District Court for South Carolina has found this requirement satisfied if the movant, if denied intervention, will have an inadequate remedy for their claims even if successful in a separate civil action.[12]

Denying intervention will impair Intervenors' interest in protecting themselves from the adverse health and welfare effects of New Indy's ongoing air pollution. In the event the EPA fails to establish that New Indy has violated the CAA and, by extension, fails to demonstrate that implementation of the Emergency Order as construed by Intervenors' air and wastewater pollution experts is warranted, they will be left without redress under the CAA to effectuate necessary changes to protect themselves and others from New Indy's pollution. Also, as noted above, the Emergency Order requires the formulation of a remediation plan to address the H_2S pollution caused by New Indy, and the remediation measures undertaken by New Indy to date are grossly inadequate and do not timely redress the problems articulated by the EPA and Intervenors. EPA has already asserted that New Indy continues to violate the Emergency Order and that its compliance efforts are "temporary, speculative, or inadequate" (D.I. 1 ¶24), which only reinforces the concern that an inadequate remediation plan will ultimately be developed.

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[10] *Lee*, 2015 WL 5178993 at *2 (citations omitted).
[11] *Thomas v. Andino*, 335 F.R.D. 364, 370 (D.S.C. 2020) (quoting *Maxum Indem. Co. v. Biddle Law Firm, PA*, 550, 555 (D.S.C. 2019)).
[12] *See e.g. Maxum Indem. Co.*, 239 F.R.D. at 555 (citing *N.H. Ins. Co. v. Greaves*, 110 F.R.D. 549, 552-53 (D.R.I. 1986)); *see also Teague*, 931 F.2d at 261 (adopting aforementioned test as articulated in *Greaves*).

Moreover, the adjudication of the EPA's H_2S-only claim will impair Intervenors' interest in addressing New Indy's emission of other dangerous chemicals. Under the Consent Order, New Indy is required to meet certain limits set for H_2S at its fence-line. However, no limits are set for other chemical compounds contained in the Facility's foul condensate such as methyl mercaptan which is considered 14 times more toxic than H_2S under DHEC's toxic air pollutant regulations. *See* Ex. A ¶¶29, 44; S.C. Code Regs. 61-62.5, Standard No. 8, Toxic Air Pollutants. Intervenors contend the health effects and odors causing the complaints alleged in the EPA's Complaint result from chemical compounds in addition to H_2S for which neither EPA nor New Indy is monitoring. (*See* D.I. 1-1, ¶52b (Emergency Order regarding monitoring scope); Ex. A ¶47 (citing Ex. 5, Declaration of Richard H. Osa, EQP and accompanying Expert Report at pg. 3 and Ex. 6, Declaration of Martin MacLeod, PhD and accompanying Expert Report at pgs. 3-4)). Based on data in New Indy's own documents, Intervenors allege that H_2S is less than 10% of the four malodorous and toxic TRS compounds being emitted from the Facility's wastewater treatment plant. (Ex. A ¶47 and accompanying declarations and reports). Intervenors also allege that the type and location of H_2S monitoring equipment installed by New Indy under the EPA's Emergency Order is inadequate to protect Intervenors' health and welfare. (Ex. A ¶¶ 45-52 (citing Ex. 5, Declaration of Richard H. Osa, EQP and accompanying Expert Report)).

What's more, New Indy has not submitted or implemented the endangerment plan required by the Emergency Order. That order, incorporated into the Consent Order, required New Indy, after consulting with a toxicologist, to submit a long-term plan by June 27 that identifies: (i) how New Indy's continued operations will avoid the endangerment identified in EPA's Order; and (ii) what operational, production or process changes to the Facility are necessary to operate in accordance with recognized and generally accepted good engineering and good air pollution

control practices. *See* D.I. 1-1 ¶52(h). On information and belief, no such endangerment plan has been released to Intervenors nor posted on websites maintained by EPA, DHEC, or New Indy. *See* Ex. A ¶25. The continuing release of H_2S from the Facility and weekly status reports issued by New Indy and posted on DHEC's website do not indicate that necessary operational, production, or process changes are being implemented at the Facility to comply with generally accepted good engineering and good air pollution control practices. *Id.* (citing expert reports).

If the Court approves a finding by the EPA that its imminent and substantial endangerment claims have been satisfied by New Indy solely based on meeting the fence-line limits for H_2S set forth in the Consent Order, Intervenors' interest in their health and welfare—as protected by the CAA, 42 U.S.C. §§ 7401(b)—will be impaired or impeded.

As to the final element, inadequate representation, the burden on the movant to demonstrate such is minimal.[13] Indeed, "the applicant need only show 'that representation of his interest "may be" inadequate….'"[14] The EPA may not be adequately representing Intervenors' interest in public health and welfare by, as described above, not requiring New Indy to test for other malodorous and toxic air pollutants such as methyl mercaptan and imposing on New Indy inadequate monitoring requirements. Therefore, intervention is appropriate under Rule 24(a)(2).

III. The Court should permit Intervenors to intervene pursuant to Rule 24(b)(1)(B).

Rule 24(b)(1)(B) of the Federal Rules of Civil Procedure grants a district court discretion, upon a timely motion, to permit a movant's intervention when:

> (1) an applicant's claim or defense and the main action have a question of law or fact in common, . . .
> (2) . . . the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties[,]

[13] *Va. v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976) (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).
[14] *Def. of Wildlife*, 281 F.R.D. at 269 (quoting *Trbovich*, 404 U.S. at 538 n.10) (emphasis added).

> (3) intervention will not destroy the jurisdiction of the federal court when based on diversity of citizenship, and
> (4) the jurisdictional amount in controversy [is] satisfied for the claims or defenses of the petitioner-intervenor.[15]

A "trial court may deny intervention where it would cause 'undue delay, complexity or confusion to the litigation' or would not contribute to the 'just and equitable adjudication of the legal question presented."[16] Only when the would-be intervenor's participation in a case "'will hinder, rather than enhance, judicial economy,' and will 'unnecessarily complicate and delay' the various stages of [a] case, to include discovery, dispositive motions, and trial[,]" is denial of a request for intervention is appropriate.[17] "As a general matter, 'liberal intervention is desirable to dispose of as much of a controversy involving as many apparently concerned persons as is compatible with efficiency and due process.'"[18]

The Court should also grant Intervenors permissive intervention. Since this is a federal question case, the last two prongs of the permissive intervention test are inapplicable. And, as noted above, this motion is timely as intervention will not result in any prejudicial delay because no proceedings have occurred before the Court and discovery has not commenced. The only open issue relating to granting intervention under Rule 24(b)(1)(B) is whether there is a common question of law or fact among Intervenors' claims against New Indy and the EPA's claims against New Indy. The answer is clearly in the affirmative. Intervenors' Complaint sets forth Intervenors' claims under the CAA and requested relief. Intervenors' Complaint asserts numerous common

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[15] *TPI Corp. v. Merchandise Mart of S.C., Inc.*, 61 F.R.D. 684, 688-89 (D.S.C. 1974).
[16] *League of Women Voters of S.C. v. Andino*, 2020 WL 6573386, *1 (D.S.C. Oct. 14, 2020) (citations omitted).
[17] *Cooper*, 332 F.R.D. at 172 (quoting *One Wis. Inst., Inc. v. Nichol*, 310 F.R.D. 394, 399-400 (W.D. Wis. 2015)).
[18] *Norfolk S. Ry. Co. v. City of Roanoke*, 2016 WL 6126397, at *1 (W.D.Va., 2016) (quoting *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986)).

questions of law and fact shared by the EPA's Complaint, all of which relate to whether New Indy is complying with the CAA and the Emergency Order and whether New Indy's ongoing emissions are endangering Intervenors' health and welfare. As such, the Court should grant Intervenors permissive intervention under Rule 24(b)(1)(B).

LIFT THE STAY TO CONSIDER THE MOTION TO INTERVENE

The Court should lift the current stay to consider Intervenors' motion to intervene. Whether or not to stay litigation is a matter left to the Court's discretion.[19] "A lifting of the stay is warranted if the circumstances supporting the stay have changed, or 'changed significantly,' such that the stay is no longer appropriate."[20]

> The court's judgment is constrained only by the need to weigh the competing interests involved in the decision of whether or not to [lift] the stay, to examine the potential hardships and inequities to which the different parties would be subjected if the stay was [perpetuated], and to keep the stay "within the bounds of moderation."[21]

The Court has stayed this action until October 31, 2021 (D.I. 6 ¶5). That is the date when the Emergency Order, now extended by the Consent Order, expires (D.I. 6 ¶3). The same day the EPA filed this action, the EPA and New Indy filed a joint motion seeking the entry of the Consent Order (D.I. ¶5). The Court entered the stay one day later because the entry of the Consent Order provided all the interim injunctive relief the EPA sought.

Intervenors' motion to intervene changes the circumstances significantly. Intervenors invoke 42 U.S.C. §7604 as a basis for unconditional intervention as well as required and permissive intervention under Federal Rule of Civil Procedure 24. A stay entered one day after a case being

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[19] *Robinson v. MeadWestvaco Corp.*, 2005 WL 8164995, *2 (D.S.C. Oct. 31, 2005) (citing *Clinton v. Jones*, 520 U.S. 681, 706 (1997)).
[20] *Sealy Tech., LLC v. Simmons Bedding Co.*, 2014 WL 12595224, *2 (M.D.N.C. Oct. 7, 2014) (citations omitted).
[21] *Nat'l Material Trading v. M/V Kaptan Cebi*, 1998 WL 449221, *1 (D.S.C. Jan. 15, 1998).

filed should not stand in the way of a proposed intervenors exercising their due process rights under statute and the Federal Rules. New Indy and the EPA may argue that they will suffer prejudice litigating Intervenors' motion to intervene. They can avoid any prejudice by consenting to Intervenors' intervention under clear legal authority. But any prejudice caused by responding to a motion on a narrow issue cannot outweigh the substantial prejudice Intervenors will suffer if the Court does not allow them to present the motion to intervene. The Court should lift the stay to consider Intervenors' motion to intervene.

WHEREFORE, Intervenors respectfully request that the Court grant the Motion to Intervene.

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Date: September 29, 2021

LR 7.02 Statement

The undersigned counsels for Intervenors affirm that prior to filing this motion, they conferred with counsel for Plaintiff, the United States of America, ("Plaintiff"), and with counsel for Defendant New-Indy Catawba, LLC ("Defendant"), in good faith to attempt to resolve the matters contained herein, pursuant to Local Civil Rule 7.02. As to the Plaintiff, its counsel authorized Intervenors' counsels to state that: i) Plaintiff does not oppose lifting the stay, solely to litigate the motion to intervene (but with the stay otherwise remaining in place as between Plaintiff and Defendant); ii) Plaintiff opposes intervention as the first claim for relief in the Complaint in Intervention; and iii) Plaintiff does not consent to the second claim for relief in the Complaint in Intervention. As to the Defendant, its counsel authorized us to state that Defendant opposes the motion.

/s/ T. David Hoyle /s/ Ben Leader