UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

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

PUTATIVE INTERVENORS' COMMENTS RE: PROPOSED CONSENT DECREE
***UNITED STATES V. NEW-INDY CATAWBA LLC*, D.J. REF. NO. 90-5-2-1-12471**
SUBMITTED TO THE UNITED STATES DEPARTMENT OF JUSTICE

Submitted March 11, 2022

I. Introduction

The motto of the State of South Carolina, *Dum spiro spero*, means "While I breathe I hope." Citizens of South Carolina, like every State, expect to breathe clean air as they live in their homes and enjoy their properties. Congress codified this natural right by enacting the Clean Air Act (the "CAA") over five decades ago. New-Indy has egregiously violated the CAA and infringed on the citizens' rights. The United States' (hereinafter also EPA) Proposed Consent Decree, D.J. REF. NO. 90-5-2-1-12471 (the "proposed CD")—which is intended to punish New-Indy's wrongdoing, stop the ongoing pollution, and prevent it from occurring again—does not accomplish those goals and is neither reasonable nor in the public interest.

The proposed CD is woefully inadequate and materially flawed in the following ways:

1. It fails to resolve New-Indy's continuing odor and health impacts to the public;
2. It mistakenly focuses only on hydrogen sulfide;
3. It only requires three fence-line hydrogen sulfide monitors which is inadequate to capture New-Indy's emissions;
4. It fails to require New-Indy to monitor the community for its malodorous and toxic air emissions;
5. It fails to require New-Indy to upgrade and expand its wastewater treatment plant to correct the ongoing emissions and to prevent future catastrophic failures;
6. It fails to require New-Indy to perform new source review and apply best available control technology;
7. It fails to protect public health because it does not require New-Indy to conduct a comprehensive assessment of endangerment;
8. It fails to require New-Indy to demonstrate compliance with South Carolina's toxic air pollutant law; and
9. The civil penalty is unreasonably meager.

Undersigned counsel represent 14 putative intervenors in the above-captioned action: 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 ("Intervenors"). In addition to Intervenors, undersigned counsel also represent approximately over 1,700 similarly situated persons living

within 30 miles of New-Indy's Mill and its wastewater and sludge disposal facilities, who have similarly suffered health effects and disrupted lives due to New-Indy's emissions. Eleven of these impacted residents were interviewed in February and March 2022 and explain in the hyperlinked[1] video the ongoing noxious odors and adverse health effects[2] they are experiencing every day that the wind blows the New-Indy emissions to their neighborhood. *See* Attach. 1 (transcript of video). These and other individuals are simultaneously pursuing a putative class action pending in the United States District Court in and for South Carolina based on the grossly malodorous, toxic, and harmful emissions from the Mill. *See In re New Indy Emissions Litigation*, Case No. 0:21-cv-1480-SAL, and Case No. 0:21-cv-01704-SAL.

Intervenors submit these comments while reserving the right to supplement after all documents responsive to Intervenors' Freedom of Information Act ("FOIA") requests are released by EPA. As described below (Section III), EPA has not responded fully to a June 23, 2021 FOIA request, and barely at all to a January 10, 2022 FOIA request, both filed on behalf of the Intervenors. Responsive documents to these requests are necessary for Intervenors to understand and comment upon the basis for EPA's requirements in the proposed CD. EPA denied a subsequent request that EPA extend the comment deadline to 10 days after all responsive documents are released.

To date, EPA has ignored Intervenors' complaints and expert opinions about what must be done to fix the ongoing chemical insult to the community. Intervenors' Motion to Intervene and accompanying Complaint in Intervention included four expert reports addressing Intervenors'

[1] https://youtu.be/zvxVwK3N9iM (video of comments from impacted residents).
[2] The adverse health effects from breathing the air emissions from the New-Indy Mill are described by residents on the video to include burning eyes and nasal passages, congestion, bloody nose, severe chest and heart burn, ear drum popping, migraines, sore throat, laryngitis, nausea, and headaches.

concerns and recommendations. [ECF Nos. 7-3, 7-7, 7-8, 7-9]. Upon Intervenors' counsels' request, Intervenors held a Teams videoconference with EPA on December 16, 2021, which included a detailed PowerPoint presentation by Intervenors' counsel and experts. Unbeknownst to Intervenors at that time, the date of that conference was one day *after* New-Indy signed, and one day *before* EPA's counsel signed, the proposed CD—revealing EPA's lack of sincerity conferencing with Intervenors. [ECF No. 27-1 at 33-34]. EPA's lack of cooperation and communication with Intervenors, a group of residents most affected by New-Indy's pollution, weighs strongly against approving the proposed CD.

It is proper for the Court to advise the parties to a proposed consent decree of deficiencies it identifies, and to insist on their correction before approving such a decree. *U.S v. State of Colo*., 937 F.2d 505, 509 (10th Cir. 1991) (noting that "[i]f the court discerns a problem with a stipulated agreement, it should advise the parties of its concern and allow them an opportunity to revise the agreement."). Intervenors submit these comments to make the Court aware of the many deficiencies presented by the proposed CD so it may afford the EPA and New-Indy an opportunity to revise the agreement, or withhold its approval, as may be necessary.

II. The Court must seriously consider the comments when deciding whether to approve the proposed Consent Decree.

The public comment process plays an important role in enforcement litigation, with the Court being required to seriously consider the comments when deciding the fate of the proposed Consent Decree. "Regulations require the government to publish the proposed consent decree in the Federal Register for a public comment period…. Accordingly, courts must take under serious consideration any comments received during this period. *U.S. v. City of Waterloo*, 2016 WL 254725, at *6 (N.D. Iowa Jan. 20, 2016) (CFR citation omitted) (citing *U.S. v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). *See also id.* at *6 (citing *U.S. v.* Telluride Co., 849

F. Supp. 1400, 1404-1405 (D. Colo. 1994) (stating that the court should consider "the number of public comment letters received in opposition to the consent decree at issue," and "that the court cannot overemphasize the role that the public plays in this process.").

Because the comments impact the Court's decision whether to approve the proposed Consent Decree, a review of the applicable standards is necessary.

The Court cannot, and should not, be a rubber stamp. "A consent decree is a negotiated agreement that has elements of both judgment and contract, and is subject to judicial approval and oversight generally not present in other private settlements." *U.S. v. Duke Energy Carolinas, LLC*, 499 F. Supp. 3d 213, 217 (M.D.N.C. 2020) (internal citations omitted). "Because it is entered as an order of the court, the terms of a consent decree must also be examined by the court." *Id.* (citing *Smyth v. Rivero*, 282 F.3d 268, 282 F.3d at 280)).

"The court has considerable discretion in deciding whether to approve the Consent Decree." *City of Waterloo*, 2016 WL 254725, at *3 (citing *U.S. v. BP Amoco Oil PLC,* 277 F.3d 1012, 1019 (8th Cir. 2002)). "[C]ourts must not abdicate their duty to adjudicate controversies before them in accordance with the law merely because the parties have proposed a consent decree. *City of Waterloo,* 2016 WL 254725, at *3 (citing *Angela R. by Hesselbein v. Clinton,* 999 F.2d 320, 324 (8th Cir. 1993) (noting that "[f]ederal courts in adopting consent decrees are not mere 'recorders of contracts' from whom parties can purchase injunctions."). "[T]he district court has an 'obligation to independently scrutinize the terms of [the agreement].'" *Arizona v. City of Tucson*, 761 F.3d 1005, 1012 (9th Cir. 2014) (quoting *U.S. v. Montrose Chem. Corp. of Cal.,* 50 F.3d 741, 748 (9th Cir. 1995)). When considering whether to effectuate a proposed consent decree, the trial court should "not blindly accept the terms of the proposed settlement." *U.S. v. North*

Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (citing *Flinn v. FMC Corp.*, 528 F.2d 1169, 1173 (4th Cir. 1975)).

The Court cannot approve a consent decree without a sufficient record. Moreover, the failure of the signatories to a consent decree to adequately justify its substantive terms is grounds to deny the entry of such a decree. *U.S. v. Pioneer Natural Resources Co*., 2020 WL 1694471, *6-7 (D. Colo. Apr. 7, 2020). Review of a "consent decree may not be made in an 'informational vacuum,' or where the record contains 'no evidence at all on an important point.'" *City of Tucson*, 761 F.3d at 1012 (citing *Montrose,* 50 F.3d at 746-47). Indeed, "the mere fact that evidence sufficient to evaluate the terms of an agreement is either before the court or purportedly in the parties' possession is not alone sufficient"; rather, "[t]he district court must actually engage with that information and explain in a reasoned disposition why the evidence" before it establishes that the consent decree is fair, reasonable, and consistent with pertinent statutory objectives. *Id.* (citing *Montrose,* 50 F.3d at 748). Likewise, in reviewing the information before it, the "court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement and the experience of plaintiffs' counsel who negotiated the settlement." *Id*. (internal quotations omitted).

The Court can approve the proposed CD only if it is 'fair, adequate, and reasonable' and 'is not illegal, a product of collusion, or against the public interest.'" *Duke Energy Carolinas,* 499 F.Supp.3d at 218 (citing *North Carolina*, 180 F.3d at 581). Analysis of a consent decree's fairness and adequacy requires the court to "assess the strength of the plaintiff's case," which includes analysis of the extent of discovery and the stage of the pleadings. *North Carolina*, 180 F.3d at 581. "Fairness has both procedural and substantive components." *Id*. at 218 (citing *U.S. v. Cannons Eng'g Corp*., 720 F. Supp. 1027, 1035 (D. Mass. 1989), aff'd, 899 F.2d 79, 86-88 (1st Cir. 1990)).

"Procedural fairness is measured by gauging the 'candor, openness, and bargaining balance' of the negotiation process, whereas substantive fairness requires that a party 'bear the cost of the harm for which it is legally responsible.'" *Id*. (citing *Cannons Eng'g Corp*., 899 F.2d at 86–88). "Substantive fairness is closely linked to reasonability and adequacy." *Id.* (citing *Cannons Eng'g Corp*., 899 F.2d at 90).

Furthermore, "[a] lengthy litigation history and extensive negotiations weigh in favor of finding a proposed consent decree was developed in a procedurally fair manner," *U.S. v. Pioneer Nat. Resources Co*., 452 F. Supp. 3d 1005, 1013 (D.Colo. 2020). However, the converse is true here: first, EPA's action has been pending for less than eight months and has been stayed for the bulk of that time. Likewise, procedural fairness may be shown if "nonsettlors … are afforded an opportunity to participate" in the negotiation of a consent decree, *U.S. v. Davis*, 11 F.Supp.2d 183, 189 (D.R.I. 1998). Here, Intervenors have been entirely excluded from the negotiations leading to the proposed CD. Additionally, EPA not only excluded Intervenors from the substantive discussions, but has substantially failed to provide vital information regarding the negotiation process sought after the proposed CD was unveiled in late December, having largely failed to adequately respond to Intervenors' consultant's January 10, 2022 FOIA request EPA-R4-2022-001848 (seeking, *inter alia,* materials regarding the "parties' basis and rationale for the technical and legal requirements.").

Moreover, "reasonableness and adequacy entail a multifaceted inquiry. Courts have variously considered: whether the decree will be effective in cleaning the environment; whether it provides satisfactory public compensation for the costs of remediation; possible alternatives for remedying hazards; whether the terms of the decree, including enforcement mechanisms, are clear;

and whether the decree reflects a resolution of the actual controversy in the complaint." *City of Waterloo,* 2016 WL 254725, at *5 (citations omitted).

Additionally, where a "consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny." *U.S. v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (Rubin, J., concurring). When considering such proposed decrees, "the court should … examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence," which in turn "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of the record, whether established by evidence, affidavit, or stipulation." *Id.* Indeed, "[i]f the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed." *Id.* Furthermore, a Court may reject a consent decree where it "undermine[s] the rightful interests of third parties…." *State v. City of Chicago*, 912 F.3d 979, 987 (7th Cir. 2019).

As outlined below, the underlying facts in this matter closely resemble the circumstances in *U.S. v. Telluride Co.,* 849 F. Supp. 1400 (D. Colo. 1994), in which the District Court denied the motion of the United States to enter a consent decree under the Clean Water Act. In *Telluride,* the Court found the proposed consent decree was not "fair, reasonable and equitable" because it was negotiated between the government and a single defendant that the government relied upon to develop much of the technical data upon which it relied in formulating the decree and its remediation plan. *Id.* at 1403-1404. Here, the record seems clear that New-Indy and its cadre of well-heeled consultants have dictated to EPA what air emissions to monitor, where to monitor

them, and what least expensive and incomplete remediation plan they can "sell" to the agency, realizing that it will not resolve the ongoing odor and health insult to the community.

Second, the *Telluride* Court, in rejecting the consent decree's proposed remediation plan, gave great weight to public comments that provided "in-depth analysis" and identified significant shortcomings in the consent decree's proposed remediation plan. *Id.* at 1405. Similarly, in this case EPA has refused to adequately consider comments from Intervenors' experts with decades of experience in the fields of wastewater treatment, air monitoring, air modeling, kraft pulp production, and toxicology in fashioning its very limited technical requirements in the proposed CD. Intervenors' experts have proposed industry-accepted approaches to air monitoring, air modelling, and wastewater treatment that, to date, have been ignored by EPA.

Third, in *Telluride*, the Court found the civil penalty provided in the proposed consent decree the minimum EPA would accept and criticized the agency for identifying the estimated dollar values it used in assessing the elements of the economic benefit of noncompliance. Insufficient. *Id* at 1405-06. Here, the EPA has provided no basis for the proposed penalty that is paltry compared to the millions of dollars New-Indy saved by avoiding necessary upgrades to its wastewater treatment plant.

For the reasons described in these comments, the Court cannot, under the applicable standard of review, approve the proposed CD.

III. The proposed consent decree is neither reasonable nor in the public interest.

A. The proposed consent decree fails to resolve New-Indy's continuing odor and health impacts to the public.

i. The proposed consent decree mistakenly focuses only on hydrogen sulfide.

The United States' Complaint and the proposed CD are directed exclusively at New-Indy's emissions of hydrogen sulfide ("H_2S"), a small component of the Mill's toxic emissions, while

ignoring its other toxic emissions of methyl mercaptan, dimethyl sulfide, dimethyl disulfide, and other volatile organic compounds, which dominate. EPA is unreasonable and arbitrary in selecting hydrogen sulfide as its compliance focus and fails to serve the public interest by ignoring the other toxics. [*See* ECF No. 1, at ¶¶ 1, 12, 22-25; ECF No. 27-1, at pp. 3-4]. Specifically, almost all of the injunctive relief in the proposed CD relating to air emissions is comprised of monitoring for and treatment of H_2S. [*See* ECF No. 27-1, App. A at p. 1 (monitoring and treatment of foul condensate to remove H_2S); p. 2 (fence-line monitoring for only H_2S); p. 3 (operation of wastewater treatment system with a goal of minimizing emissions of H_2S at the fence line); p. 4 (secondary containment of black liquor storage tank that caused H_2S fence-line exceedances in September).][3]

Noticeably missing from the proposed CD are other malodorous and toxic compounds that are known to be present and emitted from New-Indy's wastewater treatment plant ("WWTP") in substantial amounts, including among others methyl mercaptan, dimethyl sulfide, dimethyl disulfide—which together with H_2S make up the family of compounds known as Total Reduced Sulfur ("TRS"). According to EPA's May 13, 2021 Emergency Order issued to New-Indy, "TRS emissions from kraft pulp mills are extremely odorous, and there are numerous instances of poorly controlled kraft mills creating public odor problems … [that] can have an adverse effect on public welfare…." [ECF No. 1, Ex. A, p. 12, ¶39]. Significantly, methyl mercaptan in particular is more dangerous to public health than H_2S and is regulated by the South Carolina air toxics law at concentrations 14 times more stringent than H_2S, thus indicating it is much more toxic.[4] But there

[3] The one possible exception is requiring New-Indy to install a cover on the Post Aeration Tank and monitoring for volatile organic compounds. [*See* ECF No. 27-1, App. A at pp 3-4]. Even this relatively minor requirement in the proposed CD is designed to also prevent H_2S emissions.
[4] Methyl mercaptan has property line limits 14 times more stringent than H_2S. *See* S.C. Code Regs. 61-62.5, Standard No. 8, Toxic Air Pollutants.

is no requirement in the proposed CD to monitor for these harmful emissions like methyl mercaptan, let alone control them with technology such as an additional steam stripper to supplement the existing one that is too small to handle at least 300,000 gallons of foul condensate every day that is piped to the WWTP.

EPA's preoccupation with H_2S emissions in difficult to explain. Undoubtedly, it was due in part to the odors associated with H_2S, which had been a major source of citizen complaints. But it appears to have been due also to a lack of understanding of the nature of the emissions coming from New-Indy's WWTP. An email, which EPA's FOIA representative described as explaining EPA's choice of H_2S, demonstrates that EPA relied on inapplicable and dated information about emissions from pulp and paper mills. In an October 14, 2021 email from Denis Kler to Todd Russo (both in EPA's air group), with a subject line of "New Indy – H2S in TRS," Mr. Kler wrote that he was "following up on our discussion yesterday about H_2S being one of the largest components that make up TRS gases. See below." He then listed his references:

> New-Indy test report dated July 21, 2021 (page 17, table 2-15), data suggests that hydrogen sulfide is largest component *in wastewater.*
>
> New-Indy test report dated August 2021 (page 3-3, table 3-1); data suggests that hydrogen sulfide is largest component *in wastewater.*
>
> "However, hydrogen sulfide is the predominant TRS compound emitted by kraft pulp mills." (page 2-3, EPA-450/2-78-003a, January 1978).
>
> "However, hydrogen sulfide is the predominant TRS compound emitted by kraft pulp mills." (page 2-3, EPA-450/2-78-003b, March January 1979).

[Emphasis added.]. *See* Attach. 2 (October 14, 2021 Denis Kler Email).

Significantly, EPA is citing to test results from liquid "wastewater," not air emissions. New-Indy's air emissions emanate from its WWTP as well as other sources, including hundreds of acres of sludge accumulated in ponds when the WWTP operation was severely degraded by

New-Indy's process changes. There are thousands of tons of accumulated sludge and other potential sources of emissions that EPA simply ignored. Moreover, the EPA's 1978 and 1979 New Source Performance Standard ("NSPS") documents referenced in Mr. Kler's email expressly state that they address only emissions from specific devices within the plant and *do not address emissions from WWTPs*. *See* Attach. 3 (1978) (excerpts) at pp. 1-5 to 1-7; Attach. 4 (1979) (excerpts) pp. 1-5 to 1-7 (explaining at p. 1-5 that "water treatment ponds … are not covered by the proposed NSPS because data on actual TRS emissions are not available….").

The most telling demonstration of EPA's arbitrariness is that it focused on H_2S, alone, notwithstanding that New-Indy itself estimated that H_2S is only about 10% of the emissions emanating from its WWTP. In the New-Indy Catawba Mill Corrective Action Plan, Rev. 2 (July 12, 2021), submitted to DHEC but which EPA also is relying and commenting on to satisfy the Remedial Plan requirement in its Complaint, New-Indy included Table 6-1, "Summary of H2S and Other TRS Compound Emissions."[5] That Table estimates and compares H_2S emissions from New-Indy's Aerated Stabilization Basin ("ASB"), which is the key problem area of its WWTP. The estimated controlled emissions from the three parts of the ASB during operation of the Brown Mill are 2.28 lb/hr H_2S (1.64+0.36+0.27) as compared to 29.44 lb/hr of TRS (21.22+4.66+3.56). In other words, the H_2S emissions comprise less than 10% of the TRS emanating from New-Indy's WWTP.

The EPA has no reasoned explanation for only monitoring H_2S. It is unreasonable to ignore the more dangerous component of methyl mercaptan and to ignore 90% of the toxic TRS

[5] https://scdhec.gov/sites/default/files/media/document/New-IndyDHEC-CAP-report-Rev-2.pdf (page 45 of pdf).

emissions. The public deserves to have these emissions monitored and controlled as well, and the proposed CD fails to do so.

The steps taken to address New-Indy's H_2S problem by using treatment chemicals have created new problems. Extreme levels of H_2S were monitored off-site by EPA in April 2021 when most of the citizen complaints described the "rotten egg" odor symbolic of H_2S. [*See* ECF No. 1, Ex. A, pp. 7-8 (showing H_2S levels up to 473 parts per billion ("ppb")].[6] These rotten egg odors continued through the next several months as New-Indy's fence-line monitors registered emissions of H_2S in the tens to hundreds of ppb. *Id*. While the H_2S and related TRS sulfur-related odors continue to be reported by residents to DHEC, a new sickening odor emanating from the New-Indy Mill has since emerged to impact the community up to eight miles or more from the Mill. Since approximately October 2021, when New-Indy reported that it was treating foul condensate and other wastewater streams at the WWTP with hydrogen peroxide, the odors experienced by residents downwind of the Mill are being reported as a "sickeningly sweet chemical odor."

Tim Phillips, one impacted resident who lives approximately four miles to the northeast of the New-Indy Mill, has been logging the frequency and intensity of the new sweet chemical odor since January 2022 and has found a very close correlation between wind direction coming from the Mill and the presence of the odor. *See* Attach. 5 (T. Phillips March 9, 2022 Letter & Charts).[7] On several occasions, Mr. Phillips drove to the New-Indy Mill and confirmed the source of the

[6] *See also* https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation (April map showing monthly figure of odor reports, with most complaints describing rotten egg odors).

[7] Mr. Phillips' logging demonstrates that he and his community have been impacted by this noxious odor emanating from the New-Indy mill approximately for 19 of 47 days (or 40% of the time) between January 13 and March 7 (excepting Feb. 1-6) when he conducted the odor analysis and logging. This does not include adverse impacts evening hours, nor residents in other areas when the wind was blowing in a different direction.

odor was the Mill. *Id.* Other residents who live downwind of the Mill also report a similar sickening sweet odor which causes them to experience health effects and prevents them from being outdoors. *See* Attach. 1 (transcript of video).[8]

Richard Osa, an air monitoring expert with more than 40 years of experience developing and implementing air quality and monitoring programs for industry, including for the pulp and paper industry, advised EPA in a September 2021 report and in a December 16, 2021 Zoom presentation that requiring New-Indy to monitor only for H_2S is a significant deficiency that misses up to 90% or more of the TRS emissions based on estimates provided by New-Indy. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at pp 4, 8)); Attach. 7 (December 16, 2021 Power Point) at pp 6-7.[9]

Mr. Osa has reviewed the proposed CD and finds that its approach to air monitoring is "grossly inadequate" and "fails to inform EPA and the public about numerous malodorous and potentially toxic emissions that continue to be emitted by the New-Indy Mill." See Attach 6 (R. Osa March 10, 2022 Letter) at p. 1. Mr. Osa concludes that the proposed CD's requirement for New-Indy to monitor fence-line air emissions for H_2S alone is "not reasonable or rational" given that New-Indy's Title V air operating permit limits TRS emissions. *Id*. at p. 2.

In addition, given that many of the odors reported in the past five months have not resembled the H_2S "rotten egg" smell, other unmonitored chemicals at the New-Indy are causing

[8] https://youtu.be/zvxVwK3N9iM (video of comments from impacted residents).

[9] Mr. Osa's September 24, 2021 letter was attached to Intervenors' Complaint in Intervention filed on September 29, 2021 and served on EPA Senior Counsel Marirose Pratt and Department of Justice ("DOJ") attorneys Joanna Valenzuela and Steven O'Rourke [ECF No. 7, Ex. 5]. The December 16, 2021 PowerPoint was presented to Ms. Pratt, DOJ attorneys Valenzuela and O'Rourke, and EPA Enforcement Officials Carol Kemmler, Todd Russo, and Nacosta Ward. It was forwarded to DOJ and EPA counsel in a December 23, 2021 letter from David Hoyle. *See* Attach. 8.

the "sickeningly sweet chemical odor" now blanketing the community. According to Christopher Bullock, a chemical engineer with 40 years' experience working in and consulting for kraft pulp mills, the source of these odors likely includes the 300,000 gallons per day of foul condensate that is being treated only for H_2S but still contains other sweet-smelling volatile constituents, including methanol, ethanol, terpenes, and other organic compounds. *See* Attach. 9 (C. Bullock March 2, 2022 Letter) at p. 2.[10]

Mr. Osa explains that "[m]onitoring exclusively for H_2S likely overlooks the majority of the TRS and other volatile chemical releases that are traversing the mill's fence-line." *Id.* EPA should be requiring New-Indy to test air emissions from the foul condensate and other locations where wastewater and sludge are exposed to the ambient air for these and other odor-causing chemicals so that the fence-line and community monitors can accurately and comprehensively assess the levels of *all* TRS compounds, as well as the other volatile constituents in the foul condensate.[11] Yet, the Proposed CD inexplicably requires New-Indy to monitor the foul condensate being dumped into the WWTP solely for oxidation reduction potential ("ORP") to determine the dosage of hydrogen peroxide (or other chemical oxidant) necessary to treat the H_2S. [*See* ECF 27-1, App. A.1.b.-d]. This limited requirement will not treat or monitor the other volatile

[10] Mr. Bullock and Mr. Osa also state that the continuing foul odors may be coming from bypass vents in the Mill which allow TRS and other volatile compounds to discharge to the atmosphere untreated. Attach. 9 (C. Bullock March 2, 2021 Letter) at p. 2; Attach. 6 (R. Osa March 10, 2022 Letter) at p. 7. These experts recommend that EPA require all such vents be eliminated and for New-Indy to monitor, record, and report any occasion that bypass vents are activated and assess penalties for each bypass to discourage such emissions. *Id.*

[11] As was explained to EPA in the attachments to the December 23, 2021 Supplement filed by Intervenors [ECF No. 26], there are EPA and industry-accepted methods to measure H_2S, methyl mercaptan, and the other TRS compounds directly from the ASB and other treatment units at the New-Indy Mill. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. D, December 23, 2021 Letter at pp. 2-5)). The proposed CD ignores these recommendations by an air monitoring expert with 40 years of experience and relies instead only on very limited H_2S monitors to assess New-Indy's impact on the community.

constituents in the foul condensate such as methanol, ethanol, and terpenes that cause sickening sweet emissions when exposed to the ambient air at the WWTP. *See* Attach. 9 (C. Bullock March 2, 2021 Letter) at pp. 2-3.

ii. The proposed consent decree, focused solely on hydrogen sulfide, is vague and ambiguous.

Both New-Indy and the EPA have repeatedly asserted that EPA's action *only* addresses, and the proposed CD *only* purports to resolve, EPA's claim "for injunctive relief to abate the endangerment under Section 303 of the Clean Air Act ("Act") 42 U.S.C., § 7603" arising out of "emissions of hydrogen sulfide (H_2S) from Defendant's facility." [ECF No. 27-1 at 1].

For example, New-Indy has stated previously that "…disposition of this matter will not impair or impede Intervenors' ability to protect their interest"; and that the issue of "injunctive relief ordering New-Indy to apply for and obtain a PSD permit" is not at issue in this action. [ECF No. 19 at 1-2, 11]. Similarly, EPA has stated that it has not alleged "a 'PSD' violation'"; that the instant action arose solely "from emissions of Hydrogen Sulfide ('H_2S') from New Indy's Facility"; that resolution of the present action "will not foreclose any finding of a PSD violation or what injunctive relief is appropriate to address such a violation"; and will permit a subsequent court decision on "whether it is appropriate to require New Indy to undertake steps to rectify the PSD violation, such as additional monitoring or additional pollution control." [ECF No. 18, *passim*].

The proposed CD specifies that New-Indy's "compliance with this Consent Decree shall be no defense any action commenced pursuant" to, *inter alia,* "State, and local laws, regulations, and permits," and that it does not "'limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law." [ECF No. 27-1, ¶¶ 67-68]. Yet, in filings in the proposed Class Action litigation, *In re: New Indy Emissions Litig.*, Nos. 21-CV-1480-SAL,

21-cv-1704 SAL (D.S.C) (the "Class Action"), New-Indy has previously asserted to the Court that should it "enter the Consent Decree the United States has lodged…the Consent Decree will preempt Plaintiffs' demand for injunctive relief" in the Class Action "to the extent Plaintiffs' demand is inconsistent with what the Consent Decree requires." [Case No. 21:-cv-1480 SAL, ECF. No. 58, FN 13]. While Intervenors vigorously dispute New-Indy's view on the preemptive impact, if any, of the proposed CD—a document negotiated without the input of Intervenors and intended to resolve an action New-Indy and EPA both assiduously worked to exclude Intervenors from joining—New-Indy's previous statement highlights the vagueness and ambiguity of the proposed CD's language. Specifically, the statement in Paragraph 68 that the proposed CD does not limit the rights of third parties, like Intervenors, against New-Indy "except as otherwise provided by law" is vague, ambiguous, and fails to adequately delineate the impact of the proposed CD. [ECF No. 27-1, ¶ 68].

Here, EPA has intentionally, if inexplicably, limited the scope of its action to H_2S emissions. Given New-Indy's self-serving prediction about the potential impact of the proposed CD's entry, at a minimum, to ensure adequacy, fairness, and reasonableness, the decree must be revised to categorically state: that neither its intent, nor its terms, shall be construed to bind, preempt, estop, limit, act as any precedent, or in any way affect the rights of any third-parties to have New-Indy fully and expeditiously comply with the laws of South Carolina; that it has no impact on third-parties' current or PSD future claims, or remedies for such claims, against New-Indy, including but not limited to claims predicated on H2S emissions; and that it in no way affects *any* claims, or remedies for such claims, brought by third-parties against New-Indy regarding emissions or release of TRS compounds *other than* H_2S, including but not limited to methyl mercaptan, in any manner, including but not limited to providing no impediment to future

injunctive relief for claims premised on chemical compounds the EPA has chosen to ignore in this action.

iii. The three fence-line H_2S monitors required by the proposed consent decree are inadequate to capture New-Indy's emissions leaving the Mill property.

Mr. Osa also has explained to EPA on multiple occasions that the three fence-line monitors that New-Indy installed pursuant to the May 13, 2021 Emergency Order, and not changed by the proposed CD, are "clearly inadequate" given the limited number of monitors, their locations, and their capability to monitor only H_2S.[12] *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at pp 3-4)); Attach. 7 (Dec. 16, 2021 PowerPoint) at pp. 8-9. Nevertheless, without any explanation, the proposed CD requires only three H_2S monitors to cover six miles of fence-line around the New-Indy Mill. [ECF No. 27-1, App. A, II.a (Fence line monitoring), App. B (Fence Line Monitoring Locations)]. EPA's recent release of a limited number of FOIA documents now reveals the reason why EPA required only three monitors fence-line monitors – not because any monitoring assessment was done but because that is how many monitors New-Indy had installed just prior to when EPA's Emergency Order was issued. *See* Attach. 10 (May 10, 2021 emails between Cary Secrest and Patrick Foley) (Foley asks "[w]hy are we limiting this to just 3 monitors? Is that because that is all they bought?"; Secrest responds "I suggest 3 monitors because they already have 3 monitors running there and they could be relocated more quickly than mobilizing more from [their consultant].")[13]

[12] It is inexplicable why EPA has not required New-Indy to monitor for TRS and methyl mercaptan on the fence-line after Mr. Osa pointed out more than five months ago that TRS monitors are commercially available and whole air samples could be collected and sent to a laboratory to analyze for methyl mercaptan. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at p. 4)).

[13] Based on other documents reviewed, EPA has not required New-Indy to relocate the initial three fence-line monitors, nor has New-Indy moved them around or added more monitors.

iv. The three fence-line H_2S monitors required by the proposed consent decree are inadequate to capture New-Indy's emissions leaving the Mill property.

Mr. Osa also has explained to EPA on multiple occasions that the three fence-line monitors that New-Indy installed pursuant to the May 13, 2021 Emergency Order, and not changed by the proposed CD, are "clearly inadequate" given the limited number of monitors, their locations, and their capability to monitor only H_2S.[14] *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at pp 3-4)); Attach. 7 (Dec. 16, 2021 PowerPoint) at pp. 8-9. Nevertheless, without any explanation, the proposed CD requires only three H_2S monitors to cover six miles of fence-line around the New-Indy Mill. [ECF No. 27-1, App. A, II.a (Fence line monitoring), App. B (Fence Line Monitoring Locations)]. This monitoring network leaves huge gaps of 5.8 miles between two of the three monitors. *See See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at pp 4-5)); Attach. 7 (Dec. 16, 2021 PowerPoint) at pp. 8-9. As a result, New-Indy's emissions will *not* be monitored at all for downwind residents to the west, southwest, and northwest of the Mill. *Id.* Mr. Osa pointed out in his report and PowerPoint presentation that EPA's regulations for petroleum refineries would require at least 18 monitoring locations for a facility this large. *Id.* Nevertheless, EPA did not respond to Mr. Osa's comments and recommendations and failed to require a more robust fence-line monitoring program for the New-Indy Mill.

[14] It is inexplicable why EPA has not required New-Indy to monitor for TRS and methyl mercaptan on the fence-line after Mr. Osa pointed out more than five months ago that TRS monitors are commercially available and whole air samples could be collected and sent to a laboratory to analyze for methyl mercaptan. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at p. 4)).

v. The proposed consent decree completely fails to require New-Indy to monitor the community for its malodorous and toxic air emissions.

The United States' Complaint states that more than 17,000 residents living as far away as 30 miles from the New-Indy Mill have filed complaints about strong odors and health effects. [*See* ECF No. 1 at p. 4, ¶13]. The reported health effects included nausea, headaches including migraines, nose or throat irritation, eye irritation, coughing, difficulty breathing, asthma "flare ups," and dizziness. [*Id*. at ¶14]. The Complaint also noted that residents have documented a wide range of impacts to quality of life, personal comfort, and well-being, including lost sleep, a desire to stay indoors to avoid odors, stress, anxiety and other symptoms. [*Id.* at ¶15]. As a result, EPA claimed that New-Indy's emissions "have caused adverse effects on personal comfort and well-being of thousands of people" and was continuing to "cause an imminent and substantial endangerment" to public health or welfare or the environment. [*Id.* at p. 9, ¶¶35-36].

Despite these major health and welfare impacts to thousands of residents downwind of the New-Indy Mill, the proposed CD has absolutely no requirements for New-Indy to monitor the level of its emissions in the community even though hundreds of odor and health complaints continue to pour into DHEC every month.[15] The only air monitoring requirements placed on New-Indy in the proposed CD are the three woefully inadequate fence-line monitors described above that are checking solely for H_2S. Although New-Indy is monitoring H_2S at five stations located within approximately five miles of its fence-line, the vast majority of recent odor and adverse health effect complaints are being lodged by residents well beyond the locations of these five

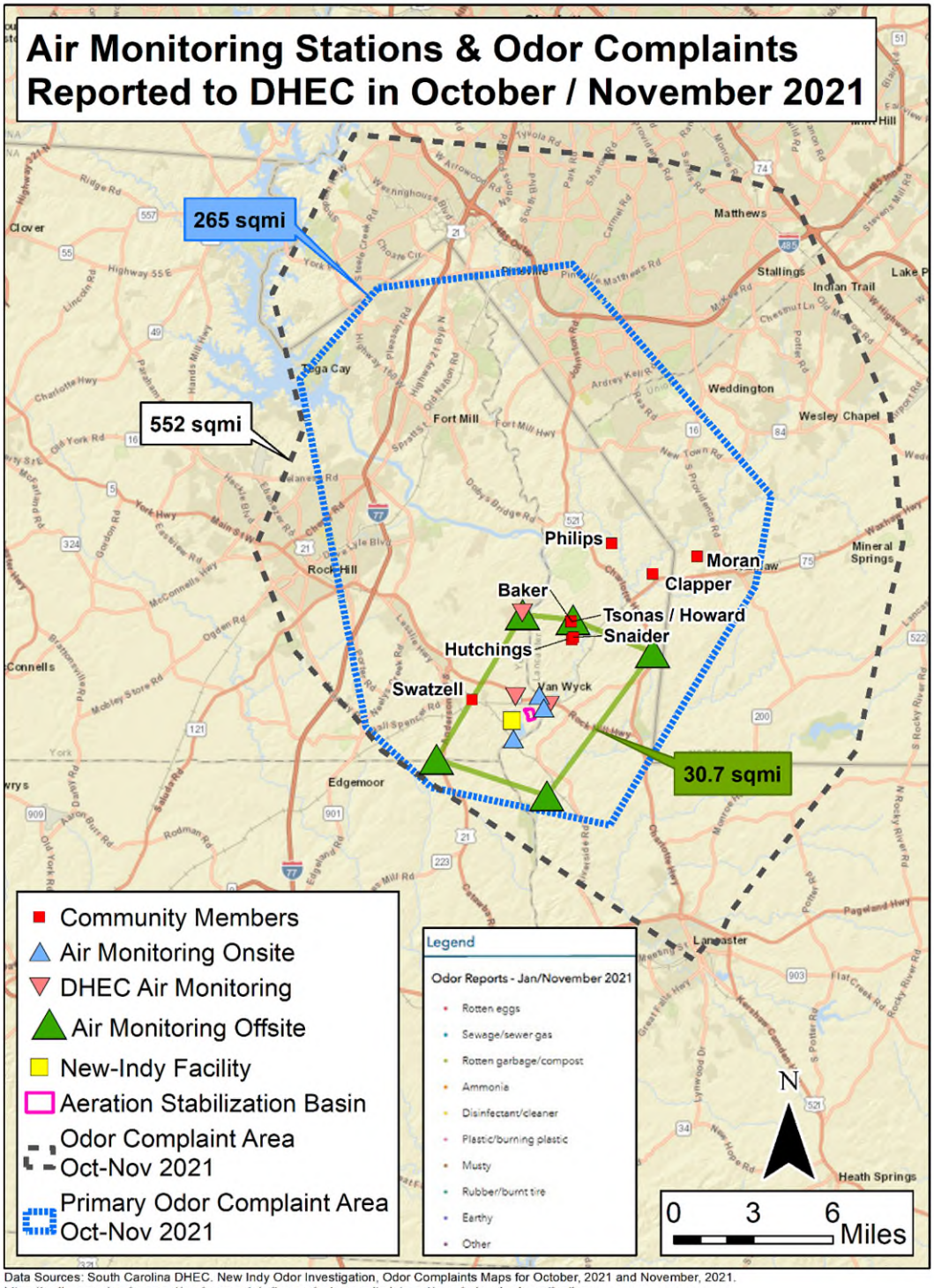
[15] *See* https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation (including monthly figure of odor reports).

stations. *See* Attach. 6 (R. Osa March 10, 2022 Letter) at p. x, Fig. x.[16] The figure has been annotated to show the location of residents who provided video interviews in February and March 2022, confirming the ongoing chemical odors on their properties when the wind blows from the New-Indy Mill and their adverse health effects resulting from the "sickeningly sweet" chemical emissions. *See* Attach. 1 (transcript of video).[17]

[Figure on Next Page]

[16] The current community monitoring network, which consists of five New-Indy stations and three DHEC stations, covers an area of approximately 30 square miles while the primary odor complaint area is 265 square miles or nearly nine times larger. *See id.*

[17] https://youtu.be/zvxVwK3N9iM (video of comments from impacted residents). The adverse health effects include burning eyes and face, congestion, nasal passage burning, bloody noses, severe chest pain, heart burn, ear drum popping, headaches and migraines, sore throat, laryngitis, and nausea.



Data Sources: South Carolina DHEC. New Indy Odor Investigation, Odor Complaints Maps for October, 2021 and November, 2021.
https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation
Accessed December 7 and February 4, 2021
https://newindycatawba.com/wp-content/uploads/2021/08/NI-Air-Monitoring-Summary-Results-08-07-21.pdf
https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation/air-monitoring-hydrogen-sulfide

Mr. Osa recommended to EPA and DOJ in his PowerPoint slides on December 16, 2021 that New-Indy should be required to install, calibrate, and operate continuous real-time H_2S and TRS monitors and report daily reading on 15 minute intervals for at least 25 locations in the broader community. *See* Attach 6 (R. Osa March 10, 2022 Letter at its Attachment C (PowerPoint) p. 10). TRS monitors, that include results for the toxic methyl mercaptan and the other reduced sulfur compounds, are commonly available for this purpose. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. B September 24, 2021 Letter at p. 4)). Similarly, whole air samples could be collected and sent to a laboratory to test for methyl mercaptan, methanol, ethanol, terpenes, and other volatile organic compounds that are known to be present in foul condensate. *Id; see also* Attach. 9 (C. Bullock March 2, 2022 Letter) at pp 2-3 (describing known chemical constituents of foul condensate).

vi. The proposed consent decree irrationally allows New-Indy to dump foul condensate into the WWTP where its volatile chemical constituents are released to the community.

As discussed above, the proposed CD addresses only H_2S as an air pollutant at the New-Indy Mill and fails to recognize that foul condensate contains other malodorous and toxic chemical constituents that are not treated by hydrogen peroxide or other oxidants. Therefore, it allows New-Indy to continue dumping up to 300,000 gallons or more of partially treated foul condensate into the open-air WWTP. This is wholly inconsistent with pulp mill industry practice which commonly uses a steam stripper to remove H_2S, methyl mercaptan, TRS, and volatile constituents from foul condensate before it is discharged as relatively clean water to the WWTP. *See* Attach. 11 (Martin MacLeod, Phd, September 25, 2021 Letter) at p. 3; Attach. 9 (C. Bullock March 2, 2022 Letter) at pp 2-3.

The current steam stripper at the New-Indy Mill is undersized to handle at least 30% of the foul condensate generated and has been reported to be out of service on numerous occasions. *See* Attach. 12 (K. Norcross March 7, 2022 Letter) at p. 6. Not only does the proposed CD fail to require New-Indy to install an adequately sized steam stripper to treat all of the foul condensate, but it allows New-Indy to take the existing stripper offline for "scheduled and unscheduled maintenance" for up to 24 days (576 hours) during the first year and up to 19 days (460 hours) thereafter. [*See* ECF No. 27-1, App. A, I.a.]. At other pulp mills, foul condensate is kept inside the mill by either being stored or returned to the process where it is generated, or the mill is shut down if that cannot be accomplished. *See* Attach. 9 (C. Bullock March 2, 2022 Letter) at p. 3. Another kraft pulp mill expert with more than 30 years of experience advised EPA last September that if there is inadequate steam stripper capacity to handle all the foul condensate, the prudent response by a kraft pulp mill operator is to reduce pulp production and the related production of foul condensate. *See* Attach. 11 (M. McLeod September 25, 2021 Letter) at p. 3. Nevertheless, the proposed CD gives New-Indy a free pass to dump partially treated, and in some cases untreated,[18] foul condensate into the WWTP where its malodorous and toxic constituents will be released to the community and not even monitored.

Even some officials at EPA recognized the need for additional steam stripper capacity at the New-Indy Mill many months ago. In a May 5, 2021 internal email, EPA's Patrick Foley advised his colleagues that New-Indy's "[odor] impacts may go on until they either reduce operating rate to match condensate production to stripper capacity or install additional stripper

[18] Wastewater expert Ken Norcross advises that chemical treatment using hydrogen peroxide or another oxidant to treat part or all of the foul condensate by New-Indy cannot be relied upon to eliminate H_2S and other odor causing chemicals. *See* Attach. 12 (K. Norcross March 7, 2022 Letter) at pp. 5-6.

capacity. It may make sense to lead them by the nose to that conclusion." *See* Attach. 13 (May 5, 2021 Foley 8:13am Email). Even so, the proposed CD inexplicably allows New-Indy to continue business as usual without installing additional steam stripper capacity or reducing production to match stripper capacity.[19]

vii. The proposed consent decree unreasonably fails to require New-Indy to upgrade and expand its WWTP to correct the ongoing emissions and to prevent future catastrophic failures.

According to Kenneth Norcross, a wastewater engineering expert with more than 40 years of experience designing and troubleshooting industrial wastewater treatment plants, including nine pulp and paper mill WWTPs, it was multiple deficiencies and failures in New-Indy's WWTP that has resulted in the continuing release of hydrogen sulfide and other malodorous and toxic air pollutants to the surrounding community. *See* Attach. 12 (K. Norcross March 7, 2022 Letter) at p. 1. Mr. Norcross previously provided EPA with a detailed explanation of why New-Indy's WWTP failed and what needs to be done to correct the ongoing air emissions and to prevent another catastrophic failure. *See generally* Attach. 14 (K. Norcross September 26, 2021 Letter). These recommendations included adding a new, adequately-sized steam stripper and enlarging, upgrading and removing sludge form other treatment units that contribute to the noxious odors leaving the New-Indy Mill. *Id.* at pp. 12-14.

However, EPA did not choose to consult further with Mr. Norcross, and none of the uniquely experienced wastewater expert's recommendations to improve New-Indy's WWTP are included in the proposed CD. Mr. Norcross has reviewed the "Work to Be Performed" in Appendix A and finds that the "very limited WWTP requirements in the Consent Decree, as

[19] It is sadly ironic that, if EPA had acted on its staff's recommendation 10 months ago to require New-Indy to install a new adequately-sized steam stripper, it would be operational by now. *See* Attach. 11 (M. McLeod September 25, 2021 Letter) at p. 4.

lodged, are simply inadequate and unreasonable to provide protection to human health and the environment." *See* Attach. 12 (K. Norcross March 7, 2022 Letter) at p. 1. He describes with great detail the "needed improvements to the outdated and inadequate New-Indy WWTP" and provides supportive references from New-Indy's WWTP NPDES permit, EPA design criteria, and pertinent professional wastewater organization design standards. *Id.*

Mr. Norcross explains why the Proposed Consent Decree's focus only on reducing H_2S emissions from the WWTP using hydrogen peroxide or another oxidant is ill-advised given the other TRS and volatile organic compounds in the foul condensate. *Id.* at p. 5. He also states: "There is simply no valid reason to ignore the most toxic constituents of the TRS emissions and other chemicals in the foul condensate and measure only H_2S during any emissions monitoring efforts. It is clearly not in the public's interest and fails utterly to follow the known science." *Id.* at p. 6.

B. The proposed consent decree fails to require New-Indy to perform new source review and apply best available control technology.

The proposed CD fails to address New-Indy's violation of the requirement to obtain a Prevention of Significant Deterioration ("PSD") permit. New-Indy avoided this obligation—and the critical pollution control analysis it would have required—by misrepresenting the emissions that would result from disconnecting its steam stripper, enlarging the pipe carrying foul condensate, and directing all of its foul condensate to its WWTP.

As part of New-Indy's conversion of its facility, it applied in April 2020 to DHEC for a construction permit to take its air pollution stripper out of service and instead transport all its foul condensate to its outdoor WWTP. [ECF. No. 7, Ex. A ¶11]. New-Indy represented to DHEC that there would be a net increase of 2.2 tons per year ("tpy") of H_2S compared to the significant increase threshold of 10 tpy prescribed by the federal PSD permit regulations, 40 C.F.R. 52.21 (a)(2)(iv)(b)(23). [ECF. No. 7, Ex. A, Ex. 1 at 4-6 (Table 3)].

Intervenors' expert has determined using back-calculations and reverse modeling that the actual H_2S emissions from New-Indy's facility in April 2021 were 1,500 times higher than what New-Indy represented in its application to DHEC. Intervenors' expert used EPA's actual Geospatial Monitoring of Air Pollution ("GMAP") measurements of H_2S ambient air concentrations taken April 24-27, 2021 about 500 to 1,000 meters north of a WWTP aeration pond, including a reading of a maximum concentration of 1000 parts per billion ("ppb"). *See* Attach. 15 (S. Hanna Dec. 23, 2021 Report). Using those measurements with wind data, Intervenors' expert used an integral dispersion model to back-calculate the emissions rate that would have produced those measurements. *Id.* Intervenors' expert concluded that the emission rate on April 27, 2021, extrapolated to an annual figure, would in a total emission rate from that aeration pond equivalent to 3650 tpy. *Id.*

In contrast, New-Indy had predicted its H_2S emission rate would increase on an annualized basis by 2.2 tpy and thus would be below EPA's PSD permit significance threshold of 10 tpy. Intervenors' expert's analysis shows that New-Indy's annualized rate was more than 1,500 times what it predicted and 365 times the level EPA regards as significant. New-Indy exceeded the PSD threshold in a single day.

Although EPA did not measure TRS concentrations in the ambient air, as described above, New-Indy has estimated that its H_2S emissions comprise only 10% of its total TRS emissions. [ECF No. 7. Ex. A, Ex. 3 (CAP) at p. 6-12, Table 6-1]. Assuming that is accurate, this analysis also yields a conclusion that TRS was being emitted at an annualized rate of 36,500 tpy as compared to EPA's PSD permit significance threshold for TRS of 10 tpy. *See* 40 CFR 52.21(a)(2)(iv)(b)(23). New-Indy had represented to DHEC that its TRS emissions resulting from

disconnecting the stripper and changing the process would be below significance. That was obviously not accurate.

Had New-Indy complied with EPA PSD permit regulations, there would at the very least have been a required control technology analysis. This proposed CD requires only that New-Indy "treat" its H_2S emissions with chemical additives. [*See* ECF No. 27-1, App. A at pp 1, 5]. It fails to address New-Indy's very significant violation of the CAA and fails to require the necessary Best Available Control Technology as part of the required injunctive relief.

EPA guidance specifically indicates that "it is no longer appropriate to merely allow a source to 'correct' an NSR[20] violation by dismantling an illegal modification, unless emissions from the … modified unit essentially become zero (e.g., the entire process line was shut down). Thus, a source generally should not be able merely to return to pre-violation conditions in order to avoid installation of control equipment or implementation of process changes." *Guidance on the Appropriate Injunctive Relief for Violations of Major New Source Review Requirements*, Nov. 17, 1998. New-Indy should be required to perform a Best Available Control Technology ("BACT") analysis and to be subject to appropriate emission limits of H_2S and TRS from fugitive emissions at the WWTP. *Id.* Intervenors contend the outcome would—and should—be a second stripper to remove most toxins from New-Indy's foul condensate before it is piped to the WWTP. The May 2021 emails between EPA staff show that EPA also seems to share that conclusion. *See* Attach. 13 (May 5, 2021 Foley Email).

[20] "New Source Review" or NSR, includes PSD permit violations.

C. The proposed consent decree fails to protect public health because it does not require New-Indy to conduct a comprehensive assessment of endangerment as required by the complaint.

The proposed CD is intended to resolve the Complaint filed by the United States against New-Indy. [ECF No. 1]. The Complaint seeks injunctive relief requiring New-Indy to comply with EPA's Emergency Order issued on May 13, 2021 that was attached to the Complaint. [*Id.* at p. 2, ¶3; *id.* Ex. A]. Specifically, the Complaint seeks to "restrain New-Indy from emitting excessive H_2S *and/or requiring [New-Indy] to take immediate steps to significantly reduce air pollution* that is *presenting an imminent and substantial endangerment to the public* health or welfare or environment." (emphasis added). [*Id.*].

In the Emergency Order, EPA recognized that the foul condensate generated by New-Indy "contained hydrogen sulfide, methyl mercaptan, methanol, and other chemicals…" [ECF No. 1, Ex. A, p. 3, ¶9]. The EPA Order also found that "Kraft pulp mills are a major source of TRS compound [and] TRS compounds can have an adverse effect on public welfare…" [*Id.* at p. 12, ¶39].[21] As a result, EPA's Order required New-Indy, "after consulting with a toxicologist," to submit to EPA in writing within 45 calendar days a "long-term plan that identified (i) how New-Indy's continued operations will avoid the endangerment in [the] Order; and (ii) what operational, production or process changes to the facility are necessary to operate in accordance with recognized and generally accepted good engineering and good air pollution control practices." [*Id.* at pp. 16-17, ¶52h].

EPA has not published or identified any such "long-term plan" that will avoid endangerment to the health or welfare of the community. When asked, EPA's legal counsel

[21] In the legal context "welfare" is defined to include "resources and conditions for *healthy* and comfortable living." Black's Law Dictionary, 2nd Ed. (emphasis added).

references two documents that purportedly meet this requirement. *See* Attach. 16 (January 12, 2022 FOIA email from M. Pratt to R. Truitt enclosing Summary of Response). One document is a two-page letter issued on June 3, 2021 to New-Indy by Dr. Christopher Teaf that addresses only H_2S and is lacking in many respects as discussed below. *See* Attach. 17 (Teaf June 3, 2021 Letter). Dr. Teaf's letter makes no mention of Paragraph 52h of the Order, New-Indy's long-term plan, or how its continued operations will avoid endangerment to the community. Rather, it addresses a wholly different requirement in the Order, the fence-line H_2S limits established in Paragraph 52b. *Id.*

The other document referenced by EPA's legal counsel as satisfying Paragraph 52h is the Corrective Action Plan ("CAP") required to be submitted by New-Indy to DHEC pursuant to its May 15, 2021 Order. However, the current CAP[22] does not mention Paragraph 52h of EPA's Order or address imminent and substantial endangerment at all.[23] Nor does it explain what operational, production, or process changes to New-Indy's Mill are necessary to operate in accordance with recognized and generally accepted good engineering and good air pollution control practices. In short, despite EPA requiring in its Emergency Order that New-Indy define the endangerment to the community and develop a plan to avoid it, EPA has failed to enforce this provision or require in the proposed CD that New-Indy assess public health and welfare impacts of all air pollutants – not merely H_2S – that it emits.

In failing to investigate and monitor emissions beyond H_2S, and failing to properly monitor ongoing H_2S emissions, the proposed CD fails to protect the public health. As Dr. Timothy

[22] The CAP has been revised twice and is still under review by DHEC. https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation/new-indy-weekly-update-reports

[23] https://scdhec.gov/sites/default/files/media/document/New-IndyDHEC-CAP-report-Rev-2.pdf

McAuley, an expert in the fields of air quality, human health exposure, and risk assessment explains in his attached report, pulp and paper mills like New-Indy's Mill emit a variety of harmful emissions beyond H_2S, including other TRS constituents like methyl mercaptan, dimethyl sulfide, dimethyl disulfide, sulfur dioxide and other volatile compounds containing reduced sulfur. *See* Attach. 18 (T. McAuley March 11, 2022 Letter) at pp. 1, 10. He also explains that New-Indy's Mill also emits particulate matter (PM), nitrogen oxides (NOx), sulfur oxides (SOx), lead, carbon monoxide (CO), ammonia, arsenic, cadmium, chlorine, chlorine dioxide, cumene, dioxins, furans, formaldehyde, hexavalent chromium, isopropyl alcohol, manganese, mercury, methanol, ethanol, methyl ethyl ketone, polycyclic aromatic hydrocarbons (PAHs), phosphorus, selenium, sulfuric acid, certain terpenes and zinc. *See id.* at pp. 1, 10.

Under the circumstances here, where residents continue to report significant and disruptive odors, including the as-yet unidentified "sickeningly sweet" chemical odor described by many residents, Dr. McAuley explains that it is critically important to identify and monitor for these emissions to evaluate their impact on nearby residents. *Id.* at p. 13. This is particularly true as the only air pollutant currently being monitored, hydrogen sulfide, is not necessarily the most toxic constituent of these emissions, nor is it is most substantial by volume, constituting only 10% of the total TRS emissions. *Id.* at p. 11. Failing to monitor for these other probable and/or potential air pollutants presents substantial risk of serious health effects, including cancer, respiratory and cardiac related health effects, each of which has been recognized as resulting from inadequately controlled air emissions from pulp and paper mills like this one. *Id*. at pp. 1, 11, 12, 19.

Dr. McAuley's report further identifies the inadequacies and inaccuracies in a very limited two-page risk analysis offered by New-Indy's toxicologist, Dr. Christopher Teaf, that discusses only H_2S and not the other pulp and paper mill chemicals mentioned above. As described by Dr.

McAuley, the opinions offered by Dr. Teaf fail to accurately set forth the actual health risks associated with hydrogen sulfide emissions, including by (1) failing to mention peer-reviewed studies demonstrating increased risk of health effects below current ATSDR guidance levels, (2) advocating for air concentration limits in conflict with national regulatory standards; (3) misstating the relationship between the detection of H_2S odor and the potential for health effects; and (4) overstating the ability to which residents can avoid the harms of H_2S by going indoors. *Id*. at pp. 15-18. Similarly, Dr. William Meggs,[24] a medical toxicologist retained by Intervenors, identifies in his report the health risks posed by hydrogen sulfide, as well as other TRS constituents. *See* Attach. 19 (W. Meggs Sept 26, 2021 Report) at pp. 2, 3.

D. The proposed Consent Decree fails to require New-Indy to demonstrate compliance with South Carolina's toxic air pollutant law.

New-Indy submitted an October 2021 Air Dispersion Model Analysis ("Air Model") in an effort to show that current air emissions from its Mill meet South Carolina's Toxic Air Pollutant standards which limit the concentrations of H_2S and methyl mercaptan at New-Indy's property line. *See* New-Indy CAP Air Dispersion Model Analysis, Section 5.3, p. 5-17, Table 5-6.[25] However, the Air Model used significantly understated input values for fugitive H_2S and TRS emissions from New-Indy's WWTP that were based on a water modeling exercise—as opposed to actually measuring emissions. Because that model is designed for a well-managed and operated WWTP, unlike New-Indy's, the modeling cannot be relied upon to accurately predict the levels of such emissions in the surrounding community or the property line.

[24] Dr. Meggs is a medical doctor, clinician, and researcher specializing in the area of human medical toxicology who is board certified in, among other specialties, medical toxicity.
[25] https://scdhec.gov/sites/default/files/media/document/New-Indy%20Catawba%20Modeling%20Report%20FINAL.pdf (page 36 of pdf).

Just as significantly, there has been no independent modeling of methyl mercaptan, a Toxic Air Pollutant designated by DHEC with property line limits 14 times more stringent than H_2S. *See* S.C. Code Regs. 61-62.5, Standard No. 8, Toxic Air Pollutants. Based on the current Air Model's results for H_2S and TRS (*See* New-Indy CAP Air Dispersion Model Analysis, Section 5.3, p. 5-17, Table 5-6),[26] the level of methyl mercaptan would likely exceed its maximum acceptable ambient concentration at New-Indy's property line. *See* Attach. 6 (R. Osa March 10, 2022 Letter (Att. D, December 21, 2021 Letter)).

The proposed CD is defective in not requiring New-Indy to measure actual emissions and to demonstrate with independent modeling of methyl mercaptan that it complies with South Carolina's air toxics law. Had New-Indy been forthright in describing the emission effect of disconnecting its stripper prior to startup of the new brown paper process, it would have been required to obtain a PSD permit for a major modification and demonstrate compliance with state law. New-Indy should be required to make that demonstration of compliance now.

E. The civil penalty assessed in the Consent Decree is unreasonably meager.

The proposed penalty of $1,100,000 per Section IV of the proposed CD is wholly inadequate. Intervenors' evaluation of the penalty is based on publicly available information and their investigation. However, EPA's failure to fully and timely respond to a FOIA request regarding the methodology and data used in assessing the proposed penalty has prevented a comprehensive assessment of the penalty. Courts have refused to enter a consent decree where the United States "has not explained why or how it calculated the amount of the civil penalty at issue," nor discussed the "applicable statutory factors, appl[ied] the facts of [the] case to those factors, weigh[ed] the factors, or explain[ed] precisely how it determined that [the amount at issue]

[26] See link in prior footnote.

represents a fair, adequate, and reasonable civil penalty." *United States v. ATP Oil & Gas Corp*., 2015 WL 13648078, at *3 (E.D. La. Jan. 28, 2015).

On January 10, 2022, Intervenors' consultant submitted FOIA request EPA-R4-2022-001848 requesting the "parties' basis and rationale for the technical and legal requirements, *including the amount of civil penalty assessed*, in the proposed Consent Decree." EPA's Office of FOIA, Privacy and Litigation Support responded on March 4, 2022, with a first interim response, almost 60 days from the date of request. The response included several documents; only one of which related to the penalty policy: a short e-mail regarding the proper location for New-Indy to send a check. EPA has not fulfilled the remainder of the request and has represented it will not do so until an anticipated date of April 27, 2022. That date is unacceptable given the March 11, 2022 deadline to submit comments to the proposed CD.

Turning to the legal standards applicable to penalties, Section 113(b) of the CAA, 42 U.S.C. § 7413(b) provides that any person who fails to comply with the CAA, its regulations, applicable SIP, or Title V Permit shall be subject to civil penalties up to $102,638 per day per violation for violations that occurred after November 3, 2015 if the penalty is assessed on or after December 23, 2020. *See* 40 C.F.R. § 19.4; 85 Fed. Reg. 83,821751 (Dec. 23, 2020).

Under Section 113, there are two elements to consider in assessing the amount of a penalty: the economic benefit of noncompliance and the gravity or the seriousness of the harm. The EPA has developed a penalty policy to provide guidance as to how the process works. *See* Attach. 20 (Clean Air Act Stationary Source Civil Penalty Policy, 1991).

The first element, economic benefit of noncompliance, is the amount of money that the violator gained by not complying. It is a complex assessment with numerous considerations. This includes the failure to install equipment to meet emission controls and the failure to effect process

changes. Based on public information, Intervenors understand that New-Indy purchased the Mill from Resolute for approximately $300,000,000 in 2018 and spent another $240,000,000 in converting the Mill to produce containerboard. Failing to use any of the investment to convert the Mill for upgrading or improving and expanding the WWTP saved New-Indy millions of dollars in capital and operation and maintenance costs. *See* Attach. 12 (K. Norcross March 7, 2022 letter) at p. 2.

The second element, the gravity and seriousness of the harm, considers among other things the actual or possible harm by analyzing the amount of the pollutant, the length of the violation, and the size of the violator. Because of EPA's failure to timely produce relevant FOIA documents, Intervenors have no information about EPA's analysis of this element. Intervenors' experts Dr. William J. Meggs and Dr. Timothy McAuley, advise that both acute and chronic exposures to hydrogen sulfide can be dangerous, causing irritation, exacerbation of respiratory conditions, neurological symptoms and permanent damage. [*See* ECF No. 7-9] and Attach. 18 (T. McAuley March 11, 2022 Letter). The serious health effects of hydrogen sulfide exposure should be a substantial factor in computing the gravity component of the penalty equation, not to mention the other noxious chemicals being emitted by the New-Indy and continuing to cause adverse health effects.

The length of the violation and the size of the violator support a much higher penalty here. According to EPA's Complaint, New-Indy's violations of elevated H_2S emissions began in February 2021, the EPA issued a Clean Air Act Emergency Order on May 13, 2021, and filed the resulting Complaint on July 12, 2021: approximately 150 days from the start of the violations. Section 113 allows for civil penalties to be assessed up to $102,638 per day per violation. A penalty of $1,100,000 represents less than 11 days of New-Indy's violations. At 150 days, the

proposed penalty amount would represent only $7,333 per day. Furthermore, New-Indy's size can be measured by its profits, likely at least $100,000 to $200,000 per day or more, with the proposed penalty only roughly between 3.6 - 7.3% of that profit. That is an infinitesimal amount that has no deterrent effect on New-Indy.[27]

III. The United States' refusal to extend the comment period until the public can reasonably review and comment on documents explaining its rationale for the terms of the consent decree is not in the public interest.

The public is entitled to understand what information the United States and New-Indy considered in negotiating the terms of the proposed CD. To that end, on January 10, 2022, one of Intervenors legal consultants, W. Roger Truitt, submitted a FOIA request, shortly after notice of the proposed CD was lodged, requesting the "parties' basis and rationale for the technical and legal requirements, *including the amount of civil penalty assessed*, in the proposed Consent Decree."

When the United States failed to provide a timely response to this request in advance of the initial February 9, 2022 deadline for public comment, Intervenors requested an extension of the public comment period on February 1, 2022 to allow the public the opportunity to review any documents responsive to the January 10th FOIA request in its assessment of the proposed CD. *See* Attach. 21 (T. David Hoyle Letter to EPA, February 1, 2022). The United States granted a 30-day extension of the public comment period the following day. *See* Attach. 22 (Email from Steve O'Rourke to T. David Hoyle, February 2, 2022).

On February 11, 2022, the United States responded further to Intervenors' January 10th request indicating that "more than 3,000 [responsive] records have been identified" and proposing

[27] Another metric that demonstrates the inadequacy of the proposed penalty is EPA's contention in its Emergency Order that more than 30,000 residents were impacted by New-Indy's emissions. That amounts to only $36 or less per impacted resident, clearly a paltry sum for the discomfort and adverse health effects suffered by so many that more than 20,000 complaints have been lodged with DHEC.

"a production schedule of every 45-60 days, with the first date of production set for March 10, 2022." *See* Attach. 23, (EPA Letter to W. Truitt, February 11, 2022). On March 4, 2022, the United States provided its "first interim response," explaining that it anticipates its next interim response will be provided "within 30-45 days of this interim release, on or before April 27, 2022." *See* Attach. 24 (EPA Letter to W. Truitt, March 4, 2022). Intervenors requested a second extension in light of this prolonged production plan that same day. *See* Attach. 25 (T. David Hoyle Letter to EPA, March 4, 2022). The request was denied. *See* Attach. 26 (Email from Steve O'Rourke, March 7, 2022).

As of March 4, 2022, the United States has only produced an interim response containing 19 documents, totaling 42 pages. Based on counsel for Intervenors' review of this small subset of responsive documents, the information the United States has produced is largely unhelpful to the public's evaluation of the proposed CD. Indeed, of the 19 documents, there appear to be two sets of duplicative documents that describe certain processes at the New-Indy Mill, but do not provide any context to inform the public of how these documents were used in developing the terms of the proposed CD. *See* ED_006445A_00000133, ED_006445A_00000135 (New-Indy Stripper Maintenance & Cleaning Outage: September 2021) and ED_006445A_00000208, ED_006445A_00000212 (Appendix IV, Passive Post Aeration Basin Cover System). The United States also produced several email communications that purport to circulate comments and edits to drafts of the proposed CD, term sheet, and Appendix A; but the actual attachments to those emails have not yet been produced. *See* ED_006445A_00000152, ED_006445A_00000168, ED_006445A_00000178, ED_006445A_00000188, ED_006445A_00000192, and ED_006445A_00000206. Interestingly, one of the emails between United States' employees dated September 8, 2021 queries whether the EPA's proposed term sheet should be shared with

SCDHEC "to see if they are asking for wildly different things." ED_006445A_00000168. The response to this question has not been produced. *See* Attach. 27 (all cited ED FOIA documents).

In addition to the United States' limited production responsive to the January 10th FOIA request, an earlier FOIA request submitted in June 2021 seeking notes and emails related to the United States' investigation of New-Indy's operations remains outstanding. The information sought by these requests was certainly relied upon in developing the proposed CD, including, but not limited to, EPA's decision to require only three fence-line H_2S monitors in Paragraph 52.f of its May 13, 2021 Emergency Order, where they were to be located, and why New-Indy was only required to measure H_2S. The United States advised Intervenors' legal consultant on January 12, 2022 that these documents would not be produced until approximately February 28, 2022. *See* Attach. 28 (EPA Letter to W. Truitt, January 12, 2022). The full production has not been completed to date.

The United States should have fully disclosed all of its communications with New-Indy concerning the proposed CD and related documents in advance of the deadline for public comment in the interest of fairness. The United States has previously granted generous extensions of the public comment period exceeding the minimum 30-day period required under 28 CFR § 50.7(b). *See e.g.*, *United States v. Hercules, LLC*, 2019 U.S. Dist. LEXIS 206282, at *12 (S.D. Ga. Nov. 27, 2019) (providing an initial thirty-day period for public comment to the Consent Decree and then two extensions resulting in a total 120-day public comment period); *United States v. PG&E*, 776 F. Supp. 2d 1007, 1026 (N.D. Cal. 2011) (extending the comment period for an additional 60 days "to enable the citizens to fully prepare their objections."). Despite having done so in other cases, the United States did not allow the public a sufficient opportunity to consider all of the pertinent information in preparing their comments here.

Ultimately, the United States' failures to produce all documents responsive to FOIA requests related to the proposed CD stifled the public's ability to provide a meaningful comment as to whether the proposed settlement constitutes a fair, reasonable, and equitable result, and is not in the public interest. *See United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994) ("Substantive fairness flows from procedural fairness.").

IV. Conclusion

"Because I'm tired and I can't breathe, I cannot live my life to its fullest capacity due to nothing of my choosing," says Lancaster County resident Sylvia Hutchings. "God gave me a life, and he didn't say that I had to sacrifice it for Kraft. And this is what, with the EPA doing nothing, is what it's telling me I have to do, or move." *See* Attach. 1, pg. 26. As set forth above, the proposed CD is neither reasonable nor in the public interest and is instead woefully inadequate and materially flawed in myriad ways. The proposed CD is causing this community to lose hope with each and every breath. The proposed Consent Decree should not be approved.

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