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

OPENING BRIEF OF APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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

No. 23-1052 Caption: Enrique Lizano et al. v. New Indy Catawba LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Enrique Lizano et al.
(name of party/amicus)

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

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

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

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

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

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

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

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: _____ Date: 1/30/23

Counsel for: Appellants

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1345, 1355, and 42 U.S.C. § 7603, and 42 U.S.C. § 7604 would have supplied still an additional jurisdictional basis for Appellants' claims.

This court has jurisdiction over this appeal under 28 U.S.C. § 1291, as the denial of intervention is treated as an appealable final judgment. *See, e.g., Bridges v. Dep't of Md. State Police*, 441 F.3d 197, 207 (4th Cir. 2006). The Order Entering Consent Decree and Final Judgment is likewise an appealable final judgment under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in departing from the Clean Air Act's plain language to find an implied exemption to the Act's citizen-suit rights, including the unconditional right to intervene, whenever EPA styles a suit as one under Section 303?

2. Whether the district court erred in considering, categorically, a hypothetical Clean Air Act claim, rather than the undisputed information showing that Appellants and EPA both sought to enforce the same standards and limits in the EPA Order and to address violations thereof?

3. Whether the district court erred in denying intervention under Federal Rule of Civil Procedure 24 to Appellants, whose claims factually and legally overlap with those of EPA and whose substantial interests EPA failed to protect in this matter?

4. Whether Citizens' effort to intervene is moot?

STATEMENT OF THE CASE

A. Citizens Suffer at New-Indy's Hands

Defendant New-Indy Catawba, LLC ("New-Indy") purchased a pulp and paper mill in Catawba, South Carolina in December 2018 that had operated for decades without the types of complaints that gave rise to this action. (*See* Norcross Rpt. at JA149-150 & JA167; Corrective Action Plan ("CAP") at JA184; EPA Order at JA34-35.) The mill is situated across 1,100 acres, near residential areas, including the homes of 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 (collectively, "Citizens"). (Citizen Compl. at JA76 & JA79; Osa Rpt. at JA682.) Approximately 1.7 million people live within a 30-mile radius of the mill, in York, Lancaster, and Chester Counties in South Carolina, and Union and Mecklenburg Counties in North Carolina. (Citizen Compl. at JA79.)

New-Indy's plan was to convert the mill from making white paper to making linerboard (used in cardboard boxes) instead. (*See, e.g.*, Norcross Rpt. at JA149). To that end, it shut the facility down for two months from September 2020 into November 2020 to make the complex changes to the manufacturing operations needed to accomplish the conversion. (EPA Order at JA34.) New-Indy resumed operations with low production rates thereafter. (EPA Order at JA34.) The

community surrounding the mill had been concerned about air quality impacts that may be associated with frequent odor events since New-Indy assumed operation of the mill. (Osa Rpt. at JA679.) As of February 1, 2021, New-Indy ramped up to high (but still not full) volume production. (Norcross Rpt. at JA149; EPA Order at JA34; CAP at JA180 (salable production starts Feb. 1, 2021)). Almost immediately, citizen complaints began to pour in to regulators, including the U.S. Environmental Protection Agency ("EPA") and the South Carolina Department of Health and Environmental Control ("S.C. DHEC"), both agencies with oversight responsibility under the Clean Air Act, 42 U.S.C. § 7401 *et seq.* ("CAA"). (*See, e.g.*, EPA Order at JA34-35.)

Citizens, who each live within 15 miles of the mill, have now suffered for more than two years with the harmful effects of excessive, unlawful pollution from the mill, described further below. 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. (Citizen Compl. at JA76.) They also have 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. (Citizen Compl. at JA76; Mtn. to Intervene at JA61.)

They are not alone. By March 12, 2021, S.C. DHEC had received so many complaints it set up an online database with descriptor fields for health impacts such as nausea, headaches, nose or throat irritation, eye irritation, coughing, difficulty breathing, asthma "flare ups," and dizziness. (EPA Order at JA35.) Within five weeks of its creation, the database had logged "approximately 14,000 such complaints, some from residents as far as 30 miles away" from the mill. (EPA Order at JA35.)

Residents of the surrounding areas "also documented on DHEC's online database a wide range of impacts to quality of life, personal comfort, and wellbeing." (EPA Order at JA36.) They suffered stress and anxiety. They stayed indoors in an (often futile) hope of avoiding odors. Even inside, they found no reprieve: odors woke them at night and deprived them of sleep. (EPA Order at JA36.) People felt they "basically [could not] enjoy [their] life" and even like "prisoners" in their "own smelly home." (EPA Order at JA36.) Meanwhile, during March and April 2021, EPA also maintained an online database of complaints, albeit less-frequently used than S.C. DHEC's. (EPA Order at JA36.) EPA received hundreds of reports of health effects consistent with the thousands S.C. DHEC tallied. (EPA Order at JA36.)

EPA employees themselves had the opportunity to experience "distressing" symptoms when, in response to the public outcry, they conducted sampling at the mill and in surrounding communities in late April 2021. (EPA Order at JA39-40.)

These symptoms occurred at the same time their equipment showed airborne hydrogen sulfide (the only pollutant for which EPA was measuring). (EPA Order at JA40.) Hydrogen sulfide (abbreviated "H_2S") is one of various sulfur-containing chemicals, referred to as "Total Reduced Sulfur" ("TRS"). (Norcross Rpt. at JA149.) As the most recognizable TRS gas, H_2S, commonly described as having a "rotten-egg smell," is often singled out for measurement, but is only an indicator of a (higher) overall combined TRS concentration, not a measure of total emissions. (Norcross Rpt. at JA149.)[1]

The complaints (and the harmful air emissions that triggered them) were foreseeable to those who, unlike New-Indy's suffering neighbors, had a window into New-Indy's plans while it prepared to undertake the mill conversion. (Norcross Rpt. at JA 149.) The process New-Indy used, and still uses, to make linerboard "requires chemicals and processes that create noxious, unhealthy off-gases, and heavily contaminated wastewater." (Norcross Rpt. at JA 149.) As particularly relevant here, New-Indy's process for digesting wood pulp employs "strong sulfide chemicals that produce a liquid waste, known as 'foul condensate.'" (Norcross Rpt. at JA149.) The foul condensate is perhaps aptly named, as it contains volatile chemical compounds that are foul-smelling, even at extremely low concentrations (such that they have

[1] "If only hydrogen sulfide concentration is measured, it does not provide the complete chemical picture of what is being emitted, and may significantly underestimate the total emissions." (MacLeod Rpt. at JA702.)

very low "odor thresholds"). (Norcross Rpt. at JA149; McLeod Rpt. at JA703.) These include TRS gases—including hydrogen sulfide and other noxious reduced sulfur compounds such as "methyl mercaptan, dimethyl sulfide, dimethyl disulfide, in addition to methanol and other volatile compounds." (Norcross Rpt. at JA149.)

TRS compounds are not only malodorous, but can be toxic, including at low concentrations. (Norcross Rpt. at JA149.) If they are not treated, the TRS gases will vaporize into the ambient air around a mill site. (MacLeod Rpt. at JA703.) Once released, they are, of course, no respecters of mill property lines, but can be carried by the wind for many miles. (MacLeod Rpt. at JA703.) Some TRS compounds are more toxic than others. For example, methyl mercaptan is "a Toxic Air Pollutant designated by DHEC with property line limits 14 times more stringent than H_2S." Citizens' Cmts. on Proposed Consent Decree ("Citizens' Cmts.") at JA999 (citing S.C. Code Regs. 61-62.5, Standard No. 8, Toxic Air Pollutants).

There is, and has been worldwide for decades, a standard process for removing TRS from foul condensates at mills that use the type of pulping process employed by New-Indy (known as "kraft" mills): specifically, steam stripping. (MacLeod Rpt. at JA703.) "Steam strippers in kraft mills are designed to remove at least 90% of the TRS load (and usually up to 99%) in the foul condensate feed." (MacLeod Rpt. at JA703.) An infrequently-used alternative of last resort is to send part of the "foul condensate flow to a biological wastewater treatment system, where biological

digestion and adequate oxidation with air may convert the TRS compounds to innocuous dissolved chemicals," but "[m]ost wastewater treatment plants are not designed to handle this load." (MacLeod Rpt. at JA703.) Even this last-resort effort "relies on a properly operated and maintained treatment system to prevent the TRS gases from escaping." (MacLeod Rpt. at JA703.)

New-Indy had a steam stripper and incinerator on the property, which it used to control a portion of the toxic air emissions pre-conversion. (EPA Order at JA34.) New-Indy decided, however, that its post-conversion process would not expand, or even use, these methods. (EPA Order at JA34.) Instead, it would skip that step. New-Indy elected to bypass the steam stripper altogether and dump all of its foul condensate in an outdoor "aeration stabilization basin" or "ASB"— a 64-acre, 375-million-gallon, lagoon that is intended to function by using mixing and oxygen to enable naturally-occurring microorganisms to remove pollutants from wastewater. (EPA Order at JA34; Norcross Rpt. at JA149 & JA163.) The ASB, along with an equalization basin, primary clarifier, sludge lagoon, and holding lagoons, form part of a wastewater treatment plant at the mill. (Norcross Rpt. at JA159-160.) That wastewater treatment plant, meanwhile, was in a state of disrepair, with key treatment facilities out of order and/or filled with sludge or other manufacturing byproducts. (Citizen Compl. at JA81.) Among other issues, only 28 of the critical 52 aerators in the ASB were even operating. (Citizen Compl. at JA81.) Although New-

Indy invested substantial funds to accomplish the conversion to linerboard, it failed to make equivalent (or any) changes to the decades-old wastewater treatment plant. (Norcross Summary at JA1195-1196) It also failed to perform even basic, minimal essential maintenance thereafter, deferring millions of dollars in maintenance costs. (Norcross Summary at JA1195-1196).

EPA has known for over forty years that pulp and paper mills such as New-Indy's are major sources of TRS compounds and that "sulfur compound air emissions from pulp and paper mills can adversely affect the welfare of the public." (EPA Order at JA43.) Additionally, "[e]pidemiological, experimental, toxicological, and other studies have investigated the relationship between inhalation exposure to hydrogen sulfide" (the TRS on which EPA would later focus) "and adverse health effects." (EPA Order at JA41.)

Notably, in obtaining its construction permit from S.C. DHEC, New-Indy presented information to suggest that its emissions would be 1,500 times less than they actually were (Citizens' Cmts at JA993.) Accurate information would have shown that New-Indy needed a "Prevention of Significant Deterioration" ("PSD") permit to proceed because its project, in reality, constitutes a major modification to a major air source of pollutants. (Citizens' Cmts at JA993.) New-Indy's inaccurate projections about the level of pollutant control that would be achieved by its wastewater treatment plant allowed it to avoid PSD and, consequently, the

associated review of the ambient air impacts on the community and a review of Best Available Control Technology ("BACT") for the modified source, as required by the CAA. *See* 42 U.S.C. §§7475(a)(4), 7479(3).

Not until after the disastrous start-up of the modified plant blanketed the community with emissions did EPA, in approximately mid-April 2021, discuss with New-Indy the operational changes New-Indy made since acquiring the mill, New-Indy's foul condensate stream, the change from using the steam stripper, what would be needed to restart the steam stripper, and when it would be able to do so. (EPA Order at JA36-37.) New-Indy, after claiming it needed S.C. DHEC approval to restart the steam-stripper, undersized for the mill's ramped up production volume, was required to do so on May 3, 2021. (EPA Order at JA41(S.C. DHEC approval obtained May 3, 2021).) Even at maximum capacity, the single existing steam stripper only could accommodate about half the foul condensate generated (specifically, 430 gpm of the 800 gpm New-Indy self-reports itself as producing), (EPA Order at JA41), and New-Indy continued to spew emissions into the community.

As experts explained on behalf of Citizens, a straightforward approach to this inadequacy would be to reduce production of pulp until New-Indy could operate without endangering the community, in line with industry-standard practices.

(MacLeod Rpt. at JA703.)[2] Internal correspondence obtained through the Freedom of Information Act ("FOIA") process show that EPA understood this. Specifically, an internal EPA email notes that New-Indy's "impacts may go on until they either reduce operating rate to match condensate production to stripper capacity or install additional stripper capacity." (JA1431). Accordingly, it further suggests that "[i]t may make sense to lead [New-Indy] by the nose to that conclusion." (JA1431). Because so much of EPA's communication with New-Indy was shrouded in secrecy, there is no way to discern whether EPA discussed this solution with New-Indy.

B. EPA Issues and New-Indy Flouts an Emergency Order

On May 13, 2021, EPA issued a "Clean Air Act Emergency Order" to New-Indy (the "EPA Order"). (*See* JA32-51.) The EPA Order invoked the agency's authority under Section 303 of the CAA, which provides that, if a pollution source "is presenting an imminent and substantial endangerment to public health or welfare, or the environment" and "it is not practicable to assure prompt protection of public health or welfare or the environment" by commencing a civil action, EPA can "issue such orders as may be necessary to protect public health or welfare or the environment." 42 U.S.C. § 7603. The EPA Order outlined evidence that the mill's operations "are emitting hydrogen sulfide into the ambient air, and that operating the

[2] To compensate for reduced production of "virgin" pulp, some mills will augment with recycled material. (MacLeod Rpt. at JA703.)

facility in the manner described [both above and in the EPA Order], if allowed to continue, is presenting an imminent and substantial endangerment to public health or welfare or the environment." (EPA Order at JA44.) More specifically, EPA found that the citizen complaints, documented exceedances of certain hydrogen sulfide levels, the experience of its own field personnel conducing sampling, and experience of S.C. DHEC personnel, presented "compelling evidence that emissions from [New-Indy's] facility are causing adverse public health and welfare impacts among exposed populations." (EPA Order at JA44.)

To abate or prevent the endangerment, the EPA Order imposed limits on New-Indy's hydrogen sulfide emissions and mandated that New-Indy take set actions, in set time-frames, to address those emissions in the short and long term. (EPA Order at JA45-48.) As particularly relevant here, it directed that New-Indy "immediately begin taking steps to minimize air emissions of hydrogen sulfide to not exceed" specific facility fence-line ambient concentration limits. (EPA Order at JA46.) The EPA Order further provides that, "[a]ny exceedance of these facility fence-line concentrations" during the pendency of the EPA Order constitutes a violation of that Order. (JA46.) Within 14 days, New-Indy was obligated to put hydrogen-sulfide fence-line monitors in place at three locations specified in the EPA Order. (JA47.)

Additionally, the EPA Order set forth deadlines within 5-10 days for New-Indy to provide EPA with a draft, and then a final, Remedial Plan setting forth

proposed procedures to, among other things, meet the hydrogen sulfide emissions limits set forth in the EPA Order. (JA46.) It further established a deadline for New-Indy to operate in accordance with that remedial plan. (JA46-47.)

If New-Indy desired to continue longer-term operations, the EPA Order also required New-Indy to provide a long-term plan within 45-days of May 13, 2021 (*i.e.* by June 27). (JA47-48.) That plan was required to address avoiding the endangerment identified in the EPA Order and "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." (JA47-48.)

Thereafter, even New-Indy's self-reporting alone showed that New-Indy repeatedly exceeded the hydrogen-sulfide emissions limits. (EPA Compl. at JA25-26; Citizen Compl. at JA89.) New-Indy failed to put in place a remediation plan to bring its emissions in line with the limits of the Emergency Order. (Mtn. to Intervene at JA66.) To Citizen's knowledge, it also failed to develop and timely submit the long-term plan required for it to continue operating the mill. (Mtn. to Intervene at JA66.)

Unsurprisingly against this background, citizens continued to suffer. By August 8, 2021, S.C. DHEC had logged 29,928 citizen complaints in its database. (Citizen Compl. at JA86.) It received nearly 13,000 of those in the June-early August

2021 period alone. (Citizen Compl. at JA86.) Through final judgment, Citizens suffered, and continue to suffer, from the unrelenting misery described in their papers below. (*See*, *e.g.*, Mtn. to Intervene at JA66-69; Reply ISO Intervention at JA799; Citizens' Cmts. at JA968 & JA1005.)

C. EPA and New-Indy Agree to the Filing of a Suit EPA Had No Intention to Litigate.

An Emergency Order issued by EPA under the CAA has a statutorily limited duration of 60-days absent a judicial filing. *See* 42 U.S.C. § 7603. If the problem that triggered the order persists, EPA can no longer act on its own, but must proceed to court for relief. *See id.* Should EPA file a lawsuit under CAA Section 303, the provisions of the Emergency Order will automatically be extended for 14-days. *See id.* The Court may authorize a longer extension of the emergency order, allowing it to remain in effect as the judicial proceedings unfold. *See id.*

With New-Indy's permission, on July 12, 2021, the U.S., on behalf of EPA, initiated this action. (New-Indy Intervention Opp. at JA783.) The complaint cited the more than 22,000 citizen complaints that EPA and S.C. DHEC had tallied by that date and sought an extension of the EPA Order. (JA20-21.) Significantly, the Complaint also alleged numerous instances in May and June 2021 when New-Indy had violated the fenceline concentrations limits imposed by the EPA Order.

In its overview of claims, EPA asserted that it was seeking: (1) an injunction obligating New-Indy to comply with the EPA Order on an ongoing basis; and (2)

injunctive relief restraining New-Indy's "excessive" hydrogen sulfide emissions and/or obligating it to take other action to reduce the air pollution endangering the public and leading to the complaints. (JA21.) EPA further alleged that to date, New-Indy's emissions-reduction measures for hydrogen sulfide had been "either temporary, speculative, or inadequate." (JA26.) Further, "New-Indy has exceeded the fence-line concentration limits required by the EPA Order . . . on numerous occasions." (JA26.)

EPA recognized New-Indy would continue these ongoing exceedances. Its complaint alleged a need for relief "[b]ecause New Indy has not yet found a permanent solution to control its H_2S emissions, continues to exceed average fence line concentration limits established in the EPA Order, and the local community continues to file odor and health-related complaints[.]" (JA26.)

Although EPA asserted a factual basis for multiple claims and multiple forms of relief, it styled its complaint as pursuing only a single legal cause of action; injunctive relief under Section 303. *See generally* JA20-30. The complaint provided notice that EPA might seek civil penalties through the same action as well, asserting that EPA reserved the right to amend its pleading to seek further relief, including

penalties for past or future violations of the EPA Order, which are unavailable under Section 303. (JA28.)[3]

EPA and New-Indy jointly submitted, the same day as the complaint, a proposed consent decree asking for a "judicial consent order extending the EPA Order," along with a stay of the case permitting them to avoid adversarial litigation in favor of behind-the-scenes coordination and settlement discussions. (JA53.) Both parties candidly admitted that they sought to avoid devoting resources to a contested motion for preliminary injunction — or other efforts to obtain injunctive relief not agreed to by New-Indy. (Joint Mtn. for Consent Order at JA53.) To that end, they represented that New-Indy was "prepared to and will abide by" all provisions of the Consent Order they requested to the Court to enter, which would extend the provisions of the EPA order. (JA53.) At the same time, they also acknowledged that expecting such compliance was unrealistic at the time: admittedly, their plan was to "coordinate" behind the scenes on "efforts to more fully comply" with the administrative order New-Indy had been systemically violating for nearly two months. (JA53.)

The Court entered the requested Consent Order on July 13, 2021, staying all proceedings. (JA55-57.)

[3] Although Section 303 authorizes only injunctive relief, EPA can also enforce Section 303, and obtain penalties for violation of orders issued thereunder, through CAA Section 113. *See* 42 U.S.C. § 7413(b)(2).

D. EPA and New-Indy Rebuff Citizens' Attempt to Intervene

As the odors and health impacts continued unabated, Citizens moved to intervene on September 21, 2021 to protect their significant interests in their health and welfare, along with the use of their properties. *See* JA 58-74.[4] Their motion sought: (1) intervention "as a matter of right" under the CAA's citizen suit provision, 42 U.S.C. 7604, applicable where EPA's action is one to "require compliance with [a] standard, limitation, or order," *id.* § 7604(b)(1)(B), with which citizens also seek compliance; and (2) intervention as of right under Federal Rule of Civil Procedure 24(a)(2) or, alternatively, permissive intervention under Federal Rule of Civil Procedure 24(b)(1)(B). Through their participation, Citizens sought to ensure the excessive emissions that had continued unabated for many months, even after EPA became involved, issued the EPA Order, and obtained the initial Consent Decree, were properly addressed. They also sought to raise important issues that EPA was not taking into account concerning the adequacy of monitoring required and the engineering and/or reduced production changes needed to bring the facility into compliance with the EPA Order and Clean Air Act. (JA58-74.)

With their motion, Citizens submitted a proposed Complaint in Intervention asserting two causes of action under the CAA. Count I thereof seeks injunctive relief

[4] Citizens' Motion also sought to lift the stay to permit consideration of their intervention request. (JA71-72.).

for violations of the emissions limitations imposed by the EPA Order (violations also alleged by EPA). (*See* Citizen Compl. at JA91-93.) Second, Intervenors sought injunctive relief for New-Indy's major modifications of its mill without obtaining the PSD permit required under the CAA for that change. (JA91-93.)[5] To demonstrate the serioussness with which they took the matter and their ability to effectively pursue their claims, Citizens also attached materials from four different experts in relevant subject matter to their submission. (JA145-171 & JA676-715.)

New-Indy balked at Citizens' potential participation, asserting that it "never would have agreed to the Consent Order" submitted contemporaneously with the complaint if it "thought for one minute" that this might become "an adversarial proceeding." (New-Indy Intervention Opp. at JA 791.) New-Indy also acknowledged that Citizens' interests and desired outcome differed from EPA's. In that regard, it threatened: "Should Intervenors become a party, this will turn into an adversarial proceeding and cooperation will break down." (JA783-784.)

[5] Citizens are also the named representatives action on behalf of a class seeking damages and other relief. *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. Although thousands of their neighbors are also impacted, Citizens are the only members of the public who sought inclusion in this action during its approximately seventeen-month pendency. The class action concerns other claims and other relief, and New-Indy already has threatened to argue the outcome of this case should impact that litigation. (*See* Citizens' Cmts. at JA982-983.)

EPA joined New-Indy in opposing intervention, insisting that any active litigation was unwarranted. EPA advised that it wanted to keep the action "narrowly focused." (JA716.) To that end, EPA further represented that it was not even interested in whether New-Indy did anything which should be "penalized." (JA716, JA724, & JA737.) It especially opposed consideration of Count II, which concerns whether New-Indy should have obtained and still needed, on the front end, a permit to be able to make the changes to the mill and engage in the activities that are also the subject of EPA's settlement discussions—a permitting process which, if required would also address the same "engineering" issues that EPA sought to resolve through a voluntary compromise. More broadly, however, EPA urged the district court not to let anything distract from EPA's "targeted strike" to address the "true task at hand" of "abating the emergency situation" by negotiating with New-Indy out of court. (JA717.)

Almost a year later, the District Court granted the request to lift the stay for the limited purpose of considering Citizens' Motion to Intervene and denied that motion on September 15, 2022. (JA868-892). The ruling relied heavily on EPA's having styled the action as one under Section 303. The district court bypassed both the CAA's plain language and legislative history in accepting EPA's argument that Congress nevertheless intended an implied exemption to the CAA citizen-suit rights unambiguously set forth in the statute. That mistaken conclusion animated its

decision across all grounds asserted for intervention. The decision also erroneously ignored that Citizens' and EPA's claims concerned the same CAA emissions standards and limits, along with undisputed evidence of EPA's failure to adequately represent Citizens' interests, among other issues discussed below. (JA868-892).

E. EPA and New-Indy Reach a Settlement that, Save for a Meager Payment on the Penalty Claims They Insisted Were Not at Issue, Lets New-Indy Off the Hook and Sanctions New, Harmful Emissions.

Meanwhile, on October 26, 2021 EPA and New-Indy filed a status report that appeared to concede New-Indy remained non-compliant with the EPA Order and the Consent Order extending it, but put the situation in a positive light, patting New-Indy on the back for having "taken steps" to comply. (JA796).[6] They further advised that they remained hopeful of reaching a "final settlement," towards which they were working. (JA797.) Only if that fell through would the U.S. "evaluate its options" concerning how to proceed with the case. (JA797.)

EPA and New-Indy subsequently provided the district court with two additional status updates and requests to extend the stay of litigation. (*See* JA 862-867.) Then, on December 29, 2021, EPA filed a new proposed Consent Decree seeking to resolve the case. *See* JA 816. At EPA's and New-Indy's joint request, the district court further stayed the case pending a mandatory public comment period

[6] This is the first status report, and all of these "steps" are characterized as things New-Indy "continued" to do, *see* JA796, making it unclear what, if anything, was actually achieved since EPA filed the lawsuit.

required by a DOJ regulation that applies to all proposed consent judgments in actions "to enjoin discharges of pollutants." 28 C.F.R. § 50.7. *See* JA863-864 (request); JA18 (order).

The proposed Consent Decree revealed that EPA, apparently, had been negotiating the settlement of a civil penalty claim all along, without disclosing it to the court or to Citizens. In an about-face from EPA's earlier stance that penalties were not at issue, the Consent Decree purports to resolve this aspect of the litigation through New-Indy's agreement to pay a $1.1 million civil penalty. *Compare* JA824-825 (proposed $1.1 million resolution of unspecified civil penalties) *with* JA796-798 & JA862-867 (status updates discussing settlement negotiations); JA716-795 (Intervention Oppositions). EPA's filing lacked even the most basic information about these penalties, such as how EPA calculated them, what the violations were, or how many were at issue. *See* JA824-825.[7] As noted above, the penalty claim is one EPA could only assert under Section 113. Concerning compliance obligations, EPA and New-Indy also belatedly recognized the need for coordination with permitting processes. The final Consent Decree obligates New-Indy to make a permit application (albeit not for a PSD permit). (*See* JA3478-3479 & JA3507-3508.)

[7] Section 113(b) of the CAA, 42 U.S.C. § 7413(b) provides for civil penalties up to $102,638 per day per violation for violations occurring during the time frame relevant here. *See* 40 C.F.R. § 19.4; 85 Fed. Reg. 83,821751 (Dec. 23, 2020).

New-Indy also was not required to add a second stripper to address the foul condensate being dumped in open-air areas or reduce pulp production to match the capacity of the existing steam stripper even though New-Indy had acknowledged that the existing stripper was undersized and could not handle up to approximately half of its foul condensate. Instead, the proposed Consent Decree, incredibly, directed that New-Indy could shut what steam-stripping capacity it did have for nineteen to twenty-four days out of a given year through New-Indy's deal with EPA. (Citizens' Cmts. at JA990.) Unlike at New-Indy, foul condensate at other pulp mills is kept *inside* the mill, through storage or return to the process from which it was generated, or the mill is shut down if that cannot be accomplished. (Citizens' Cmts. at JA990.)

Rather than solving the public health and welfare harm, the Consent Decree's solution actually increases these harms to the citizens. EPA myopically focused on hydrogen sulfide, to the exclusion of other TRS gases and toxic chemicals in the same foul condensate. Not all of the odor (or related) complaints, however, pertained to hydrogen sulfide. (*See* Citizens' Cmts. at JA979-981 & JA997-998; EPA Mem. at JA928.) At a more basic level, ignoring the "the most toxic constituents of the TRS emissions and other chemicals in the foul condensate," even during air monitoring, "fails utterly to follow the known science." (Citizens' Cmts. at JA992; Norcross Summary at JA1200.) Further, New-Indy estimates H_2S comprises only

10% of its total TRS emissions. (Citizens' Cmts. at JA993.) As noted above, the EPA Order itself acknowledged that "TRS compounds can have an adverse effect on public welfare" in articulating the basis for its issuance. (JA43.)

Meanwhile, New-Indy elected to address the chemical releases with more chemicals that have their own repercussions. (*See* Consent Decree at JA3503.) In October 2021, it started using hydrogen peroxide to treat the foul condensate and other waste streams that it pumped to the ASB and other outdoor wastewater treatment units. (Citizens' Cmts. at JA979.) This only created new problems. While the "rotten egg" odors remain, this EPA-sanctioned treatment practice now blankets the surrounding community with a new, "sickeningly sweet chemical odor" from which residents also report adverse health and welfare effects. (Citizens' Cmts. at JA979-980.)

Even the Consent Decree's hydrogen sulfide monitoring provisions are woefully inadequate, leaving gaps approaching six miles long along New-Indy's property line. (Citizens' Cmts. at JA985.) Through a FOIA request, Citizens learned EPA did not even pretend to follow a scientific basis for its choice, nor did it conduct any monitoring assessment to determine the number and placement of fence-line monitors needed when making that decision. (Citizens' Cmts. at JA984.) Instead, EPA chose to require only three monitors because that was the number of monitors New-Indy already had. (Citizens' Cmts. at JA984.)

Citizens explained all this, and more, in comments urging the Court not to rubber-stamp the agreement and imploring EPA not to ignore industry practice, principles of science, common sense and CAA requirements (as well as EPA's own guidance on when a PSD permit is necessary). (*See* JA967-1006.) However, just as it had done at every turn, EPA ignored the Citizens and their highly qualified experts' detailed comments, (*see* JA1050-1170, JA1179-1183, JA1188-1218, JA1227-1255, JA1310-1333, & JA1370-1375) and refused even to extend the comment period until after it completed its FOIA response to Citizens. As such, it prevented Citizens from making any information in the outstanding FOIA materials part of the record. (Citizens' Cmts. at JA1002-1004.) As a result, the technical requirements of Consent Decree and Final Judgment EPA proposed and the district court entered were essentially the same as the December 2021 version, while the onslaught of odors and adverse health effects continued. (*Compare* JA3469-3512 (final Consent Decree).)

F. The District Court Declines to Reconsider the Denial of Intervention and Approves the "Unopposed" Consent Decree.

Because the Citizens were not parties to the action, EPA presented the final consent decree to the Court as unopposed.[8] (JA893) ("Unopposed Motion to Enter Consent Decree"). Persisting, Citizens moved to reconsider the denial of intervention. (*See* JA18.) The Court granted the Motion to Enter Consent Decree and

[8] They were obligated, at least, to include the public comments received as exhibits. (*See* JA 933-3297.)

denied the Motion to Reconsider as moot on November 16, 2022. (JA3468.) The same day, it entered the Consent Decree and Final Judgment. (JA3469-3512.)

Citizens timely noted their appeal on January 13, 2023. (JA3513.) Meanwhile, New-Indy's neighbors continue to suffer the assault on their health and welfare from the mill's unlawful emissions. It had reached the point that, as one resident put it, with "EPA doing nothing," she may have to move from her home. (Citizens' Cmts. at JA1005.)

SUMMARY OF THE ARGUMENT

As the district court acknowledged, there is no judicial precedent on point to the factual circumstances of this case. There are, however, established principles of statutory interpretation which apply. As discussed below, the inquiry begins with the language of the statute and, if that language is clear, should also end there. In the event of ambiguity, the court might look to the legislative of history of the statute at issue. The district court erred in departing from this well-worn path.

The CAA's plain language grants Citizens an unconditional right to intervene, without regard to which CAA Section EPA invokes as the basis for its suit. Under CAA Section 304, private citizens have a right to relief where, as here, a polluter engages in repeated or ongoing violations of a CAA "emission standard or limitation." *See* 42 U.S.C. § 7604(a)(1). The district court did not disagree but declined to reach that issue. *See* Order at JA886. Were resort to legislative history appropriate, the CAA background manifestly contradicts EPA's argument, accepted by the district court, that citizens should be seen as burdensome intermeddlers with the potential to interfere with the great trust placed in the government's advocacy.

Instead of the CAA's text and history, the district court's CAA interpretation looked first to analogy. It cited *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), which concerned inapposite factual circumstances and whose ruling construed different environmental laws an "analogous" precedent.

(Order at JA885.) *Hooker*, in turn, had confronted another law with ambiguous language and little legislative history on point; to resolve the ambiguity, it extrapolated intent from the background of a separate statute.

Based primarily on *Hooker*, the district court crafted a judicially created exemption to CAA citizen suit rights absent from the CAA's text and unsupported by even the Second Circuit decision itself. That reasoning was also animated by a mistaken belief that intervention is available only where EPA and private citizens sue under the same Section of the CAA, an impossibility in any case.

This same error underpinned its ruling that Citizens and EPA, suing as they must under different CAA provisions, were not seeking to enforce the same standard or limits. In that regard, the district court denied intervention based not on the allegations in this case, but the belief that it would be possible for EPA to pursue a Section 303 claim under the CAA without such allegations. The reality, however, was that EPA filed this civil suit both to extend the provisions of the EPA Order and to enjoin New-Indy's allegedly numerous and ongoing violations of fence-line concentration limits.

Separate and apart from the CAA, Citizens also properly invoked intervention as of right under Rule 24(a)(2). The district court held otherwise based on Citizen's articulation of the legal standard which Citizens disagree was heightened in this case. It erred in ignoring that, regardless, Citizens allege uncontroverted facts showing

precisely the type of adversity of interest, collusion, and non-feasance required to clear that higher bar. Further, this background involves facts which the existing parties had also effectively admitted.

At a minimum, Citizens established a right to permissive intervention under Rule 24(b)(1)(B). The district court held otherwise without appropriately considering whether any delay would be undue and failed to appropriately consider the efficiency to be gained by resolution of the claims in one action.

In sum, relying on the plain text of a statute enacted by their representatives in Congress, Citizens sought relief from the judicial system only to have the Executive Branch join the polluter in an effort to bar the courthouse door. The end result has been, for years now, New-Indy evading obligatory controls and citizens paying the price. Presently, by blessing controls far below CAA and industry standards and required of other mills, the final Consent Decree fails to abate the harm and is, in effect, worse than nothing. The decision of the district court must be reversed. There remains relief available to Citizens, such that intervention is not a moot point.

ARGUMENT

I. Standard of Review

This court reviews rulings on motions to intervene for abuse of discretion. *Cawthorn v. Amalfi*, 35 F.4th 245, 253 (4th Cir. 2022); *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013) (addressing both intervention as a matter of right and permissive intervention). "[A] court fails to exercise its discretion soundly when it 'base[s] its ruling on an erroneous view of the law[.]"' *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1012 (2022) (internal quotation marks omitted). Denial of intervention based on legal conclusions is "not necessarily the exercise of discretion," and this court has "plenary review" of legal questions. *Smith v. Pennington*, 352 F.3d 884, 892 (4th Cir. 2003).

II. The District Court Erred in Departing from the CAA's text to create an Exemption Absent from the Statute.

A. The Clean Air Act's Plain Language Grants an Unconditional Right to Intervene

Under Federal Rule of Civil Procedure 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." Fed. R. Civ. P. 24(a)(1). Here, Citizens have an unconditional right to intervene under the plain language of the CAA's citizen-suit provision, Section 304. *See* 42 U.S.C. § 7604(a).

"As with any issue of statutory interpretation," to construe the CAA, one must "focus on the plain language of the statute, seeking 'first and foremost to implement congressional intent.'" *WEC Carolina Energy Solutions v. Miller*, 687 F.3d 199, 203 (4th Cir. 2012); *accord, e.g.*, *United States v. Am. Elec. Power Serv. Corp.*, 136 F. Supp. 2d 808, 812–13 (S.D. Ohio 2001) (declining to consider arguments by defendants and EPA concerning CAA legislative history because the language of the statutory provisions at issue was clear). Here, Section 304 grants citizens a cause of action to bring a claim

> 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 (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation[.]

42 U.S.C. § 7604(a)(1). Section 304 also sets forth, expressly, the circumstances in which a citizen suit is unavailable despite the existence of conduct fitting Section 304(a)(1). *See* 42 U.S.C. § 7604(b). These narrow circumstances include a plaintiff's failure to comply with pre-suit notice requirements or, as relevant here, when the federal government already has "commenced and is diligently prosecuting a civil action in" a district court "to require compliance with the standard, limitation, or order" that would be the subject of the citizen suit. *See id.* §7604(b)(1)(B).

In the latter instance, Congress took pains to preserve citizens' rights to pursue relief. Instead of filing a separate suit, "any person may intervene as a matter of

right" in the EPA action. *Id.* §7604(b)(1)(B); *see also U.S. v. Duke Energy Corp.*, 171 F. Supp. 2d 560, 565 (M.D.N.C. 2001) ("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); *United States v. Drummond Co., Inc.*, 2:19-CV-00240-AKK, 2020 WL 5110757, at *3–4 (N.D. Ala. Aug. 31, 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.").

Accordingly, the right to bring suit, or intervene, turns on whether Citizens allege 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). 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." *Id.* §7604(f)(1). The disjunctive definition set forth in Section 304(f)(1) includes several qualifying categories which themselves have statutory definitions. *See* 42 U.S.C. §7604(f)(1).

Three are particularly relevant here. First:

> The terms "emission limitation" and "emission standard" mean 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). Second, "a schedule or timetable of compliance," means "a schedule of required measures including an enforceable sequence of actions or operations leading to compliance with an emission limitation, other limitation, prohibition, or standard." 42 U.S.C. §7602(p). Third, a "standard of performance," means "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." 42 U.S.C. §7602(l).

For purposes of citizen claims, the relevant "emissions standards or limitations" are not only broadly defined, but broadly construed. Courts have recognized that "emission limitations' is an inclusive term referring to any type of control to reduce the amount of emissions into the air." *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. Nat. Res. Def. Council, Inc.*, 421 U.S. 60 (1975); *see also Utah Physicians for a Healthy Env't v. Diesel Power Gear LLC*, 21 F.4th 1229, 1251-52 (10th Cir. 2021) (rejecting "narrow reading" of definition as inconsistent with the both the statute and U.S. Supreme Court precedent); *Communities For A Better Env't. v. Cenco Refining Co.*, 180 F.Supp.2d 1062, 1076 (C.D. Cal. 2001) ("[A]n 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. United States 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").

Here, Citizens allege in Count 1 New-Indy's repeated violation "emissions standards or limitations" under the CAA. These include (1) specific ambient concentration limits set forth in the EPA Order, and (2) missed deadlines in a timetable for compliance in that Order, which order was extended by the district court, still without compliance by New-Indy. (JA91-93.) These are specific requirements that fit within the CAA definitions described above.

As particularly relevant here, first, Paragraph 52 of the EPA Order sets a specific limit on the quantity, rate, and concentration of emissions of the air pollutant hydrogen sulfide, requiring New Indy to "immediately begin taking steps to minimize air emissions of hydrogen sulfide to not exceed a facility fence-line average concentration of 600 ppb over a rolling 30-minute period and 70 ppb over a rolling seven (7) day period (on a daily calendar basis) as established through continuous monitoring." (JA46.) That is an "emission limitation" defined in 42 U.S.C. §7602(k). Indeed, EPA's complaint acknowledges that the EPA Order "established" limitations,

alleging that New-Indy "continues to exceed average fence line concentration limits established in the EPA Order." (JA26.)

Paragraph 52(b) further confirms that "[a]ny exceedance of these facility fence-line concentration, during the pendency of this Order, shall constitute a violation of this Order." As described above and alleged in greater detail in Citizen's proposed Complaint in Intervention, New-Indy repeatedly violated the EPA Order both during the initial 60-day pendency of the Order and after extension of that Order's pendency by the district court.

Second, paragraphs 52(e)-(h) in the EPA Order set forth a "schedule and timetable of compliance," as defined in 42 U.S.C. §7602(p). Paragraphs 52(c)-(h) prescribe a schedule of required measures and mandate that New Indy develop a remedial plan with specific actions and operational measures to control emissions. In that regard, Paragraph 52 sets forth a schedule of required measures for New Indy to: provide a draft and then final remedial plan to come into compliance (¶52(c)-(e) at JA46-47); install, operate, and report on a continuous fence-line monitoring system (¶52(f)-(g) at JA47); and submit to EPA a long-term plan on how New Indy intends to modify its operations to avoid endangering the public and be compliant with engineering and pollution control practices (¶52(h) at JA47-48).

Third, Paragraph 52 of the EPA Order includes a "standard of performance," within the meaning of 42 U.S.C. §7602(l). As described above, the EPA Order

includes findings of excessive and dangerous emissions of hydrogen sulfide from New Indy's facility (¶¶23, 31, 37, 38 (and related tables) at JA38-40 & JA42), and Paragraph 52 sets a requirement of continuous emission reduction from those excessive levels to minimize emissions, not to exceed concentrations over certain time periods that EPA views as acceptable (¶52(b) at JA46).

In sum, citizens alleged a repeated violation of "emissions standards or limitations" as defined in the CAA. Importantly, the district court did not disagree. Instead, it deemed it unnecessary to reach the issue. (*See* Order Denying Intervention ("Order") at JA886 (concluding that whether Citizens had alleged actionable conduct under Section 304(a) would not "make a dispositive difference here").) EPA persuaded the district court that despite fitting the statutory definitions, the emissions standards or limits here nevertheless are not the "type" that can give rise to citizens suits when they are repeatedly violated. *See* Order at JA885-886 & JA888 (ruling that citizen-suit rights are "inapplicable" where EPA is proceeding in court after having issued an expiring administrative order, under Section 303). This judicially-created exemption is broad. It would foreclose not only intervention, but initiation of an action by citizens, even if EPA chose to not to seek *any* relief for repeated violations of Section 303 administrative orders such as those undisputedly occurring here. *See* Order at JA885.

It was error to depart from the statute's terms. Had Congress intended to craft an exemption for actions arising out of violations of "emissions standards and limitations" set forth in Section 303 orders, it would have expressly excluded this misconduct from Section 304(a). *Compare, e.g., Raritan Baykeeper, Inc. v. NL Indus., Inc.*, 2013 WL 103880, *8-9 (D.N.J. Jan. 8, 2013) (finding that citizens could proceed with citizen suits under other environmental statutes in an analysis that noted the presence of express prohibitions to citizen suits in both statutes and the inapplicability of those provisions). Nothing in the CAA permits a court to craft an exemption to statutory rights.

B. The Denial of Intervention Is Based on an Inapposite Decision Construing Other Statutes.

As set forth above, notably absent from Section 304 is any prohibition on citizens filing a claim when the emissions standards and limits being violated are those set forth in Section 303 orders. Undisputedly, there is also no judicial precedent crafting such a carve-out. (Order at JA885) ("no court has ruled on whether CAA's citizen suit provision applies to actions brought by the EPA through its CAA emergency powers").

The district court's ruling centered around an inapposite decision, *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968 (2d Cir. 1984), which did not involve the CAA. The district court deemed it "immaterial" that in *Hooker*: (1) there was no order establishing an emission standard, or any set emission standard

or limit at issue, and (2) the court based its conclusions on the legislative history of a different statute, the Clean Water Act ("CWA"), six years before the 1990 amendments to the CAA. (Order at JA 885.) Both are dispositive distinctions. Ultimately, *Hooker*'s reasoning in no way undermines, and its rationale can be read to support, Citizen's right to intervene here.

There, the prospective intervenor "concede[d] that a literal interpretation" of the CWA would bar its participation. 749 F.2d at 980. Looking beyond literalism offered no aid. *See* 749 F.2d at 980-81. In *Hooker*, unlike here, the putative intervenor's claims neither concerned nor relied on any concrete standard, limit, deadline, or timetable established by EPA. This mattered, because the Second Circuit construed the CWA's legislative history as evidencing an intent that its citizen suit-provisions extend only to "effluent standards or limitations" that were "*established administratively*" under the CWA. *Id.* at 979 (emphasis in original). Based on this legislative history, the court determined that Congress desired "to prevent individuals from invoking the power of the courts to set as well as enforce standards." *Id.* at 980.[9]

[9] Unlike under the CAA, EPA has no authority under the CWA's "emergency powers" provision to issue administrative orders. *See* 33 U.S.C. § 1364. By contrast, CAA Section 303 permits EPA "to issue orders with the force of law[.]" *Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236, 1249 (11th Cir. 2003).

The district court in *Hooker* had employed similar reasoning with the respect to the intervenor's claims under the Resource Conservation and Recovery Act ("RCRA"). It found dispositive the absence of any effort to obtain "compliance with any '**permit, standard, regulation, condition, requirement, or order**'" (the terms used in RCRA's citizen-suit provision). *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067, 1080-1081 n.7 (W.D.N.Y. 1982), *aff'd*, 749 F.2d 968 (2d Cir. 1984) (emphasis added). As to RCRA, the Second Circuit opined that there might be more wiggle room, since it was at least "possible" to argue that RCRA's emergency powers provision established a "requirement," "condition" or "standard" in the form of refraining from causing an imminent and substantial endangerment. 749 F.2d at 981. RCRA's legislative history gave the court "little guidance." *See id.* Accordingly, the court resolved the competing possible interpretations by reasoning that RCRA has structural similarity with the CWA and its legislative history borrowed from background of the CWA, meaning one can extrapolate the Congressional intent discerned with respect to the CWA to RCRA as well. *See id.* at 981-82.[10]

[10] Intervening events showed that, on that front, *Hooker* was demonstrably contrary to Congressional desire. At the time, there was "a split of authority over" whether RCRA authorized citizen suits for imminent and substantial endangerment even absent violation of a separate, more specific standard. *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1433 (S.D. Ohio 1984) (concluding that such suits may proceed). Shortly before the *Hooker* decision issued, Congress, as part of the Hazardous and

Here, both of issues that concerned the *Hooker* court are absent. As discussed above, Citizens seek to enforce administratively established standards and limits. They are not asking to create an "open-ended, 'court-developed' standard." *See Hooker*, 749 F.2d at 980. Further, the *Hooker*'s court's method was to first look at the legislative history *of the statute at issue* before analogizing to the Congressional record concerning a different law. *See id.* at 981.[11] Were resort to 1980s (or earlier) legislative history appropriate here, one would find that the CAA background manifestly contradicts any claim that Congress considered citizens unwelcome intermeddlers likely to drag down or delay vigorous EPA efforts.

In fact, the CAA legislative history reflects a recognition that "government will never have the manpower, the techniques, or the awareness necessary to enforce the law for all" such that "[p]rivate enforcement of those laws is the only way the individual can be assured that the rights cannot be violated with impunity." *Nat. Res. Def. Council, Inc. v. Train*, 510 F.2d 692, 728 (D.C. Cir. 1974). *See also Drummond Co., Inc.*, 2020 WL 5110757, at *3 (CAA's legislative history reflects an intent for Section 304 to serve as a means for citizens to "goad the responsible agencies to

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Solid Waste Amendments of 1984, resolved that split in favor of citizen participation. *See* Solid Waste Amendments of 1984, Pub. L. No. 98–616, 98 Stat. 3268. Given that the Second Circuit appeal would already have been briefed and argued by that date, the parties may not have alerted the court to this background.

[11] As noted above, *Hooker* had no occasion to rule on any CAA claim and certainly claimed no clairvoyance concerning the CAA's 1990 amendments.

more vigorous enforcement of the anti-pollution standards"). This history rejects the notion that citizen suits "risk[] an undue or inhibiting interference with Government enforcement." *Train*, 510 F.2d at 729. Rather, it recognized that: "If we are really serious about controlling the quality of our environment before it destroys the quality of our lives, we must give the individuals affected by, or concerned about pollutions in his life, the power to stop them through legal process." *Id.* at 728.

C. Citizens and EPA Need Not Proceed Under the Same Statutory Subsection as EPA—An Impossibility in Any CAA Case.

Also underpinning the district court's decision appears to be acceptance of an incorrect, and fundamentally misleading, portrait of the CAA's structure advanced by EPA. EPA suggested that because the CAA grants private parties no ability to issue administrative orders themselves, and no "express[]" permission "to bring a claim under Section 303," it follows that Citizens also cannot intervene in a Section 303 suit. (EPA Intervention Opp. at JA719.) This is a red herring and one that, if accepted, would eviscerate citizen-suit rights entirely.

First, it is of no moment that only EPA can issue emergency administrative orders under Section 303. (*See* Order at JA884.) One would expect that *every* CAA administrative order, regulation, permit, or statutory requirement at issue in a citizen suit would be one created by government authorities, not private parties. Members of the public, of course, need not personally establish emissions standards and limitations before they can sue for their violation.

Second, and similarly, for citizens and EPA to bring a claim directly under the same subsection is an impossibility under CAA. Only EPA can sue directly under the provisions granting causes of action to it, Sections 303 and 113, and only private citizens can sue under the Section granting causes of action to them, Section 304. *See* 42 U.S.C. §§ 7413, 7603, & 7604.

Third, that Section 304 does not "expressly" reference Section 303 is neither unique nor grounds for re-writing its terms. As described above, Section 304(a) and Section 304(f)(1) at issue omit mention of *any* other subsection. They concern whether there is an "emissions standard or limitation," not under which other part of the CAA that requirement issued. By contrast, the CAA Sections setting forth EPA causes of action nowhere use the phrase "emissions standard or limitation," but are instead structured so as to list various statutory provisions or obligations which a person may violate and EPA may sue to enforce. *See, e.g.*, 42 U.S.C. § 7413(a)(3) (subsection setting forth lengthy list of CAA provisions).[12] That does not mean, of course, that EPA actions will never involve an "emissions standard or limitation," or, conversely, that citizens are barred from seeking relief related to standards and

[12] Notably, as part of Section 113, violations of Section 303 and orders thereunder are in no way treated as unique. They are lumped in the middle of a list of other Clean Air Act obligations which, if violated, could give rise to governmental claims for injunction and/or penalties. *See* Section 113, 42 U.S.C. § 7413(a)(3).

limits established under any particular CAA provision. The Sections are simply written differently.

The differing structures serve not to single out a particular CAA provision or obligation as exempt from citizen suits, but to ensure that a requirement to be enforced by citizens is "sufficiently specific." *Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1258 (1st Cir. 1996) (suggesting an intent that such that suits involve "an objective evidentiary standard" and referencing Second Circuit precedent noting "that suits can be brought to enforce specific measures, strategies, or commitments designed to ensure compliance with the NAAQS, but not to enforce the NAAQS directly").

III. Citizens and EPA Both Sought to Address Violations of and Enforce Emissions Standards and Limits in the EPA Order.

Because Citizens and EPA are not suing under the same CAA Section, the district court found, as an additional grounds, that they were not seeking to enforce the same standard or limit. In so doing, it rightly recognized that "the diligent prosecution bar forecloses only citizen suits that seek to enforce the *same* 'standard, limitation, or order' as the government enforcement action." Order at JA882 (emphasis in original) (quoting *In re Volkswagen*, 894 F.3d 1030, 1039 (9th Cir. 2018)). It erred, however, by premising its decision not on EPA's specific allegations in its complaint that New-Indy had violated the limitations prescribed by the Order, but rather on generic elements of any, hypothetical, Section 303 action.

The district court concluded that because, legally, EPA could state a claim for imminent and substantial endangerment without referring to violations of, or limits in, an emergency order (or even issuing such an order), the facts EPA pled in that regard should be disregarded as "incidental" to EPA's claim. (Order at JA886-887.) As the district court recognized, however, EPA is master of its own complaint, such that the overlap, or lack thereof, between the claims must be determined based on what EPA actually pled and sought to obtain, not what it could have done. (*See* Order at JA886.)

Here, EPA filed a civil action seeking to compel compliance with its Section 303 Order, including its emission standards and limitations, and EPA alleged that New-Indy had violated those limits on numerous occasions. (EPA Compl. ¶¶24-28 at JA25-26 (violations), ¶3 & pg. 10 at JA21 & JA29 (compliance)). Although EPA's "goal" was "getting the injunction from the court," the injunction EPA sought to get was one "to require continuing compliance by Defendant with the requirements listed in Paragraphs 52 and 53 of the [EPA] Order." (July 2021 Consent Order at JA56; *see also* EPA Compl. at JA29.) Citizens, like EPA, are seeking compliance with Paragraph 52 of the EPA Order. (Citizens' Compl. at JA76-93.) Thus, EPA was

seeking "to require compliance with the standard, limitation, or order" at issue in Citizen's Count 1. *Id.* §7604(b)(1)(B).[13]

The limits in, and violations of, the EPA Order are not only the heart of EPA's claims—enforcement of those limits is also the only relief sought. EPA advised the district court that it had not decided what it might do if this proceeding became an adversarial one. (Status Update at JA797.) It planned to consider what relief it might pursue other than compliance with, and extension of, the EPA Order or approval of a settlement compromising that claim, only if settlement negotiations fell through. (*See* Status Update at JA797.) New-Indy, too, believed there was no reason to expect that "this will turn into an adversarial proceeding" in which EPA might seek any other relief. (New-Indy Intervention Opp. at JA783-784.)

Additionally, even EPA and New-Indy abandoned any pretense that this action concerned only injunctive relief under Section 303 when they filed their proposed final judgment. As noted above, therein, EPA and New-Indy revealed that they had been negotiating civil penalties alongside the injunctive relief all along. Both EPA and the district court have acknowledged that civil penalties are unavailable under Section 303. Rather, EPA can obtain this relief only under Section

[13] The PSD claim is a different cause of action, and Citizens acknowledge as much. Including an additional claim cannot erase the right to intervene on Count I. If the court did not agree that the substantial overlap between the claims lends efficiency, the Federal Rules offer ample tools to address that concern, including severing Count II for separate trial. *See* Fed. R. Civ. P. 21.

113. *See* Order at JA 879-80. Further, both the proposed Consent Decree and the ultimate Consent Decree and Final Judgment invoke as a jurisdictional basis 28 U.S.C. § 1355, which applies to claims for penalties, not injunctions. *See* JA822 (proposed) & JA3473 (final). This change is particularly striking because the final Consent Decree obtained is not a global resolution. It seeks to resolve only the claims at issue here, while preserving EPA's right to sue separately for additional CAA violations arising out of the same course of events. *See* Consent Decree and Final Judgment at JA3492.

IV. The District Court Erred in Denying Intervention under Federal Rule of Civil Procedure 24 to Citizens, Whose Claims Factually and Legally Overlap with Those of EPA and Whose Substantial Interests EPA Failed to Protect Throughout this Action.

A. Citizens Showed Entitlement to Intervention as of Right.

Under Federal Rule of Civil Procedure 24(a)(2), 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." *Teague v. Bakker*, 931 F.2d 259, 260-261 (4th Cir. 1991). As this court has observed, "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." *Feller v. Brock*, 802 F.2d 722, 729 (4th Cir. 1986) (internal quotation marks omitted).

Here, there can be no question that Citizens satisfy the first two requirements, nor did the district court suggest otherwise. It is their health, welfare and use of their properties being compromised. The inability to participate as parties impairs Citizens' interest. *Compare Feller*, 802 F.2d at 730 (holding "[p]articipation by the intervenors as amicus curiae" insufficient); *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 910 (D.C. Cir. 1977) (rejecting the argument that putative intervenors could "vindicate their interests in some later, albeit more burdensome, litigation"). This is particularly true where, as here, New-Indy has signaled its intent to argue that its Consent Decree in this action affects Citizens' rights in other litigation. *See* Citizens' Cmts. at JA982-983.

The district court did not reach these issues because it determined that EPA was adequately representing Citizens' interests. This ruling was wrong in two respects. As a legal matter, it applied an incorrect standard. Factually, it ignored that Citizens *did* argue strenuously the same adversity of interest, collusion, and non-feasance needed to meet a heightened bar, as well as the admissions of the existing parties.

The district court faulted Citizens for arguing that EPA "*may not be* adequately representing Intervenor's interests in public health and welfare." Order at JA890-891 (emphasis in the original). This argument was not equivocation, but articulation of the legal standard. *See, e.g., Commonwealth of Virginia. 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) (burden of showing inadequacy is minimal).

As a decision on which the district court heavily relied states, a "heightened" burden applies where "the would-be intervenor and governmental party *seek the same outcome in the litigation*." *Makhteshim Agan of N. Am., Inc. v. Nat'l Marine Fisheries Serv.*, 2018 WL 5846816, at *4 (D. Md. Nov. 8, 2018) (emphasis added); *see also* Order at JA 890.[14] The district court held that "EPA and Intervenors share the same ultimate objective of protecting the environment." (Order at JA890.) A broad, mutual concern, however, does not equate to an objective of obtaining the same outcome in court. *Compare also In re Sierra Club*, 945 F.2d 776, 780 (4th Cir. 1991) ("Although Sierra Club and South Carolina DHEC may share some objectives, South Carolina DHEC is not an adequate representative for Sierra Club.").

Here, as described above, EPA's objective was to avoid adversarial litigation with New-Indy and instead reach a compromise in which New-Indy would reduce

[14] The Supreme Court recently held inappropriate a presumption of adequate representation when the putative intervenor is a state agent seeking to intervene in state litigation but declined to decide whether a presumption could apply in other circumstances. *See Berger v. N. Carolina State Conference of the NAACP*, 142 S. Ct. 2191, 2204 (2022).

somewhat its excessive emissions in a manner palatable to the polluter. Citizens, who are literally living and breathing the public health impacts and harmful pollutants, sought relief obligating New-Indy to actually comply with the EPA Order and undertake the "substantial upgrades to its massive and outdated outdoor wastewater treatment plant" needed to remedy the excessive emissions. (Order at JA 890.) *Compare Berger*, 142 S. Ct. at 2205 (reversing denial of intervention where "legislative leaders s[ought] to give voice to a different perspective" that would "focus on defending the law vigorously on the merits without an eye to crosscutting administrative concerns").

Moreover, although Citizens disagree with, and therefore did not assert in their Motion, the standard the district court applied, Citizens did allege precisely the type of "adversity of interests, collusion, or nonfeasance" that would overcome it. *See* Order at JA 890. Their briefing explains that "EPA and New Indy[]" are "more worried about a quick and cheap resolution instead of a full examination of New Indy's conduct and a comprehensive fix." Reply Br. at JA812; *see also* Reply Br. at JA812 (arguing that EPA "indisputably is not properly monitoring New Indy's emissions nor requiring New Indy to timely comply with its Order and thus does not fully understand the severity and immediacy of the health and welfare problems confronting the Intervenors"); Reply Br. at JA812 ("Intervenors' complaint explains, without rebuttal from EPA or New Indy, how EPA has not been adequately

representing their interests."). *Compare Teague*, 931 F.2d at 262 (reversing denial of intervention where existing parties' financial constraints meant there was "a significant chance" their pursuit of interests would be less vigorous than intervenors').

This is not a case in which Citizens simply "identif[ied] reasonable litigation decisions" with which they disagree. (Order at JA890 (citing *Staurt v. Huff*, 706 F.3d 345 (4th Cir. 2013)).) Unlike in *Stuart*, where the governmental plaintiff "zealously" and "vigorously" defended a statute's constitutionality through to final judgment in contested proceedings, *see* 706 F.3d at 355, here, EPA had no desire to litigate at all. Accordingly, the case remained effectively at day one for nearly seventeen months, meaning there are no tactical litigation decisions on the path to the Consent Decree and Final Judgment (apart from the submission thereof for approval) with which to disagree. *Compare Drummond Co., Inc.*, 2020 WL 5110757, at *3 ("where, as here, the parties agreed on settlement terms before the suit was filed, an argument can be made that a citizen's right to intervene may be even more essential").

Even assuming *arguendo* the contents of the Consent Decree and Final Judgment can be considered a "litigation decision," they are manifestly unreasonable. (*See* Citizens' Cmts. at JA967-1006.) Among other serious issues, the compromise imposed no obligation for New-Indy to comply with necessary BACT as part of the required injunctive relief, or at least the "generally accepted good

engineering and good air pollution control practices" contemplated by the EPA Order. *See* JA47-48. Instead, for its egregious emissions affecting entire communities, New-Indy obtained a free pass. The Consent Decree and Final Judgment allows it to dump hundreds of thousands of partially treated, and in some instances even untreated, foul condensate into open-air areas where harmful pollutants will continue to volatize and spread to surrounding areas. (*See* Citizens' Cmts. at JA989-990.) Instead of remedying the pollution and public harm, EPA essentially allowed New-Indy to substitute some part of the "rotten egg" smell for more of a "sickeningly sweet chemical odor." (Citizens' Cmts. at JA979 & JA981.)

These facts are not only uncontroverted, both parties effectively admit them. EPA made clear throughout the case that it desired to "coordinate" with New-Indy outside the public eye while avoiding any sort of "contested" litigation." (Joint Mtn. for Consent Order at JA 53; Status Updates at JA707, JA863-864, & JA866). As noted above, New-Indy appeared nothing short of outraged by the possibility that this case could "turn into an adversarial proceeding." (JA783-784.) Meanwhile, the "action" in this case occurred primarily outside of public view, limiting the information available to Citizens.

B. The District Court Did Not Consider the Pertinent Factors in Denying Permissive Intervention.

"Rule 24(b)(1)(B) gives the court discretion to allow anyone to intervene in a case who 'has a claim or defense that shares with the main action a common question

of law or fact.'" Order at JA 891 (quoting Fed. R. Civ. P. 24(b)(1)(B)). The district court reasoned that permissive intervention would "delay the proceedings" by requiring adjudication of "collateral questions of law," including adjudication of an issue raised in Count II, whether New-Indy needs a PSD permit, absent from EPA's complaint. Order at JA 892.[15] Recognizing that a decision will not be reversed based on "technicalities or semantics" requiring the use of particular words, *McHenry v. C.I.R.*, 677 F.3d 214, 223 (4th Cir. 2012), here, the ruling indicates that the district court did not consider if the delay was "undue," but set forth delay itself as a standard. (Order at JA 892.) "[D]elay in and of itself does not mean that intervention should be denied," however. 7C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1913 Discretion of Court, (3d ed. 1986). *See also* Fed. R. Civ. P. 24(b)(3).

Here, intervention, including consideration of Count II, would foster, not frustrate, judicial economy and ultimately further the goal of resolving New-Indy's harmful emissions, which have so upended Citizens' lives, sooner rather than later.

[15] EPA does not dispute that claims in the nature of Count II are available under CAA Section 304. Unlike its arguments as to Count I, its objection concerns only whether inclusion of this Count would expand this proceeding and "prejudice" the agency by creating a need to engage in the normal stages of litigation. *See* JA735. *Compare Cawthorn v. Amalfi*, 35 F.4th 245, 255 (4th Cir. 2022) (reversing denial of intervention and distinguishing engagement in "part of the ordinary course of litigation" from "legally cognizable 'prejudice'").

There is substantial factual and legal overlap even of Count II with EPA's allegations. Further, the district court's ruling stemmed in part from EPA's action being styled as a Section 303 claim. Section 303, however, was never meant as way for EPA to persuade a court to bless, indefinitely, an ad hoc compromise on "permanent[]" engineering controls that fall short of the technology standards imposed for such controls in other parts of the CAA, including the permitting obligation at issue in Count II. (Joint Motion for Consent Order at JA52.)

EPA claimed that its all-consuming need to confront an emergency justified an approach that ignored, for a time, whether New-Indy was also violating parts of the CAA other than Section 303. But, the assertion that the emergency required EPA to ignore these other violations was never well-founded. As both EPA's internal email and Citizens' experts explained, there was always a simpler solution: slow production. Then, regulators could look at what New-Indy needed to do to resume higher-volume operations safely. This would include, most fundamentally, a decision as to whether New-Indy should have had all along a PSD permit addressing the same issues that are the subject of the Consent Decree.

Had New-Indy complied with CAA PSD permit requirements, it would have had its proposed conversion project and resulting emissions reviewed to determine controls based on BACT requirements. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3). The BACT analysis would have required the regulator to determine which technology or

operational control led to the "maximum degree of reduction of each pollutant subject to regulation," *id*. §7479(3), including H_2S and TRS. If Citizens are right that New-Indy needed a PSD permit (and they are) then EPA's multi-year efforts to put a band-aid on the tip of the iceberg through the Consent Decree (and money invested in the chemical-treatment "solution") may well be a waste, as the issue of engineering controls would be again addressed in the PSD permitting process. *Compare* EPA Intervention Opp. at JA733 (admitting that resolving Section 303 claim "will not foreclose any finding of a PSD violation or what injunctive relief is appropriate to address such a violation").

EPA's own guidance dictates that the appropriate response to the failure to obtain a PSD permit is *not* to ignore the infraction. *See* Citizen Cmts. at JA994 (quoting 1998 EPA Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements). Further, New-Indy converted its entire facility in the span of two months. More than two years have now passed since the emergency cited in the EPA Order began. At some point, it strains credulity to suggest EPA is simply too focused on its "targeted strike" to be bothered to consider, or allow the district court to decide, whether New-Indy should have had a PSD permit all along. This is particularly true given that, with addition of the civil penalty claim in the Consent Decree, there can be no question EPA's strike is less targeted than claimed in its intervention opposition.

V. Citizen's Intervention Is Not a Moot Point.

In the same text order Granting the Motion to Enter the Consent Decree, the district court denied Citizens' motion to reconsider the denial of intervention as moot. *See* JA3468. It is well established, however, that a settlement or final judgment will not automatically moot a request to intervene. *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 475–76 (4th Cir. 2015) (challenge to denial of intervention was not moot where settlement failed to afford the putative intervenors all the relief sought).

Here, "the motion was made when the case was live and the intervenors can still seek a remedy," including reconsideration of the district court's approval of the final Consent Decree and appeal of that judgment's terms. *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 327 n.3 (4th Cir. 2021), *cert. denied sub nom. Marshall v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 142 S. Ct. 1447 (2022); *compare also Newport News Shipbuilding & Drydock Co. v. Peninsula Shipbuilders' Ass'n*, 646 F.2d 117, 122–23 (4th Cir. 1981) (reversing denial of motion to intervene to enable appeal). To deny Citizens the right to pursue that relief is particularly unfair given that they awaited a ruling on their timely Motion to Intervene for almost a year. Through no fault of their own, they were forced to remain unheard and on the sidelines while the adversary system

"ha[d] yet to function." *United States v. Telluride Co.*, 849 F. Supp. 1400, 1403 (D. Colo. 1994).

They have strong grounds to urge reconsideration of, and challenge on appeal, entry of the Consent Decree. The injunctive relief, as discussed above, is inadequate, unreasonable, and unmoored from science. By way of comparison, in *Telluride Co.*, the court declined to enter a consent judgment where public comments raised serious concerns and the record cast doubt on whether the existing parties "fully and carefully considered all possible alternatives." 849 F. Supp. at 1406. Further, for purposes of civil penalties, one cannot even discern which violations are resolved from the Consent Decree and Final Judgment itself, frustrating Citizens' ability to even comment. (*See* Proposed Consent Decree at JA824-825.) EPA's briefing in support of the ultimate judgment finally sheds some light, but still fails to provide basic background for the court to evaluate the civil penalty determination. (*See* EPA Mem. at JA911 & JA914-915.) To give just one of multiple examples, EPA, among other things, failed to disclose or calculate "the economic benefit of non-compliance"—one of the considerations the court must weigh. *See Telluride Co.*, 849 F. Supp. at 1404 n.1 (proper judicial evaluation of consent decree impossible "on such meager information"); *compare also United States v. ATP Oil & Gas Corp.*, 2015 WL 13648078, at *3 (E.D. La. Jan. 28, 2015) (court had inadequate

information due, among other things, to the failure to apply statutory factors to the facts of the case and weigh the relevant factors).

CONCLUSION

For the reasons set forth above, the district court's denial of intervention should be reversed and the case remanded for further proceedings. Citizens also ask the Court to vacate the orders approving and entering the Consent Decree and Final Judgment to ensure they have the opportunity for motions practice and if needed, to note a further appeal.

REQUEST FOR ORAL ARGUMENT

Because this case involves a legal question of first impression and a complex factual background, Citizens respectfully request oral argument.

March 13, 2023

Respectfully submitted,

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

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