UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

UNITED STATES OF AMERICA and STATE OF INDIANA, Plaintiffs, v. ATLANTIC RICHFIELD COMPANY and E. I. DU PONT DE NEMOURS AND COMPANY, Defendants.	Civil Action No. 2:14-cv-312

PLAINTIFF UNITED STATES' OPPOSITION
TO APPLICANTS' MOTION TO INTERVENE

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INTRODUCTION

This *was* a case to resolve liability against two companies for contamination at two areas of the USS Lead Superfund Site ("Site"). It was closed two years ago, after the Court entered the Consent Decree. Applicants seek a vehicle to second-guess EPA's selection and implementation of remedial actions at the Site. While it is understandable that Applicants are interested in the cleanup, this case is not the right vehicle.

Applicants cannot meet the standard to intervene for several reasons, starting with the fact that intervention requires a timely motion and Applicants filed two years after the case was settled and closed. Moreover, this Court does not have jurisdiction to grant the relief the Applicants seek. In crafting the cleanup law at issue here, Congress took pains to create a system where EPA alone has the authority to select the appropriate cleanup for this Site and decide how to implement it. Citizens may comment on the proposed remedy prior to it being finalized or may challenge the selected remedy after its completion. But they may not challenge a cleanup as it happens. This was a deliberate choice by Congress that sites "should be cleaned up as quickly as possible and without interruption by citizen suits." *Pollack v. U.S. Dep't of Def.*, 507 F.3d 522, 525 (7th Cir. 2007). Applicants' motion here, which seeks to enlist the Court in overseeing the ongoing cleanup, is a citizen suit cloaked as intervention and is barred by the statute.

The law makes intervention improper here; the facts show it is unnecessary. Since listing the Site on the National Priorities List in 2009, EPA has made steady progress toward remediation: selecting the remedy in 2012; reaching a Consent Decree to fund the work in two areas of the Site (known as Zone 1 and Zone 3) in 2014; and finishing the remedial design for that work this year. All the while, when sampling showed hotspots of contamination, EPA took prompt action. And when the full remedial design sampling effort was finalized in the West

Calumet Housing Complex ("Housing Complex") in Zone 1 this Spring and showed pervasive and high levels of contamination, EPA dramatically ramped up its response. On the day Applicants filed their brief, about 150 EPA employees and contractors were working at the Site, sampling and cleaning homes, excavating soil, answering residents' questions, and performing other tasks. Ex. A-10 (157 people on November 2, 2016). The contamination at the Site is the unfortunate result of a century of industrial activity. But the system is working, and EPA is diligently proceeding to clean the Site and protect residents.

While intervention in this closed case is not the appropriate tool for the public to participate in the cleanup, there are other avenues by which residents can be heard. During this year's work, EPA staffed a full service command center, dispatched personnel door-to-door, and set up a toll-free hotline. The names and contact numbers for EPA personnel have been distributed to all residents on hand-delivered flyers and are available on the Site-specific website. EPA will continue to hold public meetings in the Calumet neighborhood to explain the Agency's actions and get residents' input. And residents are in the process of forming a Community Advisory Group, a formal mechanism for residents to get Site information and make suggestions to EPA. EPA's door remains open.

Intervention here is neither allowed by law nor needed for residents to express their views. The United States respectfully requests that this Court deny the motion for intervention.

BACKGROUND

I. CERCLA And The Remedy Selection Process

In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address environmental and health risks caused by industrial pollution. The Act was designed to promote timely cleanup of hazardous waste sites and ensure that the costs of the cleanup are paid by those responsible for the contamination. *Meghrig v. KFC*

Western, Inc., 516 U.S. 479, 483 (1996). To achieve those ends, the statute gives broad authority to the President (since delegated to EPA)[1] to determine appropriate remedies for sites and order government agencies or responsible parties to perform the cleanup. *United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

Section 104 of CERCLA provides EPA the authority to "remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time . . . or take any other response measure consistent with the national contingency plan which the [EPA] deems necessary to protect public health or welfare or the environment." 42 U.S.C. § 9604(a)(1). CERCLA explicitly gives EPA the authority to "select appropriate remedial actions." 42 U.S.C. § 9621(a).

In selecting the appropriate response actions at Superfund sites, EPA follows a formal administrative process established by regulations known as the National Contingency Plan. *See generally* 40 C.F.R. §§ 300.1-300.1105. Initially, EPA evaluates whether the risks posed by a site merit inclusion on the National Priorities List. *See* 40 C.F.R. § 300.425(c). If listed, EPA performs a series of studies to characterize the contamination at the site and develop potential cleanup plans. The first step is the Remedial Investigation, which is designed to collect the information necessary to develop a remedy for the Site. 40 C.F.R. § 300.430(d); Ex. A, Declaration of Douglas Ballotti ("Ballotti Dec.") at ¶11(a). The Remedial Investigation includes a Human Health Risk Assessment, which identifies the health threats from the contamination at the Site. 40 C.F.R. § 300.430(d)(4); Ballotti Dec. at ¶14(e). Based on the information gathered in the Remedial Investigation, EPA prepares a Feasibility Study. 40 C.F.R. § 300.430(e); Ballotti

[1] While the statute refers to the President, we use EPA in this brief to reflect how that authority is implemented in practice.

Dec. at ¶14(f). The Feasibility Study presents a range of remedial alternatives and evaluates them against a series of nine criteria set by the NCP. 40 C.F.R. § 300.430(e)(2); Ballotti Dec. at ¶14(f). These site studies are complex and time-consuming, generally taking at least several years. Ballotti Dec. at ¶14(p). (The median time for Midwest sites is about a decade. *Id.*)

With the studies in hand, EPA proposes a remedy for the Site and puts the choice out for public comment, including a public meeting. *Id.* at ¶11(c). After considering those comments, EPA formally selects a remedy based on the full administrative record in a document known as the Record of Decision. *Id.* at ¶11(d). Once the Record of Decision is issued, EPA typically looks for responsible parties to perform or fund the work because the remedy decision does not come with funding. *Id.*; *see* 40 C.F.R. § 300.425(b)(2). The performing party then begins further site investigations sufficient to develop the remedial design—a detailed, precise blueprint for implementing the selected remedy. Ballotti Dec. at ¶25. Finally, the performing party executes that design.

During performance of the remedy, CERCLA generally prevents challenges to the work. CERCLA Section 113(h), with certain limited exceptions, expressly prohibits challenges to *ongoing* CERCLA response actions: "No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title." 42 U.S.C. § 9613(j). Section 113(h) reflects the Congressional determination "that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation." *Pollack*, 507 F.3d at 525 (internal citations omitted).

II. Response At The USS Lead Site

A. The Record of Decision

EPA followed the process outlined above at this Site.[2] The Agency listed the Site on the National Priorities List in April 2009. Ballotti Dec. at ¶12. This set the stage for a full investigation and remedial plan for the Site. EPA divided the Site into two areas, known as operable units. *Id.* at ¶13. This case involves Operable Unit 1, which is a residential area in East Chicago, Indiana, known as the Calumet neighborhood. *Id.* The boundaries of Operable Unit 1 are shown on Ex. A-1.[3]

EPA proceeded to do a Remedial Investigation and Feasibility Study. Ballotti Dec. at ¶14(a)-(g). In July 2012, EPA announced its proposed plan for the cleanup of the neighborhood. *Id.* at ¶14(h); Ex. C, Declaration of Janet Pope ("Pope Dec.") at ¶¶ 37-38. As required by the NCP, the public was invited and encouraged to comment on EPA's proposed plan before the final remedy was selected.[4] Pope Dec. at ¶¶ 37-43; Ballotti Dec. at ¶14(h). Since shortly before

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[2] Further detail is provided in the attached declarations. The declarations cover the following topics:

- History of the Site, selection of the remedy, and current activities: Douglas Ballotti, Acting Superfund Division Director for EPA Region 5, Ex. A.
- Work performed by the Agency for Toxic Substances and Disease Registry: Dr. Mark Johnson, Regional Director and Senior Environmental Health Scientist for ATSDR, Ex. B.
- Public outreach performed by EPA over the history of the Site: Janet Pope, Community Involvement Coordinator for the Site, Ex. C.
- Responses to specific allegations regarding sampling by individual prospective intervenors: Thomas Alcamo, Remedial Project Manager for the Site, Ex. D.

[3] Operable Unit 2 consists of 79 acres at 5300 Kennedy Ave., the former USS Lead facility. Ballotti Dec. at ¶13.

[4] The NCP requires a 30-day public comment period. 40 C.F.R. § 300.430(f)(3)(C). EPA extended the period for another 30 days at the request of the City. Ballotti Dec. at ¶14(j).

the Site was listed on the National Priorities List, EPA had established a repository of the administrative record at the East Chicago Public Library and on the internet. Ballotti Dec. at ¶15. The Remedial Investigation and Feasibility Study were available at the City library by mid-July, in advance of a July 25, 2012 public meeting. Pope Dec. at ¶39. The proposed plan, including the details of the public meeting, was mailed to every resident living within two miles of the Site. *Id.* at ¶¶11, 37. EPA also advertised the public meeting in local English and Spanish-language newspapers. *Id.* at ¶38. A total of 42 people attended the public meeting, including 15 Site residents, the East Chicago Mayor and his technical representative, the media, and potentially responsible parties. Ballotti Dec. at ¶14(k).

EPA's proposed remedy involved removing all soil (to a depth of two feet) with contamination levels above certain thresholds. *Id.* at ¶14(i); Ex. C-15 (July 2012 Proposed Plan). The public comments were mixed, with one resident favoring the proposed remedy, some (such as the Mayor) seeking a more intensive remedy, and some (such as potentially responsible parties) arguing for a less intensive remedy. Ballotti Dec. at ¶14(m). Ultimately, EPA decided to proceed with the proposed remedy and issued its Record of Decision (commonly the "ROD"). *Id.* at ¶14(o). That ROD included an explanation for the selected remedy and a response to the public comments. ECF # 16-1, Applicants' Memorandum of Law ("App. Br."), Ex. B (ROD) at 48-57.

B. The Consent Decree

While it established the remedy, the ROD did not provide funding for the work. Therefore, the United States worked to secure either funding or work from responsible parties.

That effort led to the Consent Decree entered by this Court. The United States and Indiana filed a joint complaint against Defendants on September 3, 2014. ECF # 1. On that same

date, we lodged the Consent Decree with the Court to begin a public comment period. ECF # 2. The Notice of Lodging (and the Consent Decree itself) explained that Operable Unit 1 had been divided into three zones, and that the Consent Decree covered only Zones 1 and 3.[5] ECF # 2 at 1-2; ECF # 8 at 2. Among other provisions, the settlement required Defendants to (1) pay EPA's costs to implement the remedy at Zones 1 and 3; and (2) transport and dispose of the waste excavated by EPA. ECF # 4 at 2. At the close of the 30-day public comment period, the United States reported to the Court that no comments were received and sought entry of the Consent Decree. ECF # 4 at 3, 5.

After a telephone hearing, this Court entered the Consent Decree on October 28, 2014. ECF # 8. The Court terminated the case on that same day, entering final judgment. ECF # 9. As shown in the excerpt from the telephonic status hearing quoted by Applicants, the Court understood in approving the deal that it covered Zones 1 and 3 while deferring action on Zone 2.[6] App. Br. at 15-16 (citing App. Br. Ex. M). Aside from a brief status report filed by the United States in September 2016, nothing had happened in this Court for more than two years when Applicants filed their motion. Meanwhile, EPA was proceeding to implement the cleanup.

C. Implementation of the Consent Decree and Initiation of the Cleanup

EPA began performing remedial design work for Zones 1 and 3 shortly after the entry of the Consent Decree. Ballotti Dec. at ¶28(c)(vi)-(vii). Because the remedy called for excavating soil exceeding action levels, EPA had to sample each property at several different depths to

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[5] Zone 1 consists principally of the Housing Complex, a park, and the now-closed Carrie Gosch Elementary School. Ballotti Dec. at ¶19. Zones 2 and 3 consist primarily of single-family homes. *Id.* at ¶¶20-21. A map showing the zones is attached as Ex. A-2.

[6] Applicants suggest that United States' counsel made a "misleading" statement to the Court. App. Br. at 16. But counsel's statement was accurate, and the papers before the Court were clear that Zone 2 was part of the Site but would not be remediated via the Consent Decree. *See, e.g.*, ECF # 4 at 2.

determine what soil to remove. *Id.* at ¶28(a). The results of the Zone 1 sampling were finalized in late April 2016, and shared with the property owners—the City of East Chicago ("City") and the East Chicago Housing Authority ("Housing Authority")—in late May 2016. *Id.* at ¶¶28(c)(vi), 31. These results revealed high levels of lead contamination at the Housing Complex that was pervasive. *Id.* at ¶31.

That finding led to a series of cascading consequences. First, the City opposed remediation activity at the Housing Complex while residents lived there.[7] Ballotti Dec. at ¶31. Then, in late July, the East Chicago Mayor advised residents to move out. *Id.* at ¶39. The Housing Authority applied to its funding source—the U.S. Department of Housing and Urban Development ("HUD")—to demolish the Housing Complex. *Id.* By early August, HUD announced that it would fund vouchers for residents to move. *Id.* The Housing Authority simultaneously advised residents that they would have to move out.[8] *Id.*

EPA decided that it made little sense to start excavating soil in the Housing Complex as residents were being moved out and in the face of opposition from the property owner; indeed, it was likely to make the situation worse. *Id.* at ¶41. Therefore, EPA shifted focus to (1) reduce lead exposure for Zone 1 residents while they still lived there; and (2) accelerate cleanup efforts in Zones 2 and 3. *Id.* at ¶32.

The activities and future plans for each Zone are briefly described below, with further detail in the Ballotti Declaration and Ex. B, Declaration of Mark Johnson ("Johnson Dec.").

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[7] The Housing Complex is a low-rise development ranging from one-bedroom units to five-bedroom homes. Ballotti Dec. at ¶19. In June 2016, more than 1,000 people lived at the Housing Complex, including approximately 670 under the age of 18. *Id.* at ¶42.

[8] EPA continues to believe that it could have safely remediated the Housing Complex soils with residents in place. Ballotti Dec. at ¶41.

1. Zone 1

With guidance from the Agency for Toxic Substances and Disease Registry, EPA went door-to-door in the 346-unit Housing Complex to provide residents information on reducing their lead exposure. Ballotti Dec. at ¶36; Johnson Dec. at ¶31. EPA also started placing mulch on any areas where there was no grass cover (because grass or mulch can act as a barrier to exposure to lead in soil). Ballotti Dec. at ¶37. In order to mitigate potential lead exposure inside the homes, EPA embarked on an aggressive program to clean the interior of Housing Complex units. *Id.* at ¶¶56-70. EPA cleaned the homes of all interested residents, 270 in all. *Id.* at ¶70.

EPA remains committed to cleaning up the soils in Zone 1, but the work is on hold because residents are in the process of moving out,[9] the Housing Authority has applied to demolish the Housing Complex, and the future use of the property is undecided. *Id.* at ¶41. Were EPA to proceed now, the future demolition very likely would spread contamination to the clean, new soil, and EPA would have to re-excavate all soils, at very significant additional cost. *Id.* at ¶¶41, 116. In addition, if the City changes the use from residential to commercial or industrial, EPA may have to modify the selected remedy. *Id.* at ¶117. This would require an amendment to the ROD, complete with an opportunity for public comment. *Id.* at ¶119.

2. Zone 2

EPA began the Zone 2 remedial design soil sampling in August 2016 and has so far sampled 485 out of approximately 600 properties. Ballotti Dec. at ¶77. In November, EPA cleaned up the soil in 17 priority properties: three home-based day cares (because children are more sensitive to lead than adults) and 14 homes with high contamination levels in the top six

[9] As of the beginning of December, EPA was advised that the residents in approximately 97 units had moved out. Ballotti Dec. at ¶39.

inches of the soil (where potential human exposure is most likely to occur).[10] *Id.* at ¶81. EPA also did post-excavation interior cleaning at five homes in Zone 2 and expects to do nine more by the end of the month. *Id.* at ¶73.

While the Consent Decree does not provide funding for Zone 2, EPA remains committed to ensuring that the Zone 2 cleanup is performed as quickly as possible and is actively working toward that goal. *Id.* at ¶120.

3. Zone 3

EPA's work in Zone 3 suffers neither the future use uncertainty of Zone 1 nor the funding issues of Zone 2, so is the simplest situation. Earlier this year, EPA finished remedial design sampling at 419 of the approximately 480 properties in Zone 3 (all those EPA had access to). Ballotti Dec. at ¶¶27, 28(c)(vii). In October through early December, EPA remediated all but one property in Zone 3 that had priority because of high contamination in the top six inches of the soil.[11] *Id.* at ¶80. At the request of the City, EPA also cleaned up Riley Park. *Id.* In addition, EPA did post-excavation interior cleaning at four homes in Zone 3, expects to do one more this month, and twelve more in the first quarter of 2017.[12] *Id.* at ¶74.

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[10] Soil remediation at each property requires extensive effort. The work begins with a final design drawing that shows the exact location and depth of soil removal. Ballotti Dec. at ¶¶26, 29. EPA then does a pre-excavation walkthrough with the homeowner, which includes reviewing what features of the yard can be removed and replaced. *Id.* at ¶¶83-84. Excavation is performed with a mix of heavy equipment and laborious hand-digging, which is necessary to avoid damage to foundations, trees, and other features. *Id.* at ¶85. After the excavation is complete, EPA places clean soil in the excavated area and restores the property to its pre-excavation condition, which includes replacing any features (such as trees, bushes, flowerbeds, or brickwork) that were removed during the work. *Id.* at ¶¶93–94.

[11] The one exception was because the homeowner asked EPA to defer the work until the spring of 2017. Ballotti Dec. at ¶80.

[12] EPA is using its own funds to clean the interior of homes in all of the Zones, including in Zones 1 and 3. Ballotti Dec. at ¶75. EPA elected to limit the use of the Consent Decree funding to outdoor remedial activities consistent with the Record of Decision. *Id.*

EPA will resume soil remediation work in Spring 2017 on the known 212 properties in Zone 3 that still need remediation. *Id.* at ¶121. EPA is committed to doing as many homes as possible in Zone 3 next year, with any remaining homes in 2018.[13] *Id.*

D. Sampling and Cleanup at Individual Applicants' Properties

Two applicants have charged that EPA waited five and six years before telling them about sampling results for their soil. App. Br. at 19-21. This appears to be based on a misunderstanding.

EPA has maintained careful records of the locations of all sampling performed at the Site. Ex. D, Declaration of Thomas Alcamo ("Alcamo Dec.") at ¶7. EPA checked those records and found no indication that sampling was performed at the Jimenez home in 2011 or the Garza home in 2010, contrary to the statements in Applicants' brief. *Id.* at ¶¶10(b), 12(b). It is possible that EPA approached the homeowners for access in that time frame but did not sample; EPA met the objectives of the Remedial Investigation with fewer samples than it originally projected. *Id.* at ¶¶10(c), 12(c). For these two applicants, EPA collected samples in June 2015, *id.* at ¶¶10(f), 12(f), finalized the sample analysis in September 2016, and provided the results immediately thereafter. *Id.* at ¶32. In any event, EPA did not withhold sampling results. *Id.* at ¶35. Results were provided to residents as they were finalized. *Id.*[14]

As it happens, EPA remediated the Garza property this fall (after Applicants filed their

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[13] Remediating the 37 homes in Zone 3 this fall proved to be more labor- and resource-intensive than EPA anticipated. Ballotti Dec. at ¶121. The homes are generally tightly packed together and many areas of soil had to be hand-excavated; at one property, heavy equipment could not be used at all. *Id.* Homes had significant features such as flower beds, plants, bushes, and trees that all had to be replaced. *Id.* EPA had three crews working simultaneously in Zone 3 and believed that adding more crews would be counter-productive. *Id.* at ¶122.

[14] The Declaration of Thomas Alcamo describes in greater detail the timing of the sample collection and analysis process.

motion). *Id.* at ¶12(i). EPA expects to remediate the soil at the Jimenez' property in 2017 and to perform an indoor cleaning of the Garza home in the first quarter of 2017. *Id.* at ¶¶10(i), 12(l).

ARGUMENT

Applicants seek to cloak a challenge to the cleanup as intervention. But neither mandatory nor permissive intervention is allowed here. Even if they were, the statute precludes the review of an ongoing cleanup that Applicants seek. Finally, intervention is not necessary because Applicants have other avenues to comment on the work.

I. Applicants Cannot Satisfy The Legal Prerequisites For Intervention

A. Applicants May Not Intervene by Right

Applicants seek intervention under either CERCLA Section 113(i) or Rule 24(a)(2). App. Br. at 25. The standard is the same under either provision and requires the applicant to demonstrate that:

> (1) the application is timely;
>
> (2) the applicant has an 'interest' in the property or transaction which is the subject of the action;
>
> (3) disposition of the action as a practical matter may impede or impair the applicant's ability to protect that interest; and
>
> (4) no existing party adequately represents the applicant's interest.

Int'l Paper Co. v. City of Tomah, No. 00-C-539-C, 2000 WL 34230089, at *2 (W.D. Wis. Nov. 30, 2000) (using Seventh Circuit's Rule 24(a)(2) standard for CERCLA intervention case and citing authority for principle that standards are equivalent). As noted by Applicants, the only difference in the standards is that the CERCLA intervention provision places the burden for factor four on the existing parties. Failure to satisfy any of the requirements precludes intervention. *Reich v. ABC/York–Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995).

Applicants cannot satisfy the requirements here, most clearly the first and fourth ones.

1. The motion to intervene is far from timely

The first question for the Court is whether Applicants' motion is timely. *See NAACP v. New York*, 413 U.S. 345, 365-66 (1973) ("If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness"). By filing their motion four years after EPA selected the remedy and two years after this Court closed this case, Applicants have not timely sought to intervene.

The Seventh Circuit has explained that "as soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene." *Lefkovitz v. Wagner*, 395 F.3d 773, 778 (7th Cir. 2005) (quotation marks omitted). The Seventh Circuit evaluates four factors in considering timeliness:

> (1) the length of time the intervenor knew or should have known of his or her interest in the case;
>
> (2) prejudice to the other parties caused by the intervenor's delay;
>
> (3) prejudice to the intervenor if the motion is denied; and
>
> (4) any unusual circumstances.

City of Bloomington, Ind. v. Westinghouse Elec. Corp., 824 F.2d 531, 534 (7th Cir. 1987).

Applicants should have known, and did know, that their interests might be affected for at least four years before they sought to intervene. To the extent Applicants now quarrel with the cleanup selected in the ROD, the proposed plan was mailed to every resident living within two miles of the Site in advance of a July 25, 2012 public meeting. Pope Dec. at ¶¶11, 37. Applicants were specifically advised of the public comment period and the public meeting.[15] *Id.* Then, when

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[15] Well in advance of the proposed cleanup plan, EPA engaged in extensive outreach efforts in the Calumet neighborhood. Pope Dec. at ¶¶18-19 (Nov. and Dec. 2007 public meetings); ¶25 (Dec. 2009 fact sheet mailed to residents describing Site history, Site investigations, availability of technical assistance grants, and dangers of lead); ¶26 (Dec. 2009 public meeting about sampling and cleanup); ¶28 (March 2010 meeting with two dozen City representatives about the

this case was filed in September 2014, Applicants had another public comment period to weigh in on the settlement and the Consent Decree's focus on Zones 1 and 3. They did not do so.

The Seventh Circuit has already denied a similar, but less egregiously untimely, attempt to intervene in a CERCLA settlement. In *Westinghouse*, a citizens group moved to intervene *during* consent decree negotiations, about eight months before the decree was lodged with the court for public comment. 824 F.2d at 533. The district court denied the motion to intervene as untimely, and the Seventh Circuit affirmed. *Id.* at 532. The appellate court found that the citizen group waited more than 11 months after it should have known its interests could be affected, and such a delay "clearly establishes that [its] motion to intervene was untimely." *Id.* at 535.

Next, the Seventh Circuit turned to the prejudice faced by the original parties to the case. The court found that there was significant prejudice because "the lengthy and difficult negotiation process . . . would be wasted" and because the cleanup would be delayed, "which endangers public health." *Id.* at 536. The prejudice is even greater here where the cleanup has already begun. Not only would the work of negotiating and approving the consent decree and beginning work be "wasted," the work itself would stop in its tracks.

Finally, the Seventh Circuit considered the potential prejudice to the citizens group. The court noted that the group had the opportunity to submit comments regarding the consent decree. "Because [movant] has already had an opportunity to present its views to the district court, it would suffer little prejudice if it were denied permission to intervene at this late stage in the proceedings."[16] *Id.*

Site); ¶31 (June 2010 interviews with 25 Site residents for development of Community Involvement Plan "CIP"); ¶32 (July 2010 distribution of lead prevention exposure at Calumet Day); and ¶34 (April 2011 publication of CIP).

[16] In *Westinghouse*, the group moved during negotiations, but the district court did not rule on the motion until approving the consent decree. 824 F.2d at 533.

Other courts have regularly found no prejudice to potential intervenors where they had the opportunity to comment on the proposed consent decree during the public comment period. *See, e.g., United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994) ("[I]t is hard to fathom how [applicant] would suffer undue prejudice by being denied an opportunity to present the same views to the district court again"); *United States v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184, 192 (D.N.J 1999); *United States v. ABC Indus.*, 153 F.R.D. 603, 608 (W.D. Mich. 1993); *United States v. Vasi*, Nos. 5:90 CV 1167 & 5:90 CV 1168, 1991 WL 557609 at *3-*4 (N.D. Ohio 1991); *United States v. Bliss*, 132 F.R.D. 58, 59-60 (E.D. Mo. 1990); *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 577 (W.D. Wis. 1990). These cases all found intervention untimely—and in each case the application was *more* timely than here. As the Sixth Circuit explained, approval of a consent decree "is *the* final stage of the proceeding." *United States v. BASF-Inmont Corp.*, 52 F.3d 326, at *3 (6th Cir. 1995). In *BASF-Inmont*, the district court found intervention untimely when applicants moved while the motion to enter the consent decree was pending, and the Sixth Circuit affirmed. *Id.* at *4.

Applicants offer no case law to support their timeliness claim. Instead, they argue that they only recently learned of the threat to their interest. App. Br. at 38. But the claims they make on that point are without merit.

First, EPA did not make "fundamental changes to the scope of the remediation plan between publishing the ROD and publishing the Consent Decree." *Id.* The Consent Decree requires the exact cleanup selected in the ROD. It simply covers only two of the three zones. This is not unusual. Ballotti Dec. at ¶23. As the Seventh Circuit has explained, "Environmental remediation is a complex endeavor that often proceeds in stages." *Frey v. EPA*, 751 F.3d 461, 467 (7th Cir. 2014) (in a four-decade process, responsible party serially cleaned up different

areas after reaching agreement with EPA on that area). Moreover, through its notice of lodging and same-day press release, EPA made clear that the Consent Decree would fund work in only Zones 1 and 3. ECF # 2; Ex. A-5. A local newspaper even picked up the story, writing just three days after lodging of the decree that the deal "involves two of the three areas" at the Site, leaving the third area "still under discussion." Ex. A-6. Then, as soon as the Court approved the Consent Decree, EPA mailed a fact sheet to residents and followed up with two meetings in November 2014 to further explain the coming steps. Pope Dec. at ¶¶46-47. For more than two years, Applicants have been on notice of the staging of the cleanup of the zones.[17]

Second, as explained above, Applicants were not recently informed of sampling events that happened five and six years ago. Rather, they were recently informed of June 2015 sampling events that EPA performed in the course of extensive soil sampling done to design the selected remedy. This is normal procedure at every site. EPA did not withhold any sampling results, but provided them as they were finalized. Alcamo Dec. at ¶35.[18]

The purpose of the timeliness requirement is "to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal." *Lefkovitz*, 395 F.3d at 778 (quoting *United States v. South Bend Cmty Sch. Corp.*, 710 F.2d 394, 396 (7th Cir. 1983)). Here the Court has already issued a final judgment. The lawsuit has long since arrived at the terminal. Indeed, the passengers have gone home, and the train has left for the next day's route. As the Seventh Circuit concluded in *Westinghouse*, when a citizens group had the opportunity to comment on the

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[17] The irony of the Applicants' complaint about the Consent Decree is that any of the alternatives would have delayed the implementation of the remedy even longer. The alternative here was not a Consent Decree that fully funded the Calumet neighborhood cleanup. The alternative was no consent decree at all, a consent decree that would have taken far longer to negotiate, or complex and time-consuming litigation.

[18] Applicants also invoke "the environmental justice concern" they assert exists at the Site, but this is not relevant to timeliness.

proposed remedy and later sought intervention as well, "it is difficult to understand why [movant] should be allowed to intervene in the present case for the purpose of presenting its views on the consent decree to the court after it had already been afforded an opportunity to do so." 824 F.2d at 536.

2. The United States adequately represents the Applicants' interests

A long-standing intervention law principle is that the United States represents the public interest. *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (government is presumed to "represent all its citizens"). Applicants say that principle should be abandoned here, based on assertions that EPA has not pursued the cleanup as Applicants wish. *See* App. Br. at 31-37. However, such differences of opinion are not uncommon and do not serve to upend the presumption of adequate representation.

The Seventh Circuit has explained that where the applicant and the government share "the same ultimate objective," the court will presume that the government adequately represents the applicant. *United States v. South Bend Cmty. Sch. Corp.*, 692 F.2d 623, 628 (7th Cir. 1982); *Am. Nat'l Bank & Trust Co. v. City of Chicago*, 865 F.2d 144, 148 n.3 (7th Cir. 1989). The presumption holds "unless there is a showing of gross negligence or bad faith." *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007) (citations omitted).

In 1986, Congress amended CERCLA to add a specific intervention provision, placing the burden on the United States to show that the applicant's interest was adequately represented. *See* 42 U.S.C. §9613(i). While the *burden* changed, the presumption that the government represents the public did not. *Utah ex rel. Utah State Dep't. of Health v. Kennecott Corp.*, 232 F.R.D. 392, 398 (D. Utah 2005) ("Under either alternative, a person who asserts an interest as does this petitioner by simply being a member of the public, faces a presumption that the State as

a party will adequately represent persons who assert a public interest."); *Bliss*, 132 F.R.D. at 60 ("the State of Missouri and the United States, as governmental entities acting in the public interest, are both presumed to adequately represent the interests which the Cities assert.").

Here, Applicants and EPA share the same goal: getting the Site cleaned up. Courts regularly deny intervention by concerned residents in CERLCA enforcement actions brought by the government. *See, e.g.*, *Kennecott*, 232 F.R.D. at 398; *W.R. Grace*, 185 F.R.D. at 191; *United States v. BASF-Inmont Corp.*, 819 F. Supp. 601, 606 (E.D. Mich. 1993); *Bliss*, 132 F.R.D. at 60–61.

Notably, the prospective intervenors and the government need not be of the same mind on the issues for adequate representation. "A difference of opinion concerning litigation strategy or individual aspects of a remedy does not overcome the presumption of adequate representation." *Jenkins v. Missouri*, 78 F.3d 1270, 1275 (8th Cir. 1996); *see also United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) ("[r]epresentation is not inadequate simply because [applicant and government] have different ideas about how best to achieve these goals"). Thus the government is deemed to represent the movant's interest adequately even where the applicant would:

- Advocate "supposed improvements" to a litigation settlement negotiated by the government. *South Bend Cmty. Sch. Corp.*, 692 F.2d at 628;
- "[P]ress for more drastic relief." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984); or
- Otherwise "disagree with the litigation strategy" or settlement strategy being pursued by the government. *Chiglo v. City of Preston*, 104 F.3d 185, 188 (8th Cir. 1997).

Applicants air a number of complaints about how EPA selected and is implementing the remedy, and argue that their interests are not represented. But as the case law cited above makes clear, these types of disagreements do not extinguish the

presumption of representation. Notably, Applicants cite *no* cases in which a court found that EPA did not adequately represent the interests of the community.

Nor do the specific issues Applicants raise withstand scrutiny. *See* App. Br. at 32–34. First, EPA appropriately selected the remedy pursuant to the National Contingency Plan. The public had the opportunity to raise concerns with the Remedial Investigation and Feasibility Study that EPA performed. Ballotti Dec. at ¶14(n). But while several members of the community commented on the proposed plan, none took issue with the underlying studies or claimed that EPA had failed to follow the requirements of the law. *Id.* Second, EPA did not change the remedy through the Consent Decree, so there is no issue of insufficient notice. Third, the fact that environmental justice concerns are implicated at the Site, as they are at many sites,[19] does not mean EPA cannot represent Applicants' interests. Fourth, none of Applicants' critiques of the remedy or its implementation can be litigated now, as explained in Section II below.

Finally, Applicants' claims of inadequate representation ring hollow in light of the Agency's robust response at the Site in 2016. When sampling results showed pervasive and high levels of contamination at the House Complex, EPA mobilized its resources to establish an Incident Command and Multi-Agency Coordination Team that oversaw a complex and multi-faceted response aimed at reducing residents' exposure to lead. Ballotti Dec. at ¶¶33, 43-49. Public health officials from federal, state, and local agencies were activated to provide blood lead testing and many other services to residents. *See generally* Johnson Dec. at ¶¶19–35. EPA temporarily housed hundreds of residents in

[19] As Applicants themselves note, Superfund sites "disproportionately impact low-income communities of color." App. Br. at 34.

hotels so that EPA could intensively clean their homes to reduce potential lead threats. Ballotti Dec. at ¶¶56–70. Between June and November, EPA committed over 115,000 manhours to its response in the Calumet neighborhood (the equivalent of approximately 110 full time personnel working five days a week). *Id.* at ¶34. Few Superfund site have seen the level of activity seen in East Chicago since the summer. *Id.* EPA has thoroughly represented the interests of the Calumet neighborhood residents.[20]

B. Permissive Intervention Is Also Inappropriate

Applicants argue in passing for permissive intervention. A district court has discretion to allow permissive intervention, but only where the applicant makes a timely motion and demonstrates both: (1) a common question of law or fact; and (2) independent grounds for jurisdiction. Fed. R. Civ. P. 24(b)(2); *Ligas*, 478 F.3d at 775. For many of the reasons outlined above, Applicants do not qualify for permissive intervention.

First, the motion is not timely. That in itself prevents permissive intervention, just as it does mandatory intervention. *Westinghouse*, 824 F.2d at 533-34 (quoting *NAACP v. New York*, 413 U.S. 345, 365-66 (1973): "intervention must be denied" where application is untimely, whether under Rule 24(a) or 24(b)).

Second, Applicants do not have a common question of law or fact with this case. The Seventh Circuit has rejected intervention in an analogous setting. In *Wade v. Goldschmidt*, landowners tried to intervene in a case that would block a proposed new bridge because it affected their property interests. The court found that its review was limited to the narrow issue raised by the original suit—whether the governments had adhered to the "statutory *procedural*

[20] These efforts appear to be paying off. In surveys completed by about half of the residents who had their yards cleaned up this fall, EPA's average rating was 9.7 out of 10. Ballotti Dec. at ¶97.

requirements"—and that the mismatch between that issue and the movants' interests was fatal to their motion. 673 F.2d 182, 185 (7th Cir. 1982) (emphasis added). So too here: the remedy selection and implementation are not before the Court, and cannot be considered until after the work is completed. Where there is a mismatch between the applicants' desired relief and the issues before the Court, there is no common "question of law or fact . . . to satisfy the requirement for permissive intervention." *Id.* at 187.

In CERLCA matters, where a court first denies mandatory intervention, it generally denies permissive intervention as well, for similar reasons. *See Westinghouse*, 824 F.2d at 533-34, 536 (finding either mandatory or permissive intervention untimely); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73-74 (2d Cir. 1994); *Kennecott*, 232 F.R.D. at 397; *W.R. Grace*, 185 F.R.D. at 187, 192; *United States v. ABC Indus.*, 153 F.R.D. 603, 608 (W.D. Mich. 1993); *United States v. Mid-State Disposal, Inc.*, 131 F.R.D. 573, 577 (W.D. Wis. 1990).

In their brief, Applicants cite two cases, neither of which supports intervention here. Both cited cases involved intervention when the court was considering approval of a consent decree, not two years into a decree's implementation. In addition, the *Acushnet River* court found that intervention would not delay the settlement. *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 1019, 1025 (D. Mass. 1989). In the other cited case, the court had granted mandatory intervention under the Clean Water Act (which has a different standard than that at issue here) and then briefly addressed permissive intervention. *United States v. Metro. Water Reclamation Dist. of Greater Chicago*, No. 11 C 8859, 2012 WL 3260427, at *4-*5 (N.D. Ill. Aug. 7, 2012). The court noted that the intervenors had proposed complaints that "tracked" those filed by the plaintiffs. *Id.* By contrast, Applicants have filed no complaint and could not file claims analogous to those in the United States' complaint.

II. This Court Lacks Jurisdiction To Grant The Relief Applicants Seek

Apart from Applicants' inability to satisfy the intervention requirements, the motion cannot be granted because the Court lacks jurisdiction to hear their challenge to the remedial action at this stage.

Applicants ask this Court's help to "compel EPA to perform its obligations under CERCLA." App. Br. at 39-40. They want a say in:

> 1) Ensuring that the remediation plan adequately protects human health and the environment and complies with all applicable federal and state laws…
>
> [and]
>
> 3) Ensuring that EPA adequately protects all residents from hazardous exposure during and after remediation activities

Id. In essence, Applicants want to serve as EPA's supervisor at the Site, reviewing the agency's actions as the cleanup progresses and asking the Court to force changes whenever they feel EPA strays from its obligations.

Congress specifically precluded such review. CERCLA Section 113(h), with certain limited exceptions, prohibits challenges to *ongoing* CERCLA response actions. The provision states that, "No Federal court shall have jurisdiction . . . to review any challenges to removal or remedial action selected under section 9604 of this title." "In other words, courts generally may not review challenges to CERCLA cleanup efforts." *Pollack v. U.S. Dep't. of Defense*, 507 F.3d 522, 525 (7th Cir. 2007). Section 113(h) represents "a considered choice made by Congress" that sites "should be cleaned up as quickly as possible and without interruption by citizen suits." *Id.* Congress decided "'that delays caused by citizen suit challenges posed a greater risk to the public welfare than the risk of EPA error in the selection of methods of remediation.'" *Id.* (quoting *Clinton County Comm'rs v. EPA,* 116 F.3d 1018, 1025 (3d Cir.1997)).

Section 113(h) includes five exceptions; none applies here.[21] First, the exception for cost recovery actions is available only to defendants of such actions. *See North Shore Gas Co. v. EPA*, 930 F.2d 1239, 1244 (7th Cir. 1991) (party that objected to a remedial action but was not a responsible party at the site could not use Section 113(h)(1): "the statute as worded envisages a suit by the person to whom the remedial order was addressed."); *United States v. NL Indust., Inc.*, 936 F. Supp. 545, 551-52 (S.D. Ill. 1996).

Second, the exception for citizen suits is phrased in the past tense, referring to actions "taken" or "secured." 42 U.S.C. § 9613(h)(4). "The obvious meaning of this statute is that when a remedy has been selected, no challenge to the cleanup may occur prior to completion of the remedy." *Schalk v. Reilly*, 900 F.2d 1091, 1095 (7th Cir. 1990); *see also Pollack*, 507 F.3d at 525 ("citizen suits . . . cannot be filed until all cleanup is complete.").

Applicants' brief makes clear that they seek to "litigate each detail of [EPA's] removal and remedial plans." *See Reardon v. United States*, 947 F.2d 1509, 1513 (1st Cir. 1991); *see also Village of DePue, Ill. v. Exxon Mobil Corp.*, 537 F.3d 775, 784-85 (7th Cir. 2008) (statutory purpose that "once the EPA chooses a removal or remedial action for a particular site, litigation will not delay the completion or enforcement."). This would only serve to delay the cleanup and is barred by Section 113(h).

III. Applicants Have Other Means To Provide Input On The Cleanup

Even though the judicial process is not available for Applicants, other avenues are. EPA is making extraordinary efforts to directly reach out to the Calumet neighborhood and to the residents of East Chicago as a whole, providing the Applicants a means to raise their concerns

[21] The three exceptions not discussed in the text apply to actions to enforce administrative orders, for reimbursement from EPA, and to compel remedial actions. 42 U.S.C. § 9613(h)(2), (3), (5).

and obtain current information on a daily basis. As the Declarations submitted with this brief show, EPA is committed to making those informal processes for providing information, seeking input, and responding to residents work. Moreover, EPA has a long-established mechanism—Community Advisory Groups—for community members to interact with EPA during remedy implementation at a Site.

Members of the community can contact EPA directly. Since the Site was listed on the NPL, the names and contact information of the key EPA employees have been listed on the Site-specific website, and in a series of fact sheets that have been sent to residents. Pope Dec. at ¶12(b); Exs. C-18, C-20, C-22, C-23, and C-24. EPA's Community Involvement personnel are available in the Calumet neighborhood from 7 am to 7 pm most Mondays through Fridays and many Saturdays. *Id.* at ¶10. During the work, EPA's Incident Command acted as a full service center, responding to residents' needs and explaining EPA's activities on a daily basis. Ballotti Dec. at ¶47.

Notably, EPA has provided significant access to the attorneys representing the Applicants in this case. The Acting Superfund Division Director and Regional Counsel listened to their concerns in a meeting that was scheduled before their clients moved to intervene but held afterwards. Pope Dec. at ¶91. Other Agency personnel have likewise met and communicated with them. *Id.* at ¶89-93.

In addition, EPA encourages residents to form a Community Advisory Group or "CAG" which is designed to facilitate the participation of community members living at or near Superfund sites—particularly those from low-income and minority groups—in the Superfund process. *Id.* at ¶88. When formed, such groups can qualify for potential funding to hire technical experts, further aiding their analysis. *Id.* at ¶90.

Recently, EPA has helped one of the Applicants' attorneys with the formation of a CAG. *Id.* ¶¶ 89–90, 92–93. EPA and Dr. Johnson personnel attended a kick-off meeting on October 29, 2016. *Id.* at ¶90; Johnson Dec. at ¶36. Dr. Johnson has made himself available to answer the group's health-related questions, Johnson Dec. at ¶36, and EPA has identified resources the group can access. Pope Dec. at ¶90.

EPA is committed to working closely with any CAG that is successfully formed and that is representative of the community impacted by the USS Lead Site. *Id.* at ¶97.

Of course, EPA cannot promise that it will agree with residents. But, EPA will listen and consider the community's comments. This Court need not mediate that process.

CONCLUSION

The work is proceeding. The Site will be cleaned up. Applicants will be heard. Intervention is neither allowed by the law nor necessary under the facts. The United States respectfully requests that this Court deny the motion for intervention.

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CERTIFICATE OF SERVICE

I, Annette M. Lang, hereby certify that on this 16th day of December 2016, I caused a true copy of the foregoing brief to be served by the Court's ECF system on counsel of record. In addition, I sent by first-class mail and email, the brief to the counsel below who appear not to be ECF recipients.

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