23-1052

United States Court of Appeals

for the

Fourth Circuit

ENRIQUE LIZANO; MELDA GAIN; KRISTA COOK; JEAN HOVANEC; KATHLEEN MORAN; TERRI KENNEDY; IDA MCMULLEN; CAMMIE BARNES; DONALD HONEYCUTT; KENNY N. WHITE; TRACIE NICKELL; AMANDA SWAGGER; JOHN HOLLIS; MARSHA STEWART,

Appellants,

– v. –

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

NEW INDY CATAWBA LLC,

Defendant/Appellee,

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

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

New-Indy Catawba, LLC ("New-Indy") and the United States (collectively, the "Parties") remain a united front in their mutual opposition to Citizens'[1] right to intervene in this action. Both have submitted briefs predicated on the mistaken notion that in an Environmental Protection Agency ("EPA") suit, irrespective of the factual basis or nature of the relief requested, EPA can thwart the citizen participation afforded by the plain language of the Clean Air Act, 42 U.S.C. §§ 7401, *et seq.* ("CAA") by simply styling a cause of action as one brought under CAA Section 303 (42 U.S.C. § 7603). In so doing, they leave threshold issues unaddressed, ignore the language and legislative history of the CAA, and instead ask the Court to analogize to a decision construing *different* statutes under *different* circumstances. In support of this effort, the Parties offer a hodgepodge of arguments unmoored from the statutory text and largely divorced from its history as well. As discussed below, none of their various arguments provide any valid basis, legal or practical, to judicially-create an exemption absent from, and without support in, the statute's text.

[1] As set forth in their opening brief, Citizens are 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.

More importantly, the Parties make only a passing attempt to engage the dispositive issue with regard to Citizens' statutory right to intervene: whether the EPA's emergency order ("EPA Order") is an "emission standard or limitation" within the meaning of Section 304, the CAA's citizen suit provision. 42 U.S.C. § 7604(a)(1). On this issue, they utterly fail to engage, much less rebut, any of the ample authority set forth in Citizens' brief or to offer any apposite authority of their own. Instead, they attempt to rewrite the statutory definitions that plainly encompass the EPA Order. New-Indy additionally advances an alternative argument to the effect that when the CAA says citizens may intervene "as a matter of right," what it meant was "in the court's discretion." These unfounded arguments failed to persuade the district court. This Court should reject them as well.

Finally, the Parties offer nothing to counter Citizens' arguments concerning their right to intervene under Federal Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B). What they dismiss as mere "criticism" of EPA or a depiction of an agency "asleep at the wheel" while a "bad actor" runs amuck is the undisputed record. *See* EPA Br. at 2 & 41; New-Indy Br. at 1. And, the slumber they cite is not a "distraction"; it is directly relevant to the error in the district court's conclusion that an agency committed to avoiding any conflict with New-Indy was adequately representing Citizens with the prerogative of protecting their health and enjoying their homes again.

ARGUMENT

I. EPA and New-Indy Leave Key Threshold Arguments Unrebutted.

The briefs of EPA and New-Indy gloss over threshold issues. First, neither Party disputes that the district court erred in ruling that Citizen's Motion to Reconsider the denial of intervention was moot. New-Indy says nothing, and EPA addresses only potential remedies, asking this Court to find a way for Citizens to contest and, if needed, appeal the Consent Decree and Final Judgment (hereinafter "Consent Judgment") without vacating the judgment.[2] *See* EPA Br. at 42.

Second, and relatedly, neither Party disputes that if allowed to intervene, Citizens have good grounds to challenge the Consent Judgment, on both substantive and procedural grounds.

Third, the Parties leave unrebutted Citizens' argument that the issue on which their briefs center—permissibility of citizen intervention in an action seeking only injunctive relief under CAA Section 303—is, ironically, itself a moot point because this is not such an action. Neither Party disputes that "EPA, apparently, had been negotiating the settlement of a civil penalty claim all along, without disclosing it to the court or to Citizens." Citizens' Br. at 21. EPA's theory is that as long as it pleads

[2] To address that argument, Citizens would not object to a mechanism for temporarily putting back in place the original, July 2022 Consent Order, which both Parties asserted was adequate to protect their interests, such that there was no urgency to the district court's determination of whether to enter the proposed Consent Judgment. JA886.

the factual basis for the civil penalty claim without putting the cause of action "in the complaint," it can cite the absence of a civil penalty claim as grounds to exclude the citizens who breathe the contaminated air from having a voice in the chosen remedy. EPA Br. at 29. Yet, the secretly negotiated Consent Judgment in fact includes a penalty. When the Complaint looks and quacks like a duck, it is one. This Complaint alleged a Section 303 claim and also facts for purposes of a Section 113 claim alleging specific violations of a standard or limitation of the CAA.

More importantly, EPA admitted, and the district court found, that it is in fact a duck. EPA does not even attempt to explain how what it characterizes as a purely "*potential*" claim could affect the district court's *actual* subject matter jurisdiction. EPA Br. at 29 (emphasis added). Undisputedly, at EPA's request, the district court found that it had jurisdiction under 28 U.S.C. § 1355, which concerns "an[] action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture . . . ." 28 U.S.C. § 1355(a). *See* JA822 & JA3473. On its face, this provision would be inapplicable in a Section 303-only case. Also, undisputedly, in those circumstances, Congress gave citizens a statutory right to participate in the case, including the development of the remedy.

EPA also ignores that under Federal Rule of Civil Procedure 15(b), issues "'tried by express or implied consent of the parties'" are considered part of the action, regardless of whether a party amends its pleading to reflect the broader scope.

Elmore v. Corcoran, 913 F.2d 170, 172 (4th Cir. 1990) (quoting Fed. R. Civ. P. 15(b)). Even where "no formal amendment was made, a district court may amend the pleadings merely by entering findings on the unpleaded issues." *Id.* (internal quotation marks omitted).[3] The same caselaw EPA cites state that a party cannot "be awarded judgment on a claim or defense that was never raised." *Steves & Sons, Inc. v. JELD-WEN, Inc.*, 988 F.3d 690, 728 (4th Cir. 2021). Here, the district court entered the Consent Judgment as a binding final judgment on both the Section 303 and the civil penalty claims (which undisputedly are available only under CAA Section 113) resolved by settlement, reserving to EPA all other claims. *See* JA822 & JA3473.

II. EPA and New-Indy Are Arguing for a Judicially-Created Exemption Contrary to the CAA's Plain Language.

A. Nothing in Section 304 Requires That EPA's Suit Be One "Under Section 113."

Although both Parties ignore the CAA's plain language, EPA goes particularly far in attempting to rewrite it. Much of EPA's brief consists of arguments that the intervention right set forth in Section 304(b)(1)(B) is limited to "federal enforcement actions under Section 113." EPA Br. at 16; *see also* EPA Br.

[3] In the Consent Judgment context, the Court's ability to resolve an unpled claim is limited to claims which meet certain criteria and which "fall[] within the general scope of the case as it is framed by the pleadings." *United States v. Davis*, 11 F. Supp. 2d 183, 187–88 (D.R.I. 1998), *aff'd*, 261 F.3d 1 (1st Cir. 2001) (citing *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986)).

at 17 (arguing that Section 304(b)(1)(B) applies only "if the government is prosecuting an enforcement action under Section 113"); EPA Br. at 18 (arguing that "[p]ut another way," intervention is available only in a "Section 113 action"); EPA Br. at 20 (arguing that EPA action at issue must be one "under Section 113"); EPA Br. at 27 (arguing that EPA here is not bringing "a Section 113 enforcement action"). No matter how many times that EPA repeats this contention, it is not what the statute says. On its face, nothing in Section 304(b)(1)(B) provides that EPA's action must be one under Section 113. *See* 42 U.S.C. § 7413. Likewise, nowhere does Section 304(b)(1)(B) exclude Section 303 actions from its ambit. *See id.* EPA is offering only its own *ipse dixit*, unmoored from the CAA's text and unsupported by any caselaw.

As described in Citizens' opening brief, the CAA permits a citizen suit against any person "who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of [] an emission standard or limitation . . . ." 42 U.S.C. § 7604(a)(1). If, however, EPA has commenced and is diligently prosecuting a civil action "to require compliance with the standard, limitation, or order" that the citizen would allege was violated, the citizen must pursue their claim through intervention in the EPA's action, rather than initiation of a separate proceeding. *See id.* § 7604(b)(1)(B). Thus, citizens' intervention rights turn on whether their claim entails violations of an emissions standard or limit with

which EPA also seeks to obtain compliance, regardless of the CAA subsection under which EPA sues to obtain such compliance. *See* 42 U.S.C. §§ 7604(a)-(b). Congress *could* instead have provided that intervention rights turn on whether EPA is proceeding pursuant to Section 113, but it chose not to do so.[4]

Ultimately, the issue under Section 304 is not which CAA Section EPA sued under, whether EPA views its action under Section 303 as "enforcement" activity, *e.g.* EPA Br. at 27, or if EPA is seeking "to recover for violations" of emissions standards, New-Indy Br. at 16-17. Instead, Section 304 provides for intervention when EPA is diligently prosecuting a civil action "*to require compliance* with" a "standard, limitation, or order," at issue in the citizen's suit. 42 U.S.C. § 7604(b)(1)(B) (emphasis added). This language stands in contrast to Section 304(a)(1), which speaks in terms of whether a party "ha[s] violated" or is "in

[4] EPA intonates that there is something about the "placement of Section 303 enforcement powers in Section 113" that should inform the Court's result. *See* EPA at 25-26. But, it never explains why it matters that EPA can sue under both subsections. And, the legislative history EPA cites says nothing about citizen suits. If anything, it highlights overlap between Section 113 and 303, not an attempt to create a great divide where citizen rights are concerned. *See* S. Rep. 101-228, at 231, 406-407 (1989) WL *3753, WL *0 (explaining that Section 303's civil penalty provision was deleted as duplicative). Section 113 provides that EPA can seek injunctive relief if a person "has violated, or is in violation of . . . Section 7603" (a.k.a Section 303). Section 303 similarly provides a cause of action for injunctive relief, such that some overlap remains despite the de-duplication effort referenced. This is understandable, particularly in the context of a statute that has overlap in other areas as well. *See*, *e.g.*, *U.S. v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 564-65 (M.D.N.C. 2001).

violation" of the same. *See id.* § 7604(a)(1). "[W]here 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Healthkeepers, Inc. v. Richmond Ambulance Auth.*, 642 F.3d 466, 472 (4th Cir. 2011) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

Here, neither EPA nor New-Indy dispute that, as a factual matter, the emissions standards and limits that both Citizens and EPA allege New-Indy violated (namely, those contained in Paragraph 52 of the EPA Order), are the same standards with which EPA sought to require compliance through this action. *See*, *e.g.*, Citizens' Br. at 43. In fact, New-Indy admits that EPA's Complaint sought "injunctive relief . . . requiring continuing compliance with the EPA Order." (New-Indy Br. at 5) (quoting EPA Compl.). EPA likewise concedes that it "used the requirements" of the EPA Order as the basis for the relief it requested. EPA Br. at 27.

Neither Party suggests that moving forward, Citizens could still sue under the CAA for injunctive relief to require New-Indy's compliance with the EPA Order or penalties for violating the standards and limitations on which EPA based the Consent Judgment penalties. *See* Citizens' Br. at 12-13. Citizens were precluded from contesting a remedy that undisputedly "fails utterly to follow the known science"

and "only created new problems" by allowing New-Indy to "address the chemical releases with more chemicals that have their own repercussions." Citizens' Br. at 23 (citing JA979-980 & JA3503).

B. The Issue Is Whether the *Emissions Standards and Limits* Citizens Allege New-Indy Violated Are the Same as Those With Which EPA Sought to Require Compliance, Not Whether Citizens and EPA Can Sue Under the Same *CAA Subsection*.

As described above intervention under Section 304(b)(1)(B) unambiguously turns on whether Citizens allege a violation of the *same emissions standard or limit* with which EPA seeks to require compliance, not whether Citizens are asserting the *same cause of action* as EPA. It is well-established that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart*, 534 U.S. at 461–62 (internal quotation marks omitted). "When the words of a statute are unambiguous, [] this first canon is also the last: 'judicial inquiry is complete.'" *Id.*

The district court, however, imposed an added obligation that Citizens and EPA sue, or be able to sue, under the same CAA subsection. Its denial of intervention reasoned that because "'Intervenors could not have brought suit against New Indy under Section 303,'" they also cannot intervene (or bring an original suit) under Section 304. New-Indy Br. at 9 (quoting Order reasoning that "'Section 7603

authorizes only the EPA to file suit and issue orders to abate an endangerment'").[5] As the Parties acknowledge, this ruling accepted EPA's "exclusivity" argument. *See*, *e.g.*, EPA Br. at 21. EPA's theory, which it also advances here, was that because *Section 303* grants a cause of action "exclusively" to EPA, without mentioning private parties, Citizens cannot sue under *Section 304*. *See* EPA Br. at 20-21.

Both Parties urge this Court to follow the same mistaken path. *See*, *e.g.*, New-Indy Br. at 16. Yet, they never explain how they would support the logical leap they ask the Court to make. Neither Party disputes that the same "exclusivity" argument applies equally to Section 113. *See* Citizens' Br. at 40-41. A "distinction" which is equally true of both CAA Sections is no distinction at all. *Compare* 42 U.S.C. § 7413 *with* 42 U.S.C. § 7603. And, to suggest that before a citizen can invoke Section 304, that person must *also* show that they could proceed directly under a *different* subsection granting EPA a cause of action is to demand a statutory impossibility that would eliminate Citizen suits entirely. *See* Citizens' Br. at 40-41.

[5] Oddly, New-Indy, which draws this language directly from the district court's Order, still says that there is no indication that a perceived requirement that Citizens be able to sue under the same subsection as EPA played a role in the district court's decision. *See* New-Indy Br. at 20.

Nothing in the case on which the Parties rely, *Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 894 F.3d 1030 (9th Cir. 2018), supports imposition of such a requirement. Not only did the *Volkswagen* decision *not* hold that citizens and EPA need to sue under the same CAA subsection, it had no occasion to consider the arguments raised here. There, the would-be intervenor, Mr. Fleshman, had his own suit pending against Volkswagen in state court and sought to intervene in EPA's action solely to obtain "various declarations and orders *against the EPA*." 894 F.3d at 1037 (emphasis added). "[N]one of the requested relief was" even "directed at Volkswagen." 894 F.3d at 1037. Not only that, Mr. Fleshman's claims against EPA were "entirely distinct" from EPA's claims against Volkswagen. *Id.* at 1042. Mr. Fleishman alleged violations of Virginia's State Implementation Plan ("SIP"), while EPA "did not allege that VW had not complied with Virginia's (or any state's) SIP" as any part of its claims. *Id.* at 1042.[6]

[6] Even New-Indy treats *Volkswagen* as standing for the proposition that an intervenor's allegations cannot be "entirely distinct" from the conduct underpinning the government's allegations. New-Indy Br. at 24. Although New-Indy argues that *Volkswagen* sets the standard, at one point in its brief, it also references a different, district court case as noting that intervention applies when the intervenor's and EPA's claims are identical. *See* New-Indy Br. at 24-25 (quoting *United States v. Dominion Energy, Inc.*, No. 3:13-cv-3086, 2014 WL 1476600, at *4-6 (C.D. Ill. Apr. 15, 2014)). In *Dominion Energy*, too, the court had no occasion to parse degrees of similarity because the intervenor sought to assert claims based on "different facts altogether" than EPA's action. *See* 2014 WL 1476600, at *4-6.

EPA's reliance on the other cases it cites is equally misplaced. None involved a citizen seeking to intervene as a plaintiff. *See Del. Valley Citizens' Council v. Pennsylvania*, 674 F.2d 970, 973 (3d Cir. 1982) (attempt to intervene *as defendants* "on behalf of an alleged violator," not to assert any claim); *United States v. Metro. St. Louis Sewer*, *Dist.*, 569 F.3d 829 (8th Cir. 2009) (organization with no standing to sue sought to act as a "neutral party" in Clean Water Act case without filing any complaint in intervention); *United States v. City of New York*, 198 F.3d 360, 364 (2d Cir. 1999) (attempt to intervene as a defendant to assert "irrelevant" concerns "beyond the judicial function" and thereby "block" enforcement of the Safe Drinking Water Act).

The readily distinguishable cases on which the Parties rely focused their inquiry on the existence of factual overlap between the intervenor's and EPA's claims. Yet, EPA and New-Indy persuaded the district court here to take a different tack, asking instead whether it is hypothetically possible for EPA to assert a Section 303 claim in a given case without alleging violation of an emergency order or other CAA provision. JA868 (Order). As EPA admits, that Section 303 extends to "a wide range of endangerment scenarios," that do not *require* EPA to allege violations of other CAA provisions or an emergency order, does not mean EPA *cannot* rely on such violations. *See* EPA Br. at 22. *Accord* New-Indy Br. at 10 & 17 (taking same position). Here, the record reflects that the way EPA sought to demonstrate

endangerment was through allegations that New-Indy had repeatedly violated, and was still violating, the EPA Order. JA21-26. Both Parties further asserted that as long as the Consent Order requiring New-Indy to comply with the EPA Order was in place,[7] there was no real urgency to the situation. *See* JA866 (Parties' third status report, stating with respect to the final Consent Judgment that: "Because the Consent Order remains in place, there is no need for expedited filing.").

C. EPA and New-Indy Ask the Court to Interpret the CAA By Analogy to An Inapposite Decision, Not Established Cannons of Construction.

The Parties both recognize that the district court's decision centered around a Second Circuit decision in *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984) and ask this Court to take the same approach. Neither Party, however, meaningfully engages Citizens' arguments about the many ways that the *Hooker* case is inapposite. Quite the opposite, EPA admits that the "core" of the *Hooker* decision was whether "imminent and substantial endangerment" is *itself* a pertinent "standard" within the meaning of the language used in the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA") or Clean Water Act ("CWA"). EPA Br. at 24. That is precisely Citizens' point: the *Hooker* court had no occasion to consider whether it would reach the same result if either

[7] As noted in Citizen's opening brief, the Parties submitted the Consent Order the same day as EPA's complaint to seek a longer extension of the EPA Order than automatically provided by statute. *See* Citizens' Br. at 16.

the government's imminent and substantial endangerment claims, or the citizen suits, *did* allege a violation of such standards. *See* Citizens' Br. at 16-17.

Perhaps more importantly, neither Party has an answer to Citizen's argument that *Hooker* in no way stands for the proposition that courts should depart from established cannons of statutory construction. Here, neither EPA nor New-Indy offers any reason to believe the CAA's language is ambiguous. EPA's brief does rely on a few references to the legislative history. It offers nothing to dispute, however, that this same backdrop rejects the notion, which EPA persuaded the district court to embrace, that citizen suits "risk[] an undue or inhibiting interference with Government enforcement." *Nat. Res. Def. Council*, *Inc. v. Train*, 510 F.2d 692, 729 (D.C. Cir. 1974). EPA argues that the CAA's legislative history says, in reference to Section 303, that "this emergency authority is necessary to provide for immediate, effective action." (EPA Br. at 21 (quoting S. Rep. 91-1196, at 35 (1970)). This statement, of course, says nothing about whether Congress saw citizen participation as a help or a hindrance in that regard.

EPA offers nothing to dispute that Citizens' characterization of the legislative history, *see* Citizens' Br. at 39-40, is a fair one. And, the examples Citizens referenced are by no means isolated. The same Senate Report EPA cites highlights the importance of citizen participation in accelerating EPA action and ensuring it effectively addresses harmful pollution. *See* S. Rep. 91-1196, at 36-37 (1970)

(lamenting that agency enforcement has been "restrained" and describing citizen suits as important to "accelerate enforcement action," assure more "aggressive" pursuit of agency responsibilities, and "motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings").[8] *See also* 1970 U.S.C.C.A.N. 5356, 5360 (H. Rep. 91-1146) (describing progress in "controlling air pollution" as "regrettably slow," in part due to inadequate funding for regulators and "organizational problems on the federal level where air pollution control has not been accorded a sufficiently high priority.").[9]

EPA's argument is particularly misleading because the Senate Report it cites referenced *administrative* action as the principal way to take immediate action in the face of emergency. Congress cautioned that: "The levels of concentration of air pollution agents or combinations of agents which substantially endanger health are levels which should *never be reached* in any community." S. Rep. 91-1196, at 36 (1970) (emphasis added). If it appears imminent that such endangerment could

[8] The Senate Report also uses language of immediacy in reference to citizen suits. S. Rep. 91-1196, at 37 (1970).

[9] Were this Court to analogize to the RCRA context at issue in *Hooker*, it would see the same concern reflected in that statute's history. In fact, the First Circuit reasoned, in an imminent and substantial endangerment action, that it would be "counterintuitive to suggest that Congress intended to erect an enforcement structure built on exaggerated deference to EPA." *Maine People's All. And Nat. Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 295 (1st Cir. 2006) (noting that Congress had learned of "inadequate effort" in enforcing the statute and "astonishing. . . mismanagement" by EPA).

occur, "even for a short period of time" then "an emergency action plan should be implemented to reduce emissions of air pollution agents and prevent the occurrence of substantial endangerment." S. Rep. 91-1196, at 36 (1970).[10] Understandably against this backdrop, administrative orders under Section 303, as EPA notes, had only a 24-hour duration. *See* EPA Br. at 28. Later, Congress expanded the duration to sixty days because it determined that the "24- to 48-hour time limit" was "unrealistically short" for such orders to function as "a viable enforcement tool" in their own right. S. Rep. 101-228 at 231 (1989) WL *3753.[11]

Further, EPA and New-Indy assert in unison that but for their plan to "coordinate" outside the public eye, JA53, the normal next step after filing a Section 303 action and/or extending an emergency order would be preliminary injunction proceedings, a distasteful alternative they sought to avoid. *See* New-Indy Br. at 5 & EPA Br. at 8. Neither EPA nor New-Indy offers any reason that citizen participation would inherently frustrate pursuit of an injunction. Moreover, the citizens who are

[10] EPA does not suggest here that it had an emergency action plan in place concerning H_2S or pollution from pulp mills.

[11] Although this line of argument is purely a distraction on EPA's part, one could just as easily contend that it is the option to issue, administratively, emergency orders that makes CAA Section 303 a true "emergency" provision. Undisputedly, the CAA in this respect stands in contrast to RCRA and the CWA, which provide no such authority. *See* Citizens Br. at 37 n.9. And, this Court has held that RCRA's imminent and substantial endangerment provision, which New-Indy and the district court described as "nearly identical" to the CAA's, New-Indy Br. at 18-19, is in no way limited to "emergency situations." *United States v. Waste Indust., Inc.*, 734 F.2d 159, 165 (4th Cir. 1984) (construing 42 U.S.C.A. § 6973).

being subjected to toxic air pollutants should have a role in deciding the nature and timing of appropriate injunctive relief. In this context, as in any other, the "guiding principle" remains "that citizen suits play an important role in the [CAA's] enforcement scheme." *Weiler v. Chatham Forest Products*, 392 F.3d 532, 536 (2d Cir. 2004); *see also* Roger Greenbaum & Anne Peterson, *The Clean Air Act Amendments of 1990: Citizen Suites and How They Work*, 2 Fordham Envtl. L. Rep. 79, 99 (1991) (describing the citizen suit provisions as "designed to promote enforcement through the initiatives of private citizens" with the 1990 amendments strengthening those rights). If anything, citizens suffering at polluters' hands have the most incentive for the case to move quickly. And neither party suggests that a district court could not, for example, decide to rule on a preliminary injunction motion ahead of an intervention motion.

This action provides a case in point as to the value of citizen participation in addressing an endangerment that lacks the same priority level to the Parties as it does in the daily lives of New-Indy's neighbors. Neither Party disputes that their status reports merely reference "steps" New-Indy took before the lawsuit and in which it "continued" to engage, along with updates on attempts to reach a settlement, leaving one to wonder what, if anything, EPA accomplished since filing its Complaint. Citizens Br. at 20 (quoting JA796); JA797. To the extent one could discern a difference, it was the "sickeningly sweet chemical odor" that came to blanket the

community (without removing the "rotten egg" smell) as EPA agreed to let New-Indy operate without industry-standard technology. *See* JA979 & JA981. The Parties do not dispute the complaints the pollution is so bad that, as one resident explained, she may have to move from her home, are genuine. Citizens' Br. at 25. (quoting JA1005).

Meanwhile, New-Indy is evidently so accustomed to indulgence from federal authority that it had no qualms about breaking basic rules of appellate procedure and evidence. In an attempt to cast aspersions on Citizens' counsel, New-Indy interjects into its brief multiple selective, and misleading, references to internet news articles that it never presented to the district court and which it makes no attempt to argue constitute part of the record on appeal or appropriate subjects of judicial notice. *See* New-Indy Br. at 39 & 43.[12] *Compare Rohrbough v. Wyeth Laboratories*, *Inc.*, 916 F.2d 970, 973 n.8 (4th Cir. 1990) (party's attempt to supplement record with hearsay was unjustified, but at least sought to follow a procedure). That New-Indy did not ask to add the articles to the record is unsurprising, and not only because of their

[12] So careless is New-Indy's portrayal that it misstates the identity of the hearsay declarant it selectively quotes. The statement New-Indy cites is from the reporter, not the attorney interviewed, Mr. Hoyle. The quote from Mr. Hoyle is that EPA did "too little, too late," although its post-judgment letter to New-Indy at least corroborated what Citizens and others have been saying all along. Shaquira Speaks, *Lawsuits Filed to Address York County Plant's "Sweet-Urinal-Cake Smell*," Queen City News (March 15, 2023), Lawsuits filed to address York County plant's 'sweet urinal-cake smell' (newsbreak.com).

obviously inadmissible nature.[13] This material is affirmatively unhelpful to New-Indy's position. According to a reporter, in December 2022 (not long after the district court ruled Citizens' intervention effort moot), EPA notified New-Indy concerning numerous CAA violations, but months later, still had taken no action to enforce the statute.[14] The same source describes New-Indy as violating "the consent decree issued in November 2022," citing the South Carolina Department of Health and Environmental Control as relaying, in this regard, that New-Indy *still* had yet to submit an approvable performance engineering report.[15]

D. EPA's Reference to RCRA's Amendments Only Undermine Its Position.

In a final effort to argue for an exemption to CAA Section 304's plain language, EPA contrasts RCRA's citizen suit provisions to those of the CAA. EPA's theory is that Congress amended RCRA in 1984 to, among other things, expressly permit citizens to bring imminent and substantial endangerment claims regardless of whether the endangerment arises from a violation of any other RCRA standard but did not amend the CAA at the same time. *See* EPA Br. at 22. To the extent this argument has any relevance, it is only to undermine the Parties' (and the district court's) reliance on the *Hooker* decision. If, as EPA posits, *Hooker* stands for the

[13] *See*, *e.g.*, *Gantt v. Whitaker*, 57 F. App'x 141, 150 (4th Cir. 2003).
[14] Speaks, *supra* Note 12.
[15] *See id.*

proposition that Congress considers it inherently inappropriate for citizens to bring, or intervene, in imminent and substantial endangerment actions that do not rest on violations of "previously established" administrative standards, EPA Br. at 13 & 24, why would Congress amend RCRA to eliminate any doubt that citizens can do exactly that?

As Citizens noted in their opening brief, the amendment EPA now cites resolved "a split of authority over" whether RCRA's then-existing text already permitted such suits. Citizens' Br. at 38 (quoting *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1433 (S.D. Ohio 1984)). To the extent that one can infer anything from this, it is that the Second Circuit's *Hooker* decision landed on the wrong side of that split. Indeed, EPA does not even attempt to explain how resolving that split in *favor* of citizen suits says anything about the CAA.[16] Further, the CAA's language is already plain. Undisputedly, denial of intervention in a CAA Section 303 action is also unprecedented. As such, there would be no reason for Congress to amend the CAA to make Citizens' rights clearer than they already are.

[16] In that regard, the lone case EPA cites supports Citizen's position, not EPA's. There, as here, the "plain text" of a statute "supplie[d] a ready answer" to the question, and the agency effectively attempted to rewrite that text based on analogy to a different law. *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354-55 (2018) (addressing patent law context). Here, although resolving the split of authority seems the most likely explanation for the amendment EPA cites, one could also theorize that Congress saw a particular need for this language in RCRA because of the absence of any provision therein for addressing an emergency through administrative emergency orders.

Apart from undermining any reliance on *Hooker*, EPA's arguments about whether the CAA offers an *additional* basis to intervene apart from Section 304(a)(1) are irrelevant. Unquestionably, they would have made no difference to the district court. In denying Citizens' Motion to Intervene, the district court construed *Hooker* as standing for the proposition that there is "no right to intervene" in a government imminent and substantial endangerment action under RCRA "*despite* [the] RCRA citizen suit provision authorizing certain citizen suits to abate an endangerment." JA885 (emphasis added).[17]

Moreover, a defendant could just as easily argue (and has argued) that the scenario EPA describes as supporting intervention actually weighs *against* it. In *Duke Energy Corp.*, EPA "allege[d] that Duke Energy failed to obtain the required state permits prior to the modification and operation of its electrical generating plants." 171 F. Supp. 2d at 562. Because a separate subsection of Section 304, *Section 304(a)(3)* makes available to citizens a cause of action "against any person who proposes to construct or constructs any new or modified major emitting facility without a [required] permit," Duke argued that citizens could not also bring a claim in intervention alleging, under *Section 304(a)(1)* (which Citizens also invoke), that

[17] As Citizens previously noted, it seems more likely the parties to the *Hooker* action offered the Second Circuit incomplete information, such that the court may have been unaware of the amendment. *See* Citizen's Br. at 38-39 n.10.

the failure to obtain the permits constituted a violation of an emissions standard or limitation. *See generally id.*

In *Duke Energy*, the court rejected that argument, reasoning that although there was some overlap between Section 304(a)(3) and Section 304(a)(1), that overlap rendered neither superfluous. *See id.* at 564-65. It reasoned, in part, that the provisions of Section 304(b) concerning intervention apply only to citizen claims under Section 304(a)(1). *See id.* at 564-65. "Under the plain terms of the statute," the citizens could sue under either provision. *See id*. That plain language controlled. The availability of an alternative claim paralleling that asserted by the government had no bearing on whether citizens could intervene to pursue their Section 304(a)(1) claim. *See id*. The same is true here.

III. The Parties Offer Nothing to Dispute that the EPA Order Constitutes and Emission Standard or Limitation Under the CAA.

As New-Indy, at least, ultimately acknowledges, the issue on which citizen-suit rights under Section 304(a)(1) turn is whether the citizen alleges repeated or ongoing violations of a CAA "emission standard or limitation" or an order "with respect to such a standard or limitation[.]" 42 U.S.C. § 7604(a)(1). *See* New-Indy Br. at 2-3; Citizens' Br. at 31. Both Parties focus their briefing on this issue on whether the EPA Order is one "with respect to" a CAA emissions standard or limitation. *See* EPA Br. at 30-33; New-Indy Br. at 10 & 20. This is an odd "response" because Citizens' opening brief did not argue about that alternative. Instead, just as

they did before the district court, Citizens argue that the EPA Order is *itself* an emissions standard or limit. Both parties urge deference to the district court's decision, but because the district court declined to address it, there is no ruling on this dispositive point to which the Court could defer.[18]

A. Nothing In the CAA Restricts Emissions Standards or Limits to Regulations "Promulgated" by EPA or to CAA Permits.

EPA devotes a single paragraph of its Response to the central issue raised in Citizens' brief—whether the EPA Order is an emissions standard or limitation. Therein, EPA argues that only "permits and rules" are "promulgated" by EPA such that they can constitute or contain actionable standards or limits. This argument is based on an attempt to distort one of the multiple statutory definitions at issue, while ignoring the others. As stated in Citizens' opening brief, the CAA broadly defines an "emission standard or limitation" to include, among other things, "a schedule or timetable of compliance, emission limitation, standard of performance or emission standard," through a disjunctive definition in Section 304(f)(1), which includes several qualifying categories which themselves have statutory definitions. 42 U.S.C. § 7604(f)(1). EPA glosses over Section 304(f)(1) and jumps to one of the qualifying

[18] The Court also would not review a purely legal question under a standard other than *de novo* review in any event, as the same caselaw cited by the Parties reflects. *See*, *e.g.*, *Steves & Sons*, *Inc. v. JELD-WEN*, *Inc.*, 988 F.3d 690, 728 (4th Cir. 2021).

categories. Specifically, it turns to the definition of "emission limitation" and "emission standard" in 42 U.S.C. § 7602(k). That definition encompasses:

> a requirement established by the State or the [EPA] which limits the quantity, rate or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

42 U.S.C. § 7602(k). Citing this provision, EPA asserts that it means that only "rules, regulations, and permits" can satisfy this definition because they are "promulgated" or "administratively established." EPA Br. at 32-33. EPA does not even attempt to explain, however, why or how it narrowed the wide range described in the statute to those three words (or what EPA believes the difference is between rules and regulations). Were that the intent, the legislature could have so stated, but it did not. Instead, the above-quoted definition does not even use the word "rule," "regulation," *or* "permit," much less suggest that these are the only sources of standards. Moreover, the word "promulgated," on which EPA focuses, only modifies a "work practice or operational standard" that is specifically included in the list, not the full panoply of requirements. *See* 42 U.S.C. § 7602(k). And, as noted above, EPA declines to engage the definition of "standard of performance" or of "schedule and

timetable of compliance," which omits the word "promulgated" (and also the word "established") entirely.[19]

Additionally, although EPA alludes to the Ninth Circuit *Volkswagen* decision as standing for the proposition that it is possible for a CAA obligation not to be an emissions standard, that says nothing about the nature of the requirements at issue here. *See* EPA Br. at 32. Courts have diverged concerning the interpretation of CAA Section 203, whose prohibitions concerning defeat devices in cars were at issue in *Volkswagen*, but no one here suggests this Court is being called upon to resolve that discord. *Compare Utah Physicians for a Healthy Env't v. Diesel Power Gear, LLC*, 21 F.4th 1229, 1251-52 (10th Cir. 2021) (reasoning that because the purpose of an anti-tampering requirement preventing removal or defeat of emissions control devices is to ensure emissions reductions, there is considerable force to the argument that Section 203 is an emissions standard or limit).

Finally, EPA makes a passing argument that a "schedule or timetable of compliance" must have "an emission limitation, other limitation, prohibition, or

[19] In a different part of its brief, EPA also argues that the legislative history refers to CAA "standards and regulations" as subjects of citizen suits. EPA Br. at 24 (quoting S. Rep. 91-1196, at 35-36 (1970)). EPA then baldly asserts that Section 303 itself does not implicate "standards and regulations." EPA Br. at 24. For avoidance of doubt, the history cited neither departs from nor overrides the statutory text in the manner EPA suggests. *See* S. Rep. 91-1196, at 36 (1970) (noting that alleged violations of "an emission control standard, emission requirement, or a provision in an implementation plan" all involve objective standards already set by regulators).

standard" to which it refers. EPA Br. at 31. Here, the schedule *does* refer back to the other limits in the EPA Order, making any such argument unavailing. The deadlines also are designed to address the overall prohibition in Section 303 against conduct creating the type of emergency that led to the EPA Order in the first place.

B. The Parties' New Arguments About "Continuity" Miss the Mark.

For the first time on appeal, the Parties assert that because the EPA Order, unless extended, has a 60-day duration, it cannot be an emissions standard or limit. Although EPA's cursory paragraph raises this issue, New-Indy devotes it more attention. *See* New-Indy Br. at 17-18. Both parties, however, marshal neither law nor logic to support their theory. Contrary to New-Indy's contention that an order with a sixty-day duration is "the opposite of 'on a continuous basis,'" New-Indy Br. at 17-18, the term "continuous" is a synonym of "uninterrupted," not "eternal." *See*, *e.g.*, Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/continuous ("A continuous process or event continues for a period of time without stopping."); Cambridge English Dictionary, https://dictionary.cambridge.org/us/dictionary/english/continuous (defining "continuous" as "without a pause or interruption"). There is no dispute that New-Indy's obligations under the EPA Order are continuous, as that word is generally understood. *See*, *e.g.*, Citizens' Br. at 33 (Describing EPA Order).

Perhaps more importantly, the Parties ignore that the statute expressly contemplates short-term (or even isolated) activity as within the meaning of the continuity language they reference. *See* 42 U.S.C. § 7602(k) (definition of "emission standard"); 42 U.S.C. § 7602(l) (defining "standard of performance"). As such, "any requirement relating to the operation or maintenance of a source," even a onetime action, that is meant to "assure continuous emission reduction" fits the definition of "standard of performance," for example. 42 U.S.C. § 7602(l). *Compare Duke Energy Corp.*, 171 F. Supp. 2d at 566 (ruling that a regulated entity's failure to obtain required permits constitutes an alleged violation of an "emission standard or limitation"). Here, the EPA Order obligated New-Indy to take specific steps, such as putting in place a remedial plan and submitting to EPA a final plan, which were designed to achieve a lasting reduction in H_2S emissions extending beyond sixty-days, regardless of whether the numerical limits on H_2S in the EPA Order expired or were extended. *See* JA46-48. And, as discussed above, Congress contemplated the sixty-day duration of Section 303 orders as potentially adequate to bring the emergency under control for the longer-term. *See infra* Section II.C.

Overall, instead of offering any applicable authority or engaging the statutory definitions, EPA and New-Indy simply intonate to the Court that it should not consider an emergency order with a sixty-day duration very important. This suggestion, of course, cannot be square with assertions throughout EPA's brief that

such orders are significant enough to give rise to EPA actions under Section 113.[20] Further, EPA's reliance on *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003), is misplaced. As Citizens noted in their opening brief, *Whitman* described Section 303 orders as weighty, stating that they have "the force of law[.]" *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003). Tellingly, EPA is unwilling here to disclaim that status.

IV. The District Court Rightly Rejected New-Indy's Mistaken Attempt to Characterize the CAA's Intervention Right as Anything Other Than Unconditional.

New-Indy also contends that if this Court rejects the Parties' primary arguments, it has an "alternative" theory for opposing Citizens' exercise of their right to participate. Specifically, New-Indy asserts that the district court erred in construing the intervention right under Section 304 as unconditional. *See* JA878. This argument is baseless, and to its credit, EPA declines to join it. As an initial matter, New-Indy now effectively concedes that it misstated the holdings of two CAA cases on which it relied in advancing this argument before the district court. *Compare* JA775-777 (New-Indy Intervention Opp.) (arguing that *Volkswagen* and *Dominion Energy* construed the CAA's citizen intervention right as conditional) *with* New-Indy Br. at 25 n.8 (arguing that *Volkswagen* and *Dominion Energy* "made

[20] Congress provided that such violations, if knowingly committed, may even give rise to criminal charges. *See* 42 U.S.C. § 7413(c)(1).

the same interpretive mistake" as the district court in finding that right *unconditional*). New-Indy also concedes that the only other CAA case it cites in support of this argument also reached the opposite conclusion New-Indy advances. *See Friends of the Earth v. EPA*, No. 12-cv-0363, 2012 WL 13054264, at *2 (D.D.C. Apr. 11, 2012) (holding that Section 304 "creates an unconditional right to intervene only where" government authorities have filed suit and is thus inapplicable to suits by private parties).

Admissions aside, this argument is but another attempt to rewrite the CAA. The statute is clear: "… any person may intervene as a matter of right." 42 U.S.C. § 7604(b)(1)(B). New-Indy asks this Court to ignore this plain language and hold that instead of intervention "as a matter of right," Section 304 provides for only permissive intervention instead. Like the CAA cases New-Indy cites every court to consider this question has held that Section 304 provides an unconditional right to intervene. *See U.S. v. Drummond Co., Inc.*, No. 2:19-cv-00240, 2020 WL 5110757, *3 (N.D. Ala. 2020) ("Congress provided an unconditional right to citizens to intervene in actions filed by the government so that citizens can advocate for full enforcement of the CAA.") (citing 42 U.S.C. § 7604(b)(1)(B), granting intervention); *United States v. Blue Lake Power, LLC*, 215 F. Supp. 3d 838, 841 (N.D. Cal. 2016) (holding that "[o]n a timely motion, the Court must permit anyone to intervene who 'is given an unconditional right to intervene by a federal statute'"

and "[t]he CAA provides such a right" (quoting Fed. R. Civ. P. 24(a)(1)); *Duke Energy Corp.*, 171 F. Supp. 2d at 565 ("This right to intervene is unconditional because Section 304(b)(1)(B) states that if the government has initiated an action to require compliance with an emission standard or limitation 'any person may intervene as a matter of right.'") (quoting 42 U.S.C. § 7604(b)(1)(B); granting intervention). This unity is unsurprising: a contrary interpretation would depart not only from CAA's text, but that of Rule 24, which states that the "intervention of right" provided by statute is mandatory, not discretionary. *See* Fed. R. Civ. P. 24(a) (The "court *must* permit" intervention on timely motion. (emphasis added)).

What New-Indy frames as "conditions" on intervention are simply a description of when the mandatory right to intervention applies (e.g., in a government suit, not one by private parties). They are not contingencies whose potential occurrence is uncertain. As such, the district court rightly ignored New-Indy's reliance on cases construing statutes using different language and from different contexts. The decision on which New-Indy principally relies, *Travelers Indem. Co. v. Dingwell*, 884 F.2d 629, 641 (1st Cir. 1989), is readily distinguishable. There, an insurer disputed its duty to defend a suit under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), meaning its interest in the CERCLA action was "contingent on the resolution of the coverage issue" and it had no legally cognizable interest in that case. *See id*. at 638-641. The

insurer nevertheless sought to invoke a provision of CERCLA addressing intervention by a person who "claims an interest . . ." related to the action. *Id.* at 641. The *Travelers* court reasoned that this language did not provide an unconditional right to intervene because the insurer "ha[d] not met the statutory conditions" (i.e. claiming an interest in the action). *Id.* at 641 (further stating that the insurer identified "nothing in CERCLA's legislative history" to support its argument).[21]

New-Indy's allusion to differently structured statutes in the bankruptcy arena fares no better. It cites decisions from this context only as color for its contentions, urging this Court to be "hesitant" to find an unconditional intervention right. New-Indy Br. at 26 (quoting *Fuel Oil Supply & Terminaling v. Gulf Oil Corp.*, 762 F.2d 1283, 1286 (5th Cir. 1985)). There is no indication the 1985 *Fuel Oil Supply* decision considered the environmental citizen suit context at all. And, even the more recent bankruptcy-related case New-Indy cites states "[m]any federal statutes explicitly confer" an unconditional right to intervene. *In re Wexler*, 477 B.R. 709, 712 (Bankr. N.D. Ill. 2012). The CAA is one of them.

[21] The same commentary the *Travelers* decision offered, as an illustration of a statute providing for a conditional right, a quotation from a law stating that a court "may, in its discretion" permit intervention if a statutory condition is met. *See* 7C Fed. Prac. & Proc. Civ. § 1910 (3d ed. Ar. 2023 Update). That is a far cry from the language at issue here.

V. The Parties' Responses Only Confirm that the District Court Erred in Denying Citizens' Alternative Requests to Intervene Under Rule 24(a)(2) or Rule 24(b)(1)(B).

EPA and New-Indy do not dispute that the district court's denial of intervention as of right under Federal Rule of Civil Procedure 24(a)(2) and permissive intervention 24(b)(1)(B) relied heavily on the inapposite *Hooker* decision and "counterintuitive" conclusion that EPA deserves exaggerated deference in imminent and substantial endangerment actions. *Maine People's All. & Nat. Res. Def. Council*, 471 F.3d at 295. Instead, they ask this Court to view Citizens' motion through the same lens, albeit for conflicting reasons.

EPA, for its part, argues that the Court should erect barriers to intervention because otherwise, citizens will "usually or always intervene and assert individual points of view." EPA Br. at 37 (citing *Hooker*). New-Indy, meanwhile, contends that EPA's fears are counter-factual because decades of experience shows that intervention efforts are so exceedingly "rare" as to be non-existent in this context. New-Indy Br. at 1. New-Indy knows of no case in which anyone has ever sought intervention in a CAA Section 303 action, *see id.*, nor do Citizens. Further, here, notwithstanding the tens of the thousands of people harmed at New-Indy's hands,

New-Indy admits there is only one intervention motion ever filed in this action. *See id.*[22]

In fairness, the absence of precedent in this area may be in part that, according to EPA, it is unusual for the agency to assert Section 303 claims at all, much less in court after a polluter flouted an emergency order. *See* JA742 (EPA invoked Section 303 only once, ever, from 1970-1990 and then four times from 1990-1999, all which were administrative actions); EPA, *Environmental Justice in Enforcement and Compliance Assurance*, Environmental Justice in Enforcement and Compliance Assurance | US EPA (stating that until 2021, EPA "had only issued six CAA emergency orders in the history of the Agency spanning over 50 years" and that year, it issued two more (one of which was the order against New-Indy)).[23]

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[22] New-Indy even highlights that community members have cooperated with each in avoiding the filing of duplicative suits or claims, an effort facilitated by their retention of common counsel. *See* New-Indy Br. at 7-8. Its brief indicates that there are only a handful of lawsuits (one of which is a class action) filed against it, despite the large number of injured people. *See id.*

[23] This Court may take judicial notice of the fact that EPA made these statements. *See United States v. Doe*, 962 F.3d 139, 147 & n.6 (4th Cir. 2020) ("we may take judicial notice of governmental reports"); *Newton v. Holland*, No. 13-61, 2014 WL 318567, at *1 n.1 (E.D. Ky. Jan. 29, 2014) (judicial notice of government website). To the extent EPA frames its (still small) uptick in Section 303 activity, including the order at issue in this case, as a part of its "Environmental Justice" efforts, its attempt to heighten the bar for intervention is particularly troubling. Members of communities especially burdened by pollution should not have less of a voice than those in which a polluter's violations of emissions standards and limits have not risen to the level of emergency. That is particularly true where, as here, the emergency

Regardless, the fact remains that, as this Court has held, fears about judicial economy have no place in an analysis under Rule 24(a). *See In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (noting that Rule 24(a) "affords [] no weight" to "concerns of judicial economy"). Further, courts can address any concerns that allowing Citizens to intervene here will embolden neighbors of other particularly egregious polluters, should they arise, through imposing any appropriate conditions needed for "efficient conduct of the proceedings" in such actions. *See* JA735 (quoting Advisory Committee Notes to the 1966 amendments to Federal Rule of Civil Procedure 24(a)).

Turning to the propriety of intervention in *this case*, the Parties mischaracterize and fail to engage Citizens' arguments and the caselaw in support thereof—to the point that New-Indy claims Citizens failed to raise before the district court points that are quoted directly from the intervention briefing in the Joint Appendix. *See* New-Indy Br. at 33; *compare also* New-Indy Br. at 35 & 41 (arguing that intervention would "prolong" the non-existent discovery in this case, which was stayed from its inception). Most of their arguments center around whether EPA

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may well have been avoided had EPA enforced the CAA's "Prevention of Significant Deterioration" ("PSD") permit requirements mandating New-Indy to use Best Available Control Technology ("BACT") to control its emissions of "TRS" gases (only 10% of which constitute hydrogen sulfide, but all of which would have gone into the same industry-standard equipment, had New-Indy been obligated to use it). *See* Citizens Br. at 9-10.

adequately represented Citizens' interests for purposes of Rule 24(a)(2). Instead of offering any authority holding that analogous conduct constitutes adequate representation, however, they take snippets from other cases out of context and argue that if the fact-pattern there involved a "tactical disagreement," so too must this one. *E.g.*, EPA Br. at 28-29 (citing *Stuart v. Huff*, 706 F.3d 345, 353-54 (4th Cir. 2013)). The decisions they cite, however, do not stand for the proposition that if EPA is the plaintiff, anything goes.

EPA also argues that the mere fact that the case culminated in a Consent Judgment does not show inadequacy of representation, but that is not the issue. Citizens' concern is that "the government in effect conceded the case at the outset." *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984). *Compare also Conservation Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (citing earlier precedent as implying "that evidence that parties are 'sleeping on their oars' or 'settlement talks are underway' may be enough to show inadequacy") *with* New-Indy-Br. at 1 (describing the background set forth in Citizens' brief as depicting EPA "asleep at the wheel"). The fact is that here, the Parties prove unable to point to a single filing that EPA made (including the complaint) without first obtaining New-Indy's permission. Nor does New-Indy disclaim the apparent outrage at the idea the action could "turn into an adversarial proceeding" reflected in the record. Citizens Br. at 50 (quoting JA783-784.).

Moreover, after representing that Citizens should have no ability to advocate for genuine solutions to the onslaught of air pollution entering their homes and upending their lives because EPA was in too great a hurry, the Parties changed their position concerning the urgency of obtaining a final consent judgment. As noted above, they later represented that they did not need expedited consideration of the final proposed Consent Judgment because the earlier Consent Order, signed the day after EPA filed its Complaint, adequately served as an interim measure. *See* JA866.

EPA proved so committed to reaching a result acceptable to New-Indy that when it submitted the proposed Consent Judgment, it recast the same kind of citizen complaints that it had previously cited as evidence of an emergency, *see* JA21-26, as the unreasonable expectations of people who failed to understand that paper mills tend to "smell bad," JA900. Although EPA admitted that "adverse health effects," complained of, "such as headache, nausea, difficulty breathing among people with asthma, and irritation of the eyes, nose, and throat," do not occur from H_2S unless concentrations are "[v]ery high," JA903 (EPA Memo), and it is undisputed that such complaints continued to (and still) occur, *see* JA979-980 & JA1005; Citizens' Br. at 24-25, EPA disregarded them in its eagerness to settle.

EPA protected its own rights through express provisions in the Consent Judgment ensuring that New-Indy could not argue that this case affects *EPA's* rights in any subsequent action. It failed, however, to provide the same express statement

as to *Citizens'* rights, even though it knew New-Indy planned to argue that the Consent Judgment limited the rights of private parties, including Citizens, to pursue claims outside this case. *See* JA982-983. As a result, New-Indy still insists that it is free to argue that requests for injunctive relief to genuinely solve the problem "conflict" with its Consent Judgment obligations. New-Indy Br. at 38 n.14. Although Citizens believe any such arguments are unfounded, the result would be increased time and expense to litigate, along with potential delay depending on how long it takes to resolve New-Indy's arguments. This is especially concerning because while EPA, for reasons that remain a mystery, was myopically focused on H_2S—which is only an indicator of a (higher) overall combined TRS concentration—the standard pollution control equipment in the industry does not address TRS gases on a gas-by-gas basis. *See* JA149. Citizens should not have to face a risk of New-Indy arguing that EPA's unscientific approach conflicts with one that is based on sound science. *See*, *e.g.*, Citizens' Br. at 23-24.

Finally, the Parties also contend that reversal of rulings on permissive intervention are rare. Unquestionably, however, the background of this case is itself unusual, or should be. EPA used Section 303, a provision intended to allow for obligations *more stringent* than those found elsewhere in the CAA if needed to avoid endangering the public, as means of partnering with the polluter's efforts to set a *lower bar* than the CAA otherwise requires in the name of "emergency." EPA

dismisses Citizens' description of the record below as mere "criticism," but offers nothing to dispute the oddity of insisting for some seventeen months that it could not possibly take time to consider, among other things, whether the root of the issue was New-Indy's violation of PSD permitting requirements. Citizens' Br. at 53. Nor does either Party question Citizens' contentions concerning, for example, the lack of candor. As discussed above, their negotiations, which included civil penalty claims, were not as "targeted" as they led the Court to believe. In the end, after depriving Citizens of their right to participate, they reached a Consent Judgment that made matters *worse* by authorizing New-Indy to spew still more chemicals into the air, without solving the original problem. *See* Citizens' Br. at 50 (citing JA979-980).

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

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