UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. NEW INDY CATAWBA, LLC, Defendant.	Case No.: 0:21-cv-02053-SAL **MEMORANDUM IN SUPPORT OF MOTION TO ENTER CONSENT DECREE**

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List of Exhibits

1. Comments submitted by counsel for the putative class, with exhibits.

2. All other comments received by DOJ (excluding comments of the putative class which are exhibit 1), with personal/privacy information redacted, collected into a pdf (divided up in parts to meet ECF size limitations).

3. Transcript of EPA's Public Meeting (no privacy redactions needed)

4. Response to Comments

5. Report of Dr. Helen Suh

6. Declaration of Denis Kler

7. Declaration of Richard Gillam

8. Declaration of John Wilhelmi

9. First Amendment to Consent Decree

10. EPA's January 21, 2022 letter to New Indy requesting information under Section 114 of the CAA

Plaintiff moves the Court to sign page 30 of the proposed Consent Decree ("C.D.") and enter it in the docket as a final judgment. The Consent Decree was lodged with the Court on December 29, 2021 (Dkt. 27-1). In Paragraph 81 of the proposed Consent Decree, Defendant New-Indy Catawba, LLC ("NIC") consented to entry of the Consent Decree without further notice. The Court denied the motion to intervene, *see* "Order" denying intervention, September 15, 2022. Dkt. # 38 (hereinafter "Dkt. 38 Order"), so this Motion is not opposed by any party. Notice of the proposed Consent Decree was published in the Federal Register, 87 Fed. Reg. 1186 (January 10, 2022), and public comments were solicited in accordance with Department of Justice policy, 28 C.F.R. § 50.7, and Paragraph 81 of the Consent Decree (ECF No. 27-1 at 29 of 44). Upon request, the Department extended the comment period by 30 days. 87 Fed. Reg. 7208 (February 8, 2022). Over 600 public comments were submitted (attached as exhibits 1 & 2). This memorandum discusses the public comments in general, while Exhibit 4 is a more in-depth response to each topic raised in the comments.

I. SUMMARY.

EPA issued an Emergency Order -- and the United States filed this civil action -- to address Hydrogen sulfide ("H_2S") releases from NIC's paper mill in Catawba (the "Facility"). *See* Dkt. 38 Order at 3. There is no dispute that NIC's paper mill began to emit dangerous levels of H_2S over a year ago; thousands of residents complained. By May of 2021, EPA had issued an emergency order to NIC, and the United States filed this case in July. *Id.* Because EPA believed that H_2S was the main culprit for these impacts, EPA's order required NIC to keep its emissions of H_2S below 70 parts per billion ("ppb") over a seven-day average, and under 600 ppb over a 30-minute average. *Id.* at 4.

From May to late June of 2021, NIC self-reported violations of those H_2S levels daily; thereafter, NIC began reporting emissions below the required numbers (except for an incident in late August/early September of 2021). NIC reported violations of the H_2S amounts 41 times since May of 2021. Report of Suh (Exh. 5) at 9. There was also a violation of a procedural requirement for a total of 42 violations. For those H_2S violations, if entered by the Court the Consent Decree would require NIC to pay a civil penalty of $1.1 million. C.D. □ 9.

The Consent Decree (if entered by the Court) would also include numerous operational requirements to control H_2S. For example, one reason that the emissions got so high was that NIC had stopped using its steam stripper, and another was that its Aeration Stabilization Basin ("ASB") was in disrepair. The Consent Decree requires NIC to use and maintain the steam stripper and to properly maintain the ASB (among many other requirements). These measures target H_2S control. C.D. □ 14 (requiring compliance with appendices) and Appendix A (specific requirements).

Paper mills in general smell bad. H_2S simply smells terrible. Some people can smell H_2S at levels as low as one half of one ppb (0.5ppb); others cannot smell it until the level exceeds 300 ppb or more. *See* Megg Decl. (Exh. 1 (Part 3), attachment 19 at 2) (expert for the putative class); Decl. of Suh (Exh. 5) (expert for United States). True health impacts from H_2S may occur, however, at emissions levels of H_2S of 70 ppb or above, according to EPA's review of the literature and various studies. *See also* Decl. of Suh (Exh. 5) at 7. EPA therefore imposed that level in its administrative order. NIC's emissions today are well below the 70 ppb health-based number (*e.g.*, in the 0 to10 ppb range). *See* https://newindycatawba.com/ (reports of NIC's monitoring results). This proposed Consent Decree is focused on ensuring that H_2S remains below levels that may present health impacts, and doing so may also reduce odors for some

members of the public. While it is unfortunate that people can still smell H_2S odors from NIC, reducing odors is not the focus of this proposed Consent Decree, as EPA does not consider odors at low concentrations to be a health impact that justifies imposing additional penalties or injunctive relief.

This proposed Consent Decree only resolves the filed civil action, and only deals with H_2S. C.D. □ 64. The Consent Decree does not prevent any person or entity from suing NIC for any other claims: the South Carolina Department of Health and Environmental Control ("DHEC"), and the private parties (including the members of the putative class) can maintain claims against NIC for nuisance, tort, property claims, water pollution, groundwater pollution, and even for violations of specific requirements of the Clean Air Act. C.D. □□ 64 & 68. If NIC in the future causes another endangerment to public health, EPA can issue additional orders or sue. If specific evidence comes to light about other air pollutants beyond H_2S, EPA or others can deal with that in a subsequent proceeding.

While this Consent Decree may be only a first step in resolving any other pollution issues, it is an appropriate step. EPA never intended to use its "emergency" powers to resolve each and every issue about the Facility; this narrow civil action fulfilled its purpose and reduced NIC's H_2S emissions to below the health-based level, and can continue to do so, if this Court enters the Consent Decree. If the Court rejects the Consent Decree, the path forward is unclear, but that path will divert EPA's time and resources back to dealing with H_2S, and away from dealing with any other emissions or violations at the Facility.

II. LEGAL STANDARD.

A district court reviews a consent decree to ensure that it "is fair, adequate, and reasonable" and "is not illegal, a product of collusion, or against the public interest." *United*

States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999) (internal quotations omitted); *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) (proposed settlement agreement must be "fair, reasonable, and faithful to the objectives of the governing statute"); *United States v. Duke Energy Carolinas, LLC*, 499 F.Supp.3d 213, 218 (M.D.N.C. 2020).

In reviewing a settlement, the inquiry is directed to whether the proposed settlement is a fair and reasonable compromise, and not to "whether the settlement is one which the court itself might have fashioned, or considers as ideal." *Bragg v. Robertson*, 54 F. Supp. 2d 653, 663 (S.D. W. Va. 1999) (internal quotations omitted). In reviewing a proposed consent decree, the court should not "substitute [its] judgment for that of the parties." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1435 (6th Cir. 1991). Moreover, "the court may not modify the agreement, but can only accept or reject the terms to which the parties have agreed." *Duke*, 499 F.Supp.3d at 217 (citing *Akzo*, 949 F.2d at 1435); *Officers for Justice v. Civ. Serv. Comm'n of City and County of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982).

The court's review of a proposed consent decree "should be guided by the general principle that settlements are encouraged." *North Carolina*, 180 F.3d at 581. Settlements conserve the resources of the courts, the litigants, and the taxpayers, and "should . . . be upheld whenever equitable and policy considerations so permit." *Aro Corp. v. Allied Witan Co.* 531 F.2d 1368, 1372 (6th Cir. 1976); *Duke*, 499 F.Supp.3d at 217.

The presumption in favor of settlements is "particularly strong" where the settlement "has been negotiated by the Department of Justice on behalf of a federal administrative agency specially equipped, trained, or oriented in the field." *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027, 1035 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990) (internal citations and quotations omitted); *Duke*, 499 F.Supp.3d at 217 (citation omitted) (internal quotation marks

omitted); *see also United States v. Town of Timmonsville*, No. 4:13-cv-01522-BH, 2013 WL 6193100, at *2 (D.S.C. Nov. 26, 2013) ("There is a strong presumption in favor of approval of a consent decree proposed by the United States on behalf of EPA."). "[W]here a government agency charged with protecting the public interest has pulled the laboring oar in constructing the proposed settlement, a reviewing court may appropriately accord substantial weight to the agency's expertise and public interest responsibility." *Bragg v. Robertson*, 83 F. Supp.2d 713, 717 (S.D. W. Va. 2000) (citation omitted).

III. BACKGROUND FACTS.

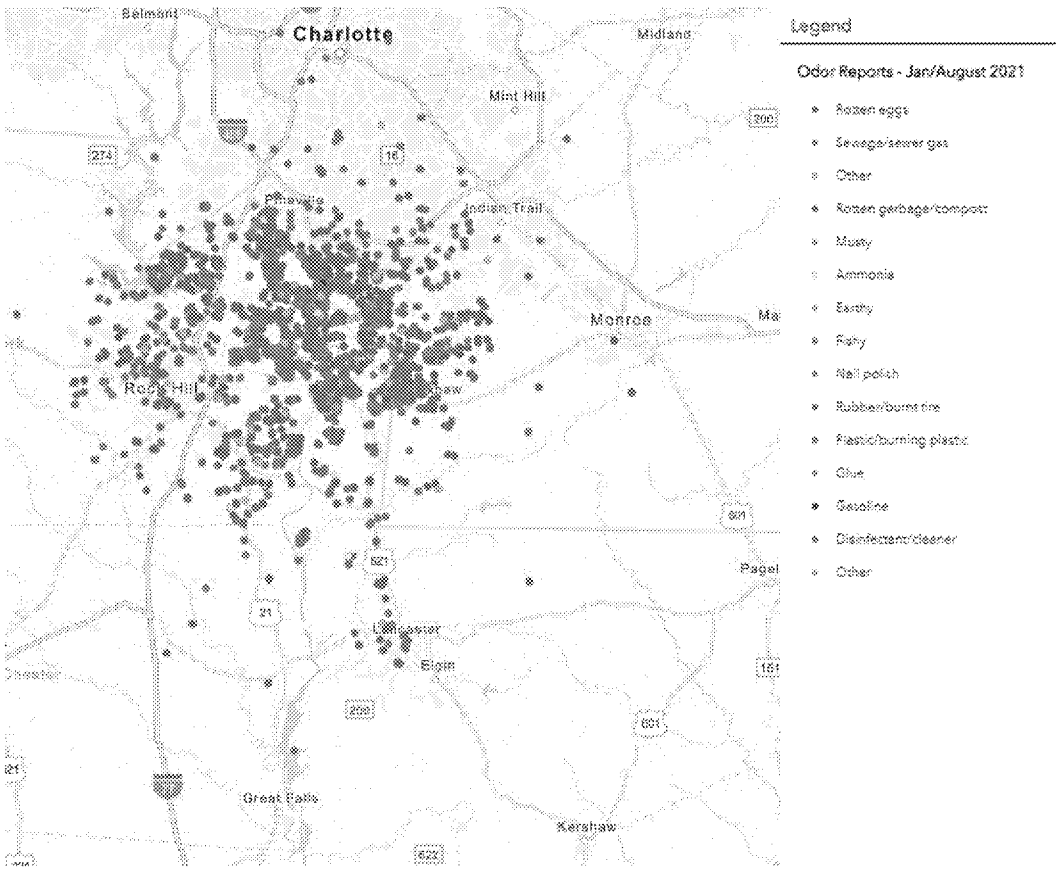
Hydrogen Sulfide. H_2S is a gas that smells like rotten eggs, or worse. People can smell H_2S in ambient air at concentrations ranging as low as 0.5 ppb, but some cannot smell it until 300 ppb. Very high concentrations of H_2S cause various adverse health effects, such as headache, nausea, difficulty breathing among people with asthma, and irritation of the eyes, nose, and throat. *See* Report Megg (Exh. 1 (Part 3), attachment 19 at 2) (expert for the putative class); Report of Teaf (Exh. 1 (Part 3), attachment 17) (report of expert for NIC);[1] Declaration of Suh (Exh. 5) (expert for United States) at 7.

Facility. This long-extant kraft paper mill in Catawba was previously owned and operated by a company named Resolute, who sold the Facility to NIC in late 2018. NIC is a joint venture between Schwarz Partners and the Kraft Group. https://newindycatawba.com/overview/ (last visited on October 24, 2022). NIC shut down its paper mill during 2020 to convert from

[1] We assume here that the experts employed by NIC and the class attorneys are qualified and meet Rule 702 standards, but reserve the right to challenge these experts if the need arises (*e.g.*, if the C.D. is rejected and litigation ensues).

producing bleached paper grades to unbleached or brown paper.[2] By February of 2021, NIC had restarted and ramped up production. After that, the Facility emitted high levels of H_2S. Dkt. 38 Order at 3.

Complaints. Shortly after the restart, residents lodged over 20,000 complaints to the DHEC, and many sent complaints to EPA. People complained from 30 miles away. Dkt. 38 Order at 3. For example, this map from DHEC's website shows the locations of various citizens who complained:[3]



[2] Some of the citizen comments express suspicion that NIC failed to do a proper Clean Air Act "PSD" (prevention of significant deterioration) analysis for its 2020 process change; EPA has not filed that claim, but a group of private citizens have done so. This issue is discussed below.

[3] https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation shows maps of the complaints (last visited on Oct. 2, 2022). Click on April 2021 for the map shown here.

DHEC response. DHEC initially responded and issued an Order to correct undesirable emissions ("DHEC's May 7, 2021 Order")[4], and conducted a "trajectory" analysis showing that NIC was the most likely source of the H_2S air emissions.[5] DHEC has since issued another order related to wastewater discharges from the Facility. DHEC also has continued to summarize monthly odor complaints by location of complainant.[6]

EPA Order & Violations. In May of 2021, EPA exercised its authority under Section 303 of the Act and issued an administrative order ("EPA Order") to NIC, requiring it to reduce its H_2S emissions, monitor the concentrations of the emissions, and submit a long-term plan to control H_2S emissions in the future. Dkt. No. 1-1 (Exh. A to complaint); Dkt. 38 Order at 4. The EPA Order also imposed numerical requirements: H_2S should not exceed a Facility fence-line average concentration of 600 ppb over a rolling 30-minute period (one can consider this an "acute" level) and 70 ppb over a rolling seven-day period (chronic level). These numbers are not required by any CAA regulation or permit, but they are based on EPA's judgment and review of published human health studies. C.D. at 3-4; Exh. 5 at 7-8 (Suh Report). The 600 ppb/ 30 minute rate is based on the Acute Exposure Guideline Level 1 (AEGL-1) established by the EPA and the Agency for Toxic Substances and Disease Registry ("ATSDR"). Exh. 5 at 7-8. AEGLs are used by emergency planners and responders worldwide as guidance in dealing with rare, usually accidental, releases of chemicals into the air. AEGLs are expressed as specific concentrations of

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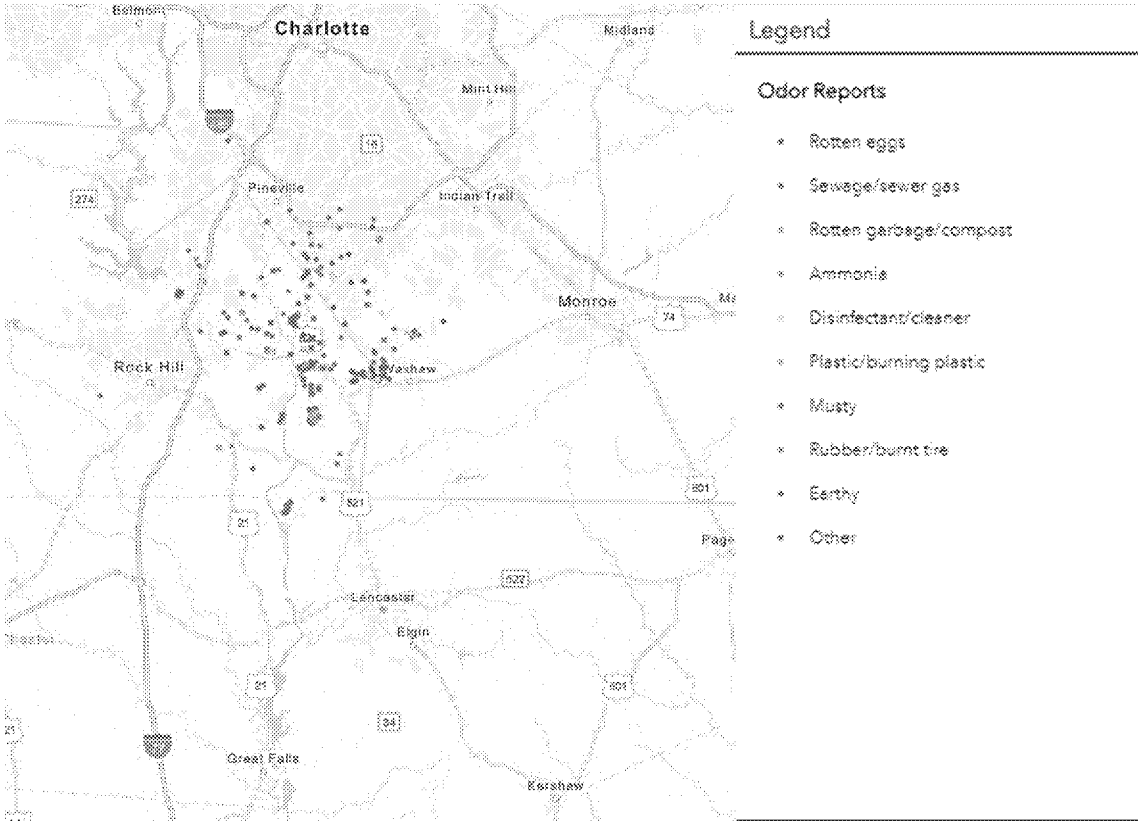
[4] https://scdhec.gov/sites/default/files/media/document/New-Indy-Package.pdf (last visited Oct. 2, 2022).

[5] https://scdhec.gov/sites/default/files/media/document/DHEC%20Back%20Trajectory%20Summary%20Report.pdf. (last visited Oct. 2, 2022).

[6] https://scdhec.gov/environment/environmental-sites-projects-permits-interest/new-indy-odor-investigation. (last visited Oct. 2, 2022).

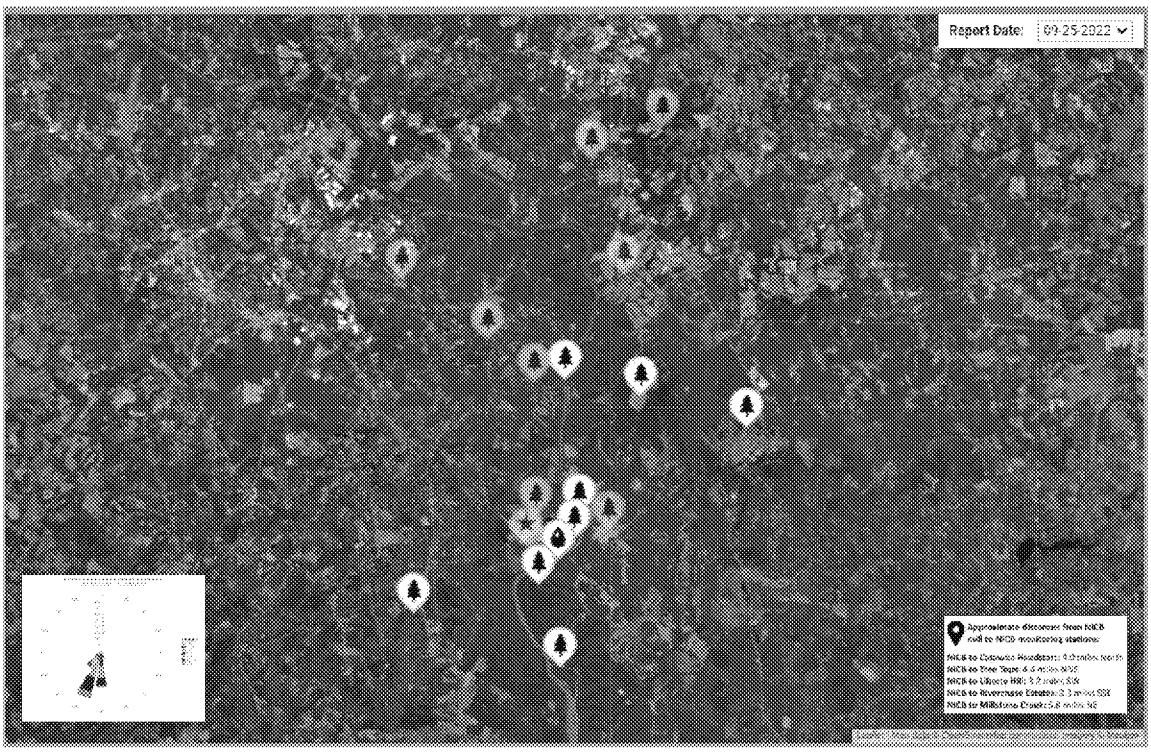
airborne chemicals at which health effects may occur. They are designed to protect the elderly and children, and other individuals who may be susceptible. *Id.* ATSDR also has a "Minimal Risk Level" ("MRL") of 70 ppb averaged over periods of one to 14 days. *Id.* EPA selected 70 ppb over seven days for the EPA Order requirement. MRLs represent a level at or below which adverse health effects are unlikely to occur, and should not be presumed that occasional excursions above that level will necessarily lead to a manifestation of toxicity. The risk of experiencing adverse health effects will be expected to increase, however, with increasing frequency and magnitude of excursions above that level. *Id.*

Since the EPA Order, NIC complied with the operational terms of the EPA Order, including submitting monitoring results and operating plans, and hiring a toxicologist. However, during the first few weeks, NIC reported that it had exceeded the 70 ppb/7-day rolling average and occasionally the 600ppb/30-minute rolling average. Other than an incident during late August/early September, when the Facility reported exceeding the levels for a few days, NIC has reported H_2S at rates far lower than the 70 and 600 ppb requirements since June of 2021. Kler Decl. (Exh. 6) ¶ 22. Also, complaints reported to DHEC have fallen since the EPA Order. This image shows the complaints in April of 2022, one year after the April 2021 image above:

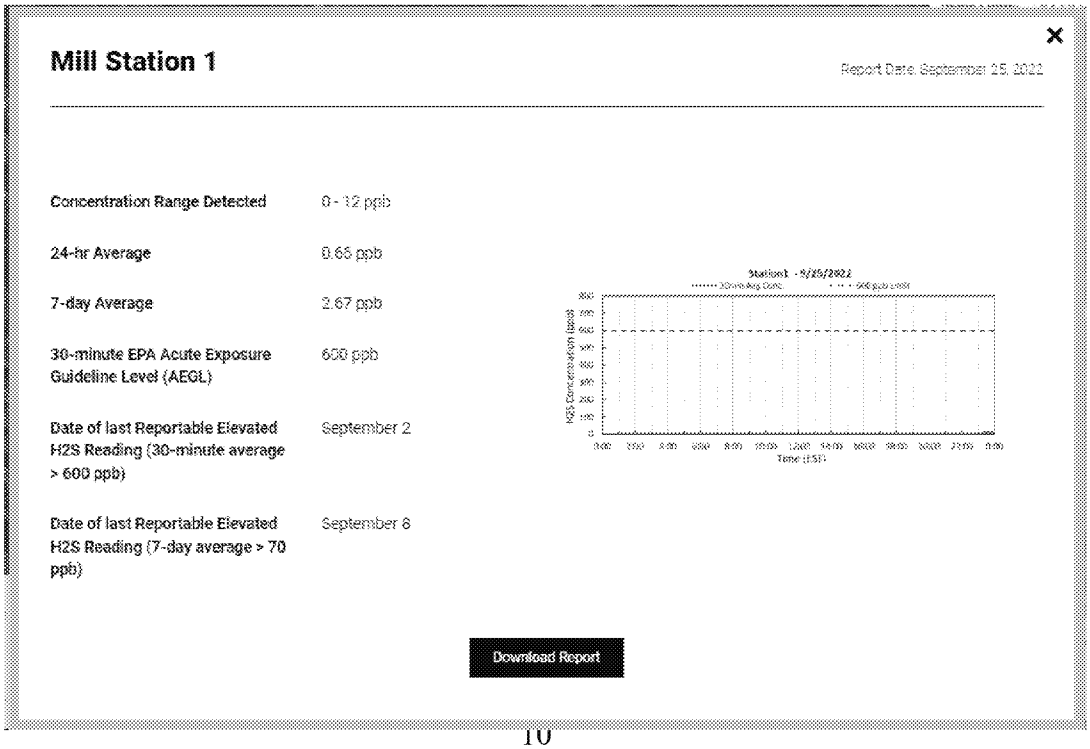


Since the EPA order, NIC has reported its daily monitoring results on the front of its public webpage. *See* https://newindycatawba.com/ (last visited Oct. 2, 2022). EPA also issued NIC a requirement to monitor and report at several "community" monitors two to six miles from the plant. This was not a requirement of the Emergency EPA order, but EPA required it under a separate authority. NIC continues to operate and report the community monitors under DHEC's supervision. NIC reports the results of the community monitors on its same public web page. *Id.*

This image shows a random recent date demonstrating how NIC presents to the public the results of its monitoring at the fenceline and in the community:



Each icon is "clickable" and brings the reader to a report. There are icons for the fenceline and for the community monitors. For this September 25, 2022 date, the "Mill Station 1" icon called up this result:



The highest instantaneous concentration was 12 ppb, the 24-hour average was 0.66 (as opposed to the 600 ppb requirement) and the 7 day average was 2.67 (as compared to the 70 ppb requirement). *Id.*

Lawsuits. Because Section 303 requires a civil action, the United States filed this case in July of 2021. Upon filing of the complaint, NIC consented to interim injunctions that took the substantive requirements of the EPA Order (*e.g.*, emission concentrations, monitoring and reporting) and turned them into a court injunction through the end of 2021. Dkt. 38 Order at 5. The same order stayed the litigation entirely through 2021. On December 29, 2021, after the settlement was lodged, the Court extended the interim consent injunction for the duration of the comment and approval process. Dkt. 29; Dkt. 38 Order at 5.

Meanwhile, some class action lawsuits were filed and consolidated against NIC related to the emissions. *In re: New Indy Emissions Litigation*, 0:21-cv-1480 (the "Putative Class Actions"). Dkt. 38 Order at 2. Recently, some of the class members filed a case against NIC for violations of the "PSD" provisions of the CAA. *Butler et al. v. New-Indy Catawba*, 0:22-cv-02366. Dkt. 38 at 2-3. Some of the class members also moved to intervene in this civil action, which the Court denied. Dkt. 38 Order.

Comment Period. After lodging the Consent Decree, the DOJ held its mandatory comment period, and over 600 comments were submitted. The United States reviewed each comment and concluded that there was no disclosure of facts or considerations indicating that the Consent Decree is inappropriate, improper or inadequate, consistent with Paragraph 81 of the C.D. (Dkt. 27-1). The comments are discussed in Part VI, below.

IV. TERMS OF THE PROPOSED CONSENT DECREE.

A. Injunctive relief: Operational Requirements.

The injunctive program set out in Appendix A of the Consent Decree (Dkt. 27-1 at 35 - 40) requires NIC to:

- operate its steam stripper, because turning it off when switching to brown paper was one of the causes of the incidents in the spring of 2021 (App. A § I(a));
- add chemical treatment to the waste stream, to further treat sulfur compounds (App. A § I(b));
- operate and maintain the Aeration Stabilization Basin ("ASBs") and treatment basins and ponds properly, because they are a crucial part of the H_2S treatment system. (App. A. § III);
- cover and monitor the post-aeration tank, which NIC discovered was a significant source of H_2S while responding to the EPA Order (App. A § IV);
- install a containment system for the "black liquor" tank, because a spill from that tank was the cause of some excess emissions in September of 2021 (App A § V); and
- incorporate the above into enforceable permits (C.D. ¶¶ 211-22 and App. A § VI).

After three years of compliance, NIC may seek to terminate the Consent Decree, C.D. □□ 78-81, but the operational requirements will remain in effect under the required permits.

NIC has informed EPA that its total costs of complying with the EPA Order, court injunction, and the proposed Consent Decree would reach $50 million spread out over the first three years, and $6 million per year thereafter. During 2021 alone, the dredging, oxygen, peroxide, aerator maintenance and other projects cost NIC about $8 million. Kler Decl. (Exh. 6) □ 31.

B. Injunctive relief: Emission Monitoring and Concentration Levels.

The injunctive program in Appendices A and B of the C.D. requires NIC to continue to meet the 70 ppb and 600 ppb levels for H_2S, and continue to operate and report results from the

fenceline air monitors. App. A § II; App. B (Map of monitor locations). The monitoring must be conducted under a Quality Assurance Project Plan ("QAPP") approved by EPA.[7] These levels are based on the EPA Order and are justified by the reported literature values and EPA's expert opinion. Suh Report (Exh. 5) at 7-10. The EPA knows of no other pulp and paper mill in the United States that is required to monitor for H_2S, or to operate below specific concentrations of H_2S, at its fence line. Exh. 6 (Kler Decl.) ¶ 25. If NIC exceeds the levels, it faces rapidly escalating stipulated penalties. C.D. ¶ 31. Moreover, the Consent Decree cannot be terminated until NIC has operated for at least three years without exceeding the fence line concentrations. C.D. ¶ 78. We expect these measures will minimize any exceedances. C.D. ¶¶ 21-22.

Within 120 days of entry, NIC must apply for a DHEC permit that incorporates these same fence line levels. C.D. ¶¶ 21-22. Any exceedance of the levels in the permit triggers a requirement to undertake a root cause analysis and prepare a corrective measures plan for review by DHEC. C.D. App. A ¶ 5(a)(ii).

C. Civil Penalty.

The Consent Decree requires payment of a civil penalty of $1.1 million, C.D. □ 9, under Section 113(b) of the CAA (discussed below under "Substantive Fairness"). 42 U.S.C. § 7413(b).

D. Form of Consent Decree.

The form of the Consent Decree is consistent with standard consent decrees from other environmental cases and includes standard provisions such as stipulated penalties (C.D. § VII),

[7] EPA approved the original QAPP in the spring of 2021. EPA recently required several changes to improve the QAPP to ensure quality data. EPA also required NIC to replace the fence-line monitors with new devices, to ensure quality data. Exh. 6 (Kler Decl.) ¶ 23. The recent data collected by NIC with new monitors continue to show that NIC is reporting well below 70 ppb. *See* https://newindycatawba.com/ (last visited Oct. 2, 2022).

dispute resolution (C.D. § IX), and force majeure (C.D. § VIII). The settlement expressly resolves only the claim in the complaint (and any claims for penalties for violations of the EPA Order, which were not in the complaint but for which NIC is paying a penalty), with all other claims reserved. C.D. ¶¶ 64 & 65. Notably, the limited scope of the Consent Decree does not provide NIC any protection against a private party suit, or a suit by DHEC, or a case by a public interest group, nor indeed a future suit by EPA for other claims (such as the "PSD" claim that several comments discuss). C.D. ¶ 68.

V. ARGUMENT: THIS CONSENT DECREE IS FAIR, REASONABLE, ADEQUATE, AND IN THE PUBLIC INTEREST.

In this case, the EPA and the Justice Department's Environment and Natural Resources Division and United States Attorney's Office negotiated the settlement, with sophisticated counsel representing the defendant; as such, the Court should presume that the settlement is fair, reasonable, and in the public interest. Nevertheless, because so many comments were received, the United States recommends a thorough review of those concerns. This section thus argues that the Consent Decree meets the legal test, while the next section also addresses the comments as relevant to each element.

A. The Settlement is Fair.

When examining the propriety of a proposed consent decree, courts first consider whether the decree is procedurally and substantively fair. *Duke*, 499 F.Supp.3d at 218. "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.* As discussed below, the proposed Consent Decree meets both of these standards.

1. Procedural Fairness: the Negotiations.

The procedural fairness prong is generally met if the settlement is the product of good-faith negotiations with "bargaining balance." *United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996) (citation omitted). Courts in the Fourth Circuit also assess "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 adopted the settlement." *League of Women Voters of Va. v. Va. State Bd. of Elections*, 481 F. Supp. 3d 580, 588 (W.D. Va. 2020) (citation omitted).

Although the United States and NIC have not engaged in formal discovery, settlement negotiations lasted many months and included numerous discussions of the proposed Decree and numerous exchanges of information about the Facility. Both sides were represented by experienced counsel who vigorously defended their respective client's positions and consulted with technical experts when needed. *See* C.D. at 76–79 (signatures of counsel). EPA's technical staff played an important role in evaluating settlement provisions related to pollution control technologies and emission levels. Kler Decl. (Exh. 6) ¶ 6. The proposed C.D. is therefore neither a product of collusion nor a consequence of one-sided bargaining power, but rather a reflection of the parties' arms-length efforts to reach an informed, equitable outcome. *See United States v. Arch Coal, Inc.*, 829 F. Supp.2d 408, 416 (S.D. W. Va. 2011); *Duke*, 499 F. Supp.3d at 218 (discussing procedural fairness).

As no comments state that the settlement process was procedurally unfair as between NIC and the United States, this element is established.

2. Substantive Fairness: the Penalty.

In considering the substantive fairness of a proposed consent decree in environmental enforcement cases, courts in the Fourth Circuit often focus on whether the settlement sufficiently holds the defendant accountable for its actions and remedies for the violations at issue. *E.g., United States v. Patriot Coal Corp.*, No. 2:09-cv-0099, 2009 WL 1210622, at *5–6 (S.D. W. Va. Apr. 30, 2009). Courts in other circuits have observed that substantive fairness incorporates "concepts of corrective justice and accountability." *United States v. Hyundai Motor Co.*, 77 F. Supp.3d 197, 199 (D.D.C. 2015) (citation omitted). The court's inquiry on this point is, however, limited. The district court "does not determine whether 'the settlement is one which the court itself might have fashioned, or considers ideal.'" *United States v. Pac. Gas & Elec.*, 776 F. Supp.2d 1007, 1025 (N.D. Cal. 2011). Rather, "[t]he court need only be satisfied that the decree represents a 'reasonable factual and legal determination.'" *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990) (citation omitted) (internal quotation marks omitted).

Here, NIC has agreed to pay a $1.1 million penalty, which represents both corrective justice and accountability. EPA found that NIC violated the emission levels in the EPA Order 42 times, based on NIC's self-reported measurements. Kler Decl. (Exh. 6) ¶ 29. Section 113(b) of the CAA allows up to $102,638[8] per violation of a Section 303 order, 42 U.S.C. § 7413(b), for a statutory maximum penalty here of about $4.3 million (42 x $102,638 = $4,310,796). But, courts

[8] The original CAA provided for a civil penalty of up to $25,000 per violation at 42 U.S.C. § 7413(b). Several acts of Congress over the years have required federal departments and agencies to adjust their civil penalties for inflation. The statute in effect now is the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Section 701 of Pub. L.114–74), November 2, 2015. EPA's inflation-adjusted amounts are set out at 40 C.F.R. § 19.4, in a table. The column that applies here is "Statutory civil monetary penalties for violations that occurred after November 2, 2015, where penalties were assessed on or after December 23, 2020, but before 1/12/2022," and the entry for § 7413(b) is the source of the $102,638 number.

are not to simply enter judgment for the maximum; the CAA requires that "[i]n determining the amount of any penalty to be assessed under this section . . . the court . . . shall take into consideration" the following:

- the size of the business
- the economic impact of the penalty on the business
- the violator's full compliance history and good faith efforts to comply
- the duration of the violation as established by any credible evidence (including evidence other than the applicable test method)
- payment by the violator of penalties previously assessed for the same violation
- the economic benefit of noncompliance
- the seriousness of the violation
- such other factors as justice may require

42 U.S.C. § 7413(e). EPA and the Justice Department therefore consider these same factors when settling a civil penalty.

Here, the Consent Decree requires a penalty of $1.1 million, or about 25% of the maximum. The amount is reasonable because it considers several factors. First, the violations are quite "serious," so a significant penalty of over a million dollars is appropriate. Second, NIC has been cooperative in complying with the EPA Order, agreeing to this Court's injunctive "Consent Order" and its extensions, and agreeing to the Consent Decree and penalty without protracted litigation. It is good public policy for the government to reduce a penalty to reflect cooperation by the defendant, for settlement purposes. Third, NIC has spent millions of dollars since the Spring of 2021 on reducing emissions and has committed to spend millions more on future H_2S controls under the Consent Decree. This cooperation creates some litigation risk that the Court could reduce NIC's penalty by some amount. Finally, one must consider litigation risks in settling any case, which are discussed further in the next section. For these reasons, 25% of the maximum is appropriate.

B. The Settlement is Adequate and Reasonable.

Adequacy and reasonableness are closely linked to substantive fairness. In fact, courts often conflate all of these criteria into a single analysis. Courts in the Fourth Circuit commonly find that a decree is adequate and reasonable if it includes a comprehensive injunctive program to protect the environment and bring the defendant into compliance with the law. *E.g., Timmonsville*, 2013 WL 6193100, at *4.

Courts also look to the strength of the plaintiff's case when assessing adequacy and reasonableness, especially in juxtaposition to the relief obtained. *E.g., Carcaño v. Cooper*, 2019 WL 3302208, at *5 (M.D.N.C. Jul. 23, 2019). But many courts have noted the need to weigh the advantages of securing environmental compliance against the uncertainties of protracted litigation, with great credit given to the key role that settlements play in civil enforcement. *See, e.g., Bragg*, 83 F. Supp.2d at 717; *Cannons Eng'g Corp.*, 720 F. Supp. at 1039; *Kelley v. Thomas Solvent Co.*, 717 F. Supp. 507, 516 (W.D. Mich. 1989). This is particularly true in complex environmental suits brought by the government that, if litigated, would "consume a significant amount of time and expense by the parties, including the public fisc, along with a substantial redirection of judicial resources." *Arch Coal*, 829 F. Supp.2d at 416. Indeed, "[i]t is almost axiomatic that voluntary compliance on an issue where there is a potential disagreement is a better alternative than the uncertainty of litigation over that issue." *District of Columbia*, 933 F. Supp. at 51.

A major aspect of whether it is "reasonable" to settle is to compare the settlement to expected or possible litigation outcomes. Litigating this matter would require the Court to determine **(1)** liability, **(2)** injunctive remedy, and **(3)** civil penalty amount. **(1)** As to liability, Section 303 requires a "substantial endangerment" to human health or welfare. 42 U.S.C. § 7603.

In this case, EPA issued an order requiring NIC to comply with the 600 and 70 ppb levels, and NIC could try to prove that such levels are too restrictive. Further, NIC has been reporting compliance with those levels for over a year. Thus, it is "reasonable" for the government to consider whether this Court would issue any relief where the Facility has been meeting health-based levels.[9] **(2)** As to the injunctive relief, NIC would argue for no injunction at all, as it has complied with the 600 and 70 ppb numbers, while the Commenters would have this Court order more extensive relief (such as a second steam stripper and doubling the wastewater system). This Consent Decree requires extensive relief far beyond the "nothing" that NIC might seek, but it is less than what the Commenters would hope for. The United States settled for something in the middle, which is reasonable, and is based on EPA's understanding of what is effective in reducing health risks to the public. Experts agree that the levels in the Consent Decree are appropriate. Suh Report (Exh. 5) at 7-10. **(3)** As for the civil penalty, the Consent Decree calls for 25% of the maximum allowable amount. That is reasonable, as explained above under "Substantive fairness."

Finally, it is reasonable for the United States to avoid the litigation alternative which would waste time and resources. NIC has previously agreed to the "Consent Order" that this Court approved requiring NIC to meet the 600 and 70 ppb rate and other requirements without the need for a trial or injunction. Dkt. 38 Order at 5. If the Consent Decree is rejected, it is not clear that NIC would voluntarily continue to consent to an injunction without a trial. Absent the Consent Decree, the United States would likely need to invest time and resources to litigate the

[9] If the C.D. is rejected, we reserve all rights against NIC, including the right to argue that the 70 ppb level is not stringent enough, and was selected only to address an emergency, and the right to adduce expert or other evidence showing "endangerment" at lower levels. Further, an "imminent" "endangerment" need only be a condition of potential future harm. The Declaration of Suh evinces that the 70 and 600 levels are soundly based on health effects.

appropriate civil penalty and injunctive relief for the H_2S case, instead of spending time on other potential issues regarding the NIC plant or on other pollution issues in general.

C. Public Interest, Adequacy and Consistency with the CAA.

This final factor turns on whether the proposed Consent Decree furthers the goals of the CAA and is in the public interest. *Duke*, 499 F. Supp.3d at 218; *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995) (explaining that a court's function is not to determine if the settlement will best serve society but only to confirm that the settlement is within the reaches of the public interest). The CAA's stated goal is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

In considering the public interest, it is important to bear in mind that this Consent Decree only resolves the currently-filed civil action. C.D. □ 64. If a future imminent and substantial endangerment arises, the Consent Decree does not foreclose EPA in any way. C.D. □ 65. Commenters' rights are also preserved. C.D. □ 68. The same is so for any PSD claims. *Id.* As such, the analysis of the public interest is limited to the as-filed civil action and the H_2S-focused Consent Decree.

Thus, the Consent Decree is in the public interest because it requires NIC to comply with several specified operational requirements (*e.g.*, using the steam stripper) that are intended to control H_2S emissions and ensure that the incidents of uncontrolled emissions that occurred in the Spring of 2021 will not recur. Further, under the Consent Decree, NIC must not emit H_2S above the specified concentration rates that EPA established in its Order from May of 2021 (70 ppb and 600 ppb). C.D. App. A § II. Finally, it is consistent with the CAA to impose a civil penalty for any violations of the EPA Order.

Many comments received can be construed to imply that the Consent Decree is not in the public interest, and those are addressed in the next section.

VI. THE PUBLIC COMMENTS DO NOT REQUIRE RESCINDING THE CONSENT DECREE.

All comments received are attached as exhibits. Exhibit 4 is a detailed summary of and "Response to Comments," that responds to each comment topic, including ones that do not address whether the Consent Decree should be entered by this Court. Federal agencies often prepare such responses even where a court is not involved. This brief addresses the most common and significant comments received to aid the Court in reviewing the settlement. The United States reviewed each comment and concluded that there was no disclosure of facts or considerations indicating that the Consent Decree is inappropriate, improper or inadequate. C.D. ¶ 81.

A. The Comments & Comment Process.

1. Comments.

The Department of Justice accepted public comments for 30 days under 28 C.F.R. § 50.7, beginning January 10, 2022. 87 Fed. Reg. 1186 (January 10, 2022). Upon request, DOJ extended the comment period by an additional 30 days. 87 Fed. Reg. 7208 (February 8, 2022). DOJ received 607 written comments during the comment period. Among the 607 commenters, a group of lawyers for the putative class in the consolidated civil cases also submitted one substantial set of comments supported by expert reports, attached as Exhibit 1 (divided into parts for ECF size restrictions). The other 606 comments are compiled and supplied as Exhibit 2 (privacy information redacted; where comments included attachments those are included in the same exhibit; the ECF file size limit requires that this exhibit be subdivided).

Also, EPA held a public meeting on January 25, 2022, in Rock Hill, South Carolina, at which 23 comments were presented either in person or via teleconference. Exh. 3 (transcript of that meeting (no privacy information needed to be redacted)).

Thus, between the DOJ comment period and the EPA meeting, there were 630 separate commenters, as follows[10]:

- 555 comments (89 percent) from private citizens (possibly including some former or current NIC employees who did not identify themselves as such);
- 54 comments (9 percent) from private citizens who identified themselves as current or former NIC employees;
- 15 comments (2 percent) were submitted by people with other affiliations, including individuals who worked in the paper industry (outside of NIC), lawyers, an environmental organization, and a state government official.

We separate out the NIC employees for information only; the NIC employees are public citizens with just as much right to comment on the Consent Decree as everyone else, and their comments are treated with equal weight.

Several individuals submitted multiple comments: over 50 comments came from 5 individuals, and over 12% of the comments came from 13 people. Overall, the 630 comments were submitted by 526 individuals.

After a substantive review of the written and oral comments, the government compiled a list of comment "topics" that were raised.[11] About 32 distinct "topics" emerged, but the topics

[10] This is an accurate summary of the voluminous comments under Fed. R. Evid. 1006. *See* Exh. 8 (Wilhelmi Decl.) (supporting the numerical analysis of comments in this section).

[11] Many of the commenters included more than one comment "topic" (*e.g.*, a 1-page comment might mention bad smells, and that the penalty is too low; another might mention that New Indy is good for jobs and that the penalty is too high). Thus, the total number of times that the various topics were raised exceeds the total number of commenters.

can be grouped into the following overarching categories, ranked generally in order of the percentage of commenters that raised them:

- NIC's impact on quality of life and human health effects (well over 25%), including: odors or lack of odors; health effects or lack thereof; movement of odors through air; and whether the foregoing worsened after NIC took over the Facility. These are discussed in subsection C below.
- The adequacy or inadequacy of the Consent Decree's injunctive requirements, including: the monitoring program, process changes, and pollution control equipment, discussed in subparts B1 and B2 below.
- The civil penalty is too high or too low, discussed in subsection B3.
- Specific Consent Decree provisions.
- The public comment process itself (2%) (discussed in the next subsection).

Many commenters raised various topics that are not specific to this case or the Consent Decree, so we have not ranked those above, but discuss them in part VI.C. below.

Exhibit 4 is the detailed summary of and "Response to Comments," that responds to each comment topic. Given page limitations, this brief addresses the most common and significant comments received.

2. Comments about the public comment process itself.

Some commenters (about 36) stated that the government should have given a second extension to the comment period or waited until certain FOIA requests were completed, or stated that EPA's public meeting was not adequate. The requirement for the comment period comes from 28 C.F.R. § 50.7, which requires the DOJ (not EPA) to take comments for 30 days for any consent decree in a civil action that seeks to enjoin pollution. DOJ's decision to extend the comment period to 60 days was voluntary, as was EPA's decision to hold a public meeting in Rock Hill; both of those steps exceed the legal requirement. Also, there is no requirement that FOIA requests be completed before the comment period can conclude. Indeed, since the

conclusion of the comment period, additional FOIA requests have been made to EPA. Kler Decl. (Exh. 6) ¶ 30. Keeping the comment period open for the conclusion of all FOIA requests could be endless and runs counter to the public interest by preventing timely compliance with environmental obligations in the decree as well as resolution.

B. Comments that Relate to the Consent Decree or Complaint.

This portion of the brief discusses the public comments that specifically relate to the Consent Decree and complaint. This section does not include the (many) comments about air emissions, odors, and air conditions in general, which are discussed below in Section VI.C.

1. Emission levels and monitoring.

Many commenters state that the Consent Decree should require monitoring for additional compounds beyond H_2S, that the 70 ppb number is not stringent enough, or that more monitoring devices are needed.

H_2S Levels. A few comments state that the 70 and 600 ppb requirements are too lenient. As explained above, those numbers were selected based on ATSDR guidance and other literature. These are health-based requirements but are not intended to eliminate all possible odor or annoyance. As one comment states, the ability to smell H_2S ranges from as low as 0.5 ppb and up to 300 ppb. Exh. 1 (Part 3), attachment 19 at page 2 (Megg report) (noxious odors can be smelled "below levels considered safe."). The U.S. Occupational Safety and Health Administration (OSHA) Ceiling concentration is set at 20,000 ppb. Exh. 1 (Part 3), attachment 17 at page 3 (Teaf report). Thus, the numbers that EPA selected and that are in the Consent Decree are protective of human health.

Fenceline Monitors. The C.D. requires NIC to monitor for H_2S at the "fenceline," using approved monitors at three specific locations under a data quality assurance plan. C.D. Appendix

A § II. EPA analyzed NIC's modeling data as submitted to DHEC in August and October of 2021 and confirmed that three monitors, as located, were sufficient to obtain a representative sample of the maximum H_2S concentrations present at NIC's fenceline, and that additional fenceline monitors were not needed to characterize the maximum H_2S concentrations resulting from NIC's emissions. Exh. 7 (Gillam Decl.) □ 7.

Community Monitors. Several commenters suggest that the Consent Decree is inadequate because it does not require air monitors in the communities, at a distance from the Facility fence line. It is true that the Consent Decree does not include such a requirement, but that requirement is not needed here because community monitors have been and still are required under different requirements outside the confines of the Consent Decree. The community monitoring was initially required by DHEC's May 7, 2021 Order, which remains in effect. Exh. 6 (Kler Decl.) ¶ 27. DHEC has always taken the lead role on requiring the community monitors. *Id.* ¶ 27. EPA did also require NIC to perform community monitoring under a separate CAA authority that gives EPA the power to require monitoring and reporting, 42 U.S.C. § 9614. EPA's requirement was for a one-year period. NIC has since completed the monitoring required by the EPA but remains subject to DHEC's May 7, 2021 Order requiring the same. *Id.* ¶ 27. Thus, the community monitoring is indeed required, but under a different legal mechanism. There is no reason that the community monitoring must be part of this Consent Decree instead of a free-standing requirement that EPA or DHEC can implement without involving the Court.

Monitored compounds. Some comments state that EPA should require monitoring of compounds in addition to H_2S, and specifically for the other components of "TRS" (total reduced sulfides). EPA selected H_2S as the most significant compound to monitor. This was based on experience, literature, and expertise. Specifically, the majority of citizen complaints described

the offensive odor as a "rotten-egg" smell (the characteristic odor of H_2S), the EPA Inspectors' monitor alarms for H_2S went off multiple times during the EPA's April 2021 inspection, and the EPA's Geospatial Measurement of Air Pollution ("GMAP") monitoring data detected elevated levels of H_2S on and around the Facility property. Kler Decl. (Exh. 6) ¶ 8. At the time that the EPA filed the Complaint in this action, NIC had reported to EPA multiple instances of H_2S concentrations at its fenceline exceeding the health-based concentration levels that the EPA had established in its CAA Emergency Order.

Also, the results of NIC's June 21-27, 2021 emission testing (required to comply with DHEC's May 7, 2021 Order) and the results of the wastewater testing NIC conducted in June of 2021 (to comply with DHEC's May 7, 2021 Order and the EPA's June 2, 2021, CAA Section 114 information request) show that H_2S was by far the largest TRS constituent contained in NIC's wastewater at the time and would therefore be the largest component of the TRS constituents being emitted from the ASB.[12] Kler Decl. (Exh. 6) ¶ 14.

Moreover, if EPA decides in the future that other TRS compounds are causing an endangerment to public health, the Consent Decree would not limit EPA's ability to address such compounds. See C.D. □□ 64-66 (Consent Decree only reserves the H_2S emergency claim, all other claims reserved and NIC waives and claim splitting defense for future civil actions).

2. Plant operations and pollution control technology.

Several commenters, and notably the lawyers for the putative class, state that NIC should be required to upgrade much or almost all of its air pollution equipment. For example, some comments ask for a second steam stripper to be required. NIC has been meeting the H_2S

[12] Section 114 empowers EPA to require owners of sources of air pollution to provide information to EPA. 42 U.S.C. § 7414.

concentrations with its existing technology, and the Consent Decree requires the existing technology plus some new improvements. So, comments that seek redundant control technology do not raise a concern that would impact the entry of this Consent Decree, because the Consent Decree already requires all necessary technology to meet the EPA-imposed concentrations for an H_2S emergency. The commenters' proposed technologies might be needed to meet zero-odor thresholds, or other nuisance thresholds, or to address compounds other than H_2S, but not to meet the 600 and 70 ppb fenceline numbers. Additional technologies might also be required if a plaintiff proves that NIC violated the "PSD" regulations in their separately-filed civil actions, but that is not this case. For example, on July 29, 2022, DHEC sent NIC a letter, requesting that NIC install a second steam stripper or else DHEC might order NIC to do so.[13]

3. Penalty amount.

Some comments state that the civil penalty is too low, or "unreasonably meager" as the comments from counsel for the putative class put it. Of those, some discuss that Kraft Industries or Mr. Kraft himself are wealthy so $1.1 million is insufficient. Some suggested higher amounts, or that the penalty should be distributed to individuals. Many consider the penalty a "slap on the wrist" and state that $1 million is the profit that NIC makes per day of operation. Meanwhile, a smaller number of commenters suggested that the penalty amount is too high or "excessive."

Under section 303 of the Clean Air Act ("Emergency Powers"), when a pollution source "is presenting an imminent and substantial endangerment to public health or welfare," the United States may file a civil action for an injunction. 42 U.S.C. § 7603. EPA also has authority to issue administrative orders to protect public health or welfare or the environment. *Id.* If the polluting entity fails to comply with an administrative order issued under Section 303, EPA can impose an

[13] scdhec.gov/sites/default/files/media/document/NewIndy_PCAOrderLetter.pdf

administrative penalty or the United States may sue for a civil penalty. 42 U.S.C. § 9613. Here, the Administrative order was issued in May of 2021, and NIC was largely in compliance by June. EPA counted 42 violations of the EPA order. The maximum penalty was about $4.3 million and the settlement is for 25% of that number, as discussed above under "Substantive Fairness." The United States believes that the 25% settlement number is reasonable given litigation risks and the other penalty factors.

Some comments referred to a $50 million or $100 million penalty as appropriate, or a million dollars per day. These numbers far exceed the maximum penalty of $4.3 million available under the CAA. If the case were to go to trial, the Court would not order a penalty above the legal limit.

As for those comments about Kraft Industries, or Mr. Kraft himself, EPA did not issue any administrative order to those entities, who are not parties to this Consent Decree and are therefore neither subject to any penalties nor entitled to any protections under the Consent Decree.

As for the comments that the penalty is too high, the United States negotiated in good faith and gave a discount from the maximum penalty, largely for NIC's cooperation. If we proceed to trial instead of settling, the United States might seek a higher number. Thus, the penalty amount is a reasonable discount.

Finally, there may be other potential claims for penalties, but those are not precluded by this settlement.

4. Many Comments Support the Consent Decree in Whole or in Part.

A number of comments fully support the Consent Decree and thus do not require responses here. Numerous comments state that the Consent Decree is a positive step, but go on to

find some fault with the Consent Decree; those faults are addressed in the other comment topics here and in the Response to Comments (Exh. 4).

5. Scrivener's Errors and the Minor Modification to the Consent Decree.

DHEC's comments on the Consent Decree pointed out two minor mistakes: an inaccurate cross reference and a mistaken minimum detection limit. NIC and the United States have agreed to correct those two errors in the "First Amendment to Consent Decree." Exh. 9. Paragraph 76 of the Consent Decree states: "The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Consent Decree, it shall be effective only upon approval by the Court." The parties agree that the amendment is so minor that the Court need not approve.

C. Comments Related to Ongoing Air Emissions and Reported Impacts, but not to the Consent Decree Itself.

By far the most common comment topic is that residents can still smell foul odors even though NIC is not violating the 600 or 70 ppb levels. Others state that they suffer adverse health impacts. These comments do not specifically discuss the Consent Decree, but instead discuss the quality of the air and its impacts. These are not comments that call for rejecting the Consent Decree, because they do not address any specific Consent Decree term. However, the bulk of the comments fall into this category, so must be discussed.

As explained above, this settlement is the H_2S settlement. EPA's Administrative Order of May, 2021 was targeted solely at H_2S emissions. Since the time of the Order, emissions of H_2S from NIC have fallen dramatically, and are consistently far below the 600 and 70 ppb levels.

NIC's own website reports the emissions daily.[14] Levels tend to be far below 10 ppb, and often are zero to one ppb. The Consent Decree requires NIC to continue to control and monitor H_2S and to keep levels below 70 ppb. Moreover, the 70 ppb level is based on health-impact studies, and is not designed to eliminate all possible odor.

Thus, many of the complaints about quality of life and health impacts likely are either: (1) related to H_2S odor (rather than a health-impact H_2S threshold), or (2) not related to H_2S from NIC.

(1) As to odors, comments referred to "rotten egg" smell, which is likely H_2S. Exh. 6 (Kler Decl.) ¶ 8; Exh. 5 at 7 (Suh Report). It is worth noting that about 42 commenters stated that all paper mills smell bad. And, as stated, this case was never about stopping all odors. An easy way to eliminate all odors would be to shut down the Facility permanently, but no commenter suggested a legal mechanism to do so. Under this Consent Decree, at least, odors will likely be reduced to some extent because of the reduction in H_2S emissions from the Facility.

(2) As to other odors, other compounds from NIC, or other sources of air pollution, some comments referred to sweet, garbage, or chemical smells. Exh. 6, Kler Decl. n. 1. The Consent Decree does not cover other compounds, and as such does not prohibit anyone from seeking to investigate or control other compounds. EPA can investigate NIC's other emissions, as appropriate, and if EPA determines that some other substance is causing an imminent and substantial endangerment to human health, EPA can issue a new order, or file a new civil action. Indeed, EPA has issued a request for information from NIC related to various plant operations. Exh. 9; Kler Decl. (Exh. 6) ¶ 32. Entering the Consent Decree does not foreclose EPA or DHEC or any private party from continuing investigation into these other smells or compounds. Rather,

[14] https://newindycatawba.com/ (last visited on October 24, 2022).

rejecting the Consent Decree would divert EPA resources back to H_2S and away from any potential future investigations of other issues.

D. Many of the Comments do not relate to this Consent Decree, Civil Action, or Hydrogen Sulfide.

Above, this memorandum discussed the comments that relate to the adequacy of the injunctions and penalty required by the Consent Decree. Here, we list some groups of comments that are not germane to the settlement, even if they do relate to the NIC Facility in general. These comments may be fully accurate, but they are not legally relevant.

Clean Water Act Discharges and Permit. Some comments state that NIC should be required to obtain a new Clean Water Act discharge permit (referred to as an "NPDES" permit), updated to reflect the change in NIC's operations. This is not required to address the imminent and substantial endangerment from H_2S air emissions at issue in this action, and is outside the scope of the CAA issues. Any claims for water discharges are preserved for future resolution.

In fact, DHEC on July 29, 2022 issued an Order requiring NIC to control its wastewater and pay a civil penalty.[15]

PSD Claim & Modelling results. Many comments relate to whether NIC may have violated the "PSD" provisions of the CAA. EPA frequently sues entities that make major modifications that significantly increase pollution without a proper analysis of the likely increases in emissions and the best available control technology. It may be that EPA, DHEC, or both, could also pursue a PSD claim. The Consent Decree here does not preclude any such claims; the Consent Decree resolves only the Section 303 "emergency" claim associated with H_2S (and associated penalties). Some comments state that the air modelling results that NIC

[15] https://scdhec.gov/sites/default/files/media/document/NewIndy_NPDESConsentOrder.pdf. (last visited Oct. 2, 2022)

conducted and submitted to DHEC are incorrect (and counsel for the putative class submitted expert reports on this topic included in Exhibit 1). These modelling results were submitted as part of NIC's permit application to DHEC and thus relate to the PSD issue. Again, any PSD claims remain alive for future resolution.

In fact, on July 22, 2022, a group of private citizens filed a PSD claim against NIC in this court. Dkt. 38 Order at 2-3. *Butler, et al. v. New-Indy Catawba LLC, et al.*, 22-cv-02366-SAL. There is no legal requirement for EPA to bring all possible claims in this first suit; this civil action is to abate the H_2S emergency.

SC Air Toxic Levels. Some commenters argued that the injunctive relief is inadequate because it fails to ensure that NIC is in compliance with Standard No. 8 of South Carolina's Toxic Air Pollutants regulations for hazardous air pollutants. As discussed above, the purpose of the proposed Consent Decree is to address an imminent and substantial endangerment from H_2S, not to address NIC's compliance with any specific CAA or State law requirement, and it reserves the right of the United States or South Carolina to bring a future action for penalties or injunctive relief for any such violations. The Consent Decree has no impact on DHEC's ability to enforce its air regulations.

Groundwater. Some comments suggest that NIC should take steps to protect groundwater. The complaint and Consent Decree do not relate to groundwater at all, and are not appropriately addressed by a CAA case. The Consent Decree does not prevent NIC, EPA or DHEC from addressing any groundwater issues under other authorities.

Property Values & Other Adverse Economic Impacts. Some comments state that the odors from NIC are causing devaluation of properties in the area, to the detriment of homeowners and other property holders. Similarly, some commenters state that they have

incurred costs of installing air filters or other expenses to deal with odors or health impacts. The Consent Decree does not prohibit property owners from bringing any potential claims (*e.g.*, nuisance) against NIC in any private party lawsuits. Those class cases have been filed and consolidated. Dkt. 38 Order at 1.

General Comments on EPA. Some comments suggests that EPA should improve program evaluation and audits on facilities and identify good practices for implementing and improving the state/local program, and that the Federal government must adequately fund the EPA for appropriate oversight. Other comments praise EPA's pollution control efforts in general. These comments do not relate to the instant Consent Decree so are not relevant to this Court's decision here.

General Comments Supporting NIC. Several commenters stated that NIC is a good company, a good employer, or a good business partner. A few commenters were employees of NIC, and state that workers in the Facility did not mind the smell and that their clothes or car did not have a smell after work. Some employees felt that the complaints of neighbors were understandable, but did not agree with them. Some stated that NIC "inherited" the problem from the prior owners. None of these facts weighs in favor or against the injunctive provisions of the Consent Decree aimed at H_2S controls. To the extent these facts call for a reduced penalty, the Consent Decree includes a 75% reduction in the penalty, so these commenters' concerns have been adequately addressed.

VII. CONCLUSION.

Plaintiff requests that the Court grant this unopposed motion by signing page 30 of the proposed Consent Decree and entering it in the docket as a final judgment. The Court need not

sign or approve the minor modification (Exh. 9). Because entry of the Consent Decree is the relief requested, we have not supplied a proposed order.

Respectfully submitted,

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